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Volume 4

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- The official judgment number is inserted immediately beneath the case name;
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- Holding references in the headnotes, and any other cross-references, are to an official paragraph number, not to a page of the report;
- When such a judgment is subsequently cited in another report,

  (i) the official judgment number is inserted before the usual report citations in the case lists and on the first occasion when the case is cited in the text. Thereafter, only the report citations are given;

  (ii) All 'at' references are to the official paragraph number rather than to a page of a report, with the paragraph number in square brackets but not in bold;

  (iii) The 'at' reference is only given in conjunction with the first report cited; eg [2001] 4 All ER 159 at [16], [2001] AC 61. If an 'at' reference is included on the first occasion when the case is cited, it also appears alongside the official judgment number.

For the avoidance of doubt, these changes do not apply to reports of judgments delivered before 11 January 2001 or to the citation of such cases in other reports.

CITATION

These reports are cited thus:

[2006] 4 All ER

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Halsbury's Laws of England

The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

The reference 10 *Halsbury's Laws* (4th edn reissue) para 370 refers to paragraph 370 on page 163 of reissue volume 10 of the fourth edition of *Halsbury's Laws of England*.

The reference 11(1) *Halsbury's Laws* (4th edn) (2006 reissue) para 9 refers to paragraph 9 on page 27 of the 2006 reissue of volume 11(1) of the fourth edition of *Halsbury's Laws of England*.

Halsbury's Statutes of England and Wales

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The reference 40(1) *Halsbury's Statutes* (4th edn) (2006 reissue) 271 refers to page 271 of the 2006 reissue of volume 40(1) of the fourth edition of *Halsbury's Statutes of England and Wales*.

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——Victimisation – Protected disclosure – Whether employee entitled to bring claim for being subjected to detriment on ground of protected disclosure in relation to acts of employer after employment had ceased

Woodward v Abbey National plc .. .. **CA 1209**

EQUITY – Laches – Defence – Availability – Whether defence available where no period of limitation prescribed by statute

Re Loftus (decd) .. .. **CA 1110**

EUROPEAN COMMUNITY – Fishing rights – Common fishing policy – Community law exempting under ten metre vessels from detailed record keeping and reporting obligations – Fishing licence under domestic law for under ten metre vessels including condition as to monthly catch limit – Whether condition contrary to Community law

R v Bossom .. .. **CA** **995**

——Rules on competition – Claimant bringing proceedings in England for breach of European Community law prohibition on such agreements – Claimant contending that judge should treat as binding factual assessment made by European Commission in deciding proceedings between different parties in same market

Crehan v Inntrepreneur Pub Co (CPC) .. .. **HL** **465**

EVIDENCE – Expert witness – Conflict of interest – Guidance – Best practice

Toth v Jarman (Note).. .. .. **CA** **1276**

——Without prejudice correspondence – Correspondence forming part of negotiations – Privilege from admission in evidence – Creditor inviting debtor to make proposals for paying debt – Debtor's agent writing letters to creditor acknowledging debt and offering to pay smaller sum – Creditor bringing procedings for recovery of debt and seeking to rely on letters to defeat limitation defence – Whether letters inadmissible under without prejudice rule

Bradford & Bingley plc v Rashid .. .. **HL** **705**

EXTRADITION – Evidence – Evidence not available at extradition hearing – Judge ordering extradition after extradition hearing – Test to be applied to determine whether to admit further evidence on appeal

Miklis v Deputy Prosecutor General of Lithuania .. .. **DC** **808**

——Extradition hearing – Initial hearing – Identity of person arrested – Appropriate judge deciding issue of identity at initial hearing – Different judge at extradition hearing determining issue afresh – Whether judge at extradition hearing having jurisdiction to review finding of identity made at initial hearing

Hilali v Central Court of Criminal Proceedings No 5 of the National Court, Madrid .. .. **DC** **435**

——Extradition order – Appeal – Notice of appeal – Permitted period for lodging notice of appeal being seven days starting with day on which order made – Extradition hearing in which extradition ordered concluding after six p m – Whether extradition order made on next business day

R (on the application of Amoako) v DPP .. .. **Ouseley J** **230**

FAMILY PROCEEDINGS – Orders in family proceedings – Residence order – Shared residence order – Same sex couple – Children born to one partner by anonymous donor insemination – Significance of fact of parentage

Re G (children) (residence: same-sex partner) .. .. **HL** **241**

HOUSING – Homeless person – Duty to provide accommodation for such period as housing authority considering would give him reasonable opportunity of securing accommodation for his occupation – Whether authority entitled to have regard to considerations other than individual situation in determining what amounted to reasonable opportunity of securing accommodation for occupation

R (on the application of Conville) v Richmond upon Thames London BC .. **CA** **917**

INCOME TAX – Pay as you earn system – Money paid by one person under compulsion of law – Employer accounting for tax and national insurance under PAYE system on exercise of share options by former employee – Whether amount of tax and national insurance paid recoverable in quasi contract

McCarthy v McCarthy & Stone plc .. .. **Peter Smith J** **1127**

INJUNCTION – Interlocutory – Undertaking as to damages – Cross-undertaking as to damages – Enforcement of undertaking – By whom and for whose benefit undertaking enforceable – Restitution – Claim in restitution by members of group not subjects of interim undertaking – Whether claim in restitution existing

SmithKline Beecham plc v Apotex Europe Ltd .. .. **CA** **1078**

LANDLORD AND TENANT – Assignment of lease – Implied covenant – Indemnity for unpaid rent – Reversioner claiming rent from original tenant after current tenant defaulting – Original tenant claiming under implied covenant – Whether original tenant liable for rent – Whether notice of liability valid – Whether notice served within specified period of date when rent became due

Scottish & Newcastle plc v Raguz .. .. **Hart J** **524**

——Forfeiture of lease – Premises let as a dwelling – Lease of shop premises and residential flat – Landlord peaceably re-entering shop premises – Whether lease forfeit – Whether premises let as a dwelling – Meaning of 'let as a dwelling'

Patel v Pirabakaran .. .. **CA** **506**

——Lease – Right to acquire new lease – Landlord intending to redevelop – Redevelopment of any premises in which tenant's flat contained – Whether 'any premises in which the tenant's flat is contained' referring to existing recognisable unit

Majorstake Ltd v Curtis .. .. **CA** **1326**

——Recovery of possession – Order for possession – Secure tenancy – Suspended order for possession on conditions as to payment of arrears of rent – Whether date for possession having to appear on face of order – Appropriate form of order

Bristol City Council v Hassan .. .. **CA** **420**

LIBEL AND SLANDER – Damages – Offer to make amends – Compensation determined on same principles as damages in defamation proceedings – Mitigation of damages – Evidence relevant to the damage caused

Turner v News Group Newspapers Ltd .. .. **CA** **613**

——Parties – Right to sue – Corporation – Foreign corporation – Right to freedom of expression – Common law presumption of damage under English law once publication of libel established – Whether right to freedom of expression modifying common law presumption in relation to foreign corporation

Jameel v Wall Street Journal Europe SPRL . .. . **HL** **1279**

——Qualified privilege – Common law privilege – Duty to publish – Public interest – Whether exercise of responsible journalism equating to test for qualified privilege

Jameel v Wall Street Journal Europe SPRL . .. . **HL** **1279**

LIMITATION OF ACTION – Accrual of cause of action – Claim to personal estate of deceased person or to any share or interest in any such estate – Date on which the right to receive the share or interest accruing

Re Loftus (decd) .. .. **CA** **1110**

LIMITATION OF ACTION (CONT'D) – Acknowledgment – Debt – Whether acknowledgments confined to admissions of debts which were indisputable as to quantum as well as liability

Bradford & Bingley plc v Rashid .. .. **HL** **705**

LOCAL AUTHORITY – Land – Housing – Right to respect for private and family life – Tenants of housing trust occupying properties owned by local authority and leased to housing trust – Gipsies occupying local authority land without licence or consent – Local authorities seeking possession orders – Whether breach of right to respect for private and family life

Lambeth London BC v Kay . .. . **HL** **128**

MARRIAGE – Right to marry – Requirement for persons subject to immigration control wishing to marry other than according to rites of Church of England to obtain written permission of Secretary of State – Secretary of State refusing permission to person present in United Kingdom unlawfully – Whether breach of right to marry – Whether discriminatory

R (on the application of Baiai) v Secretary of State for the Home Dept (No 2) .. .. **Silber J** **555**

MENTAL HEALTH – Mental health review tribunal – Discharge of restricted patient – Applicant applying for discharge of restriction order – Medical evidence – Statute requiring tribunal to discharge patient if not satisfied as to statutory criteria – Applicable standard of proof

R (on the application of N) v Mental Health Review Tribunal (Northern Region) .. .. **CA** **194**

——Patient – Seclusion – Prohibition of inhuman or degrading treatment – Right to respect for private and family life – Code of practice issued by Secretary of State in relation to admission and medical treatment of patients suffering from mental disorder – Code of practice requiring hospitals to have written guidelines on use of seclusion – High security hospital's policy set out in guidelines differing from code of practice – Whether policy unlawful – Whether policy breaching prohibition of inhuman or degrading treatment – Whether policy breaching right to respect for private and family life

R (on the application of Munjaz) v Mersey Care NHS Trust .. .. .. **HL** **736**

NEGLIGENCE – Cause of action – Damage – Negligent exposure of employees by employers to asbestos – Employees developing pleural plaques – Employees at risk of asbestos related diseases – Employees suffering anxiety or depressive illness – Whether cause of action could be founded by aggregating heads of claim – Whether employers owing duty of care not to expose employees to risk of psychiatric injury as consequence of anxiety about future health

Rothwell v Chemical & Insulating Co Ltd .. .. **CA** **1161**

——Duty to take care – Defendant publishing hydrogeological report on water samples from Bangladesh – Implied statement in report as to absence of arsenic – Claimant seeking to recover damages for personal injury caused by drinking water contaminated by arsenic – Whether defendant owing duty of care to claimant

Sutradhar v Natural Environment Research Council .. .. **HL** **490**

OPTION – Option to purchase – Shares – Construction of scheme rules – Remedy for unlawful decision under scheme rules

McCarthy v McCarthy & Stone plc .. .. **Peter Smith J** **1127**

PLEADING – Striking out – Defendant making pre-action admission – Defendant withdrawing pre-action admission and filing defence – Claimant applying to strike out defence as abuse of process or likely to obstruct just disposal of proceedings – Applicable test

Walley v Stoke-on-Trent City Council .. .. **CA 1230**

POLICE – Powers – Searching for articles of a kind which could be used in connection with terrorism – Senior police officer issuing authorisation – Secretary of State confirming authorisation – Whether authorisation and confirmation lawful – Whether exercise of search powers lawful

R (on the application of Gillan) v Metropolitan Police Comr .. .. .. **HL 1041**

PRACTICE – Pre-trial or post judgment relief – Search order – Privilege against self-incrimination – Material constituting freestanding evidence which had not been created by respondent to search order under compulsion – Whether privileged at common law – Whether court having power to modify application of common law privilege

C plc v P (Secretary of State for the Home Office intervening) **Evans-Lombe J 311**

PRECEDENT – House of Lords – Decision of European Court of Human Rights inconsistent with previous decision of the House – Whether appropriate for House of Lords to depart from previous decision of the House

Lambeth London BC v Kay . .. . **HL 128**

PRISONS – Release on licence – Life sentence – Right to liberty and security – Statutory scheme for recall of life prisoners while on licence – Whether statutory scheme compatible with right to liberty and security

R (on the application of Hirst) v Secretary of State for the Home Dept .. **CA 639**

PROBATE – Costs – Discontinuance – Claimant commencing probate action – Claimant subsequently applying to discontinue action – Incidence of costs on discontinuance

Re Wylde (decd). .. .. **George Bompas QC 345**

PROCEEDS OF CRIME – Knowledge or suspicion of arrangement facilitating acquisition, retention, use or control of criminal property – Bank forming relevant suspicion in relation to customer's account – Bank refusing to carry out customer's instructions – Whether customer entitled to mandatory injunction – Meaning of 'suspect' – Whether evidence of suspicion required to be adduced

K Ltd v National Westminster Bank plc .. .. **CA 907**

SENTENCE – Custodial sentence – Whether sentence of imprisonment for public protection capable of being ordered to run consecutively to another sentence of imprisonment for public protection – Whether sentence of imprisonment for public protection capable of being ordered to run consecutively to period of return to prison where offence committed during original sentence – Guidance

R v O'Brien .. .. **CA 1012**

SOLICITOR – Negligence – Damages – Assessment of damages – Cost of cure

Fulham Leisure Holdings Ltd v Nicholson Graham & Jones (a firm) (No 2) (Note) .. .. **Mann J 1397**

STATUTE – Construction – Anomalies – Correction of obvious drafting error – Statute abolishing sections containing offence in previous statute before implementing sections in new statute recreating repealed offences – Whether permissible for court to use interpretive powers to achieve clear intention of legislation

R (on the application of the CPS) v Bow Street Magistrates' Court . .. **DC 1342**

STATUTORY INSTRUMENT – Power to make instrument – Preamble – General enabling words in preamble – Interpretation and effect of general enabling words – Whether general enabling words could be interpreted as referring to enabling power not expressly invoked

Vibixa Ltd v Komori UK Ltd .. .. **CA** **294**

STREET TRADING – Offence – Displaying for sale notice in private vehicle – Private vehicle parked in road – Test for determining whether statutory defence satisfied

Onasanya v Newham London BC .. .. **DC** **459**

VICARIOUS LIABILITY – Employer and employee – Prohibited act by employee – Statutory prohibition – Harassment – Whether employer vicariously liable for harassment committed by employee in course of employment in breach of statutory prohibition

Majrowski v Guy's and St Thomas's NHS Trust .. .. **HL** **395**

House of Lords petitions

This list, which covers the period 10 October 2006 to 6 December 2006, sets out all cases which have formed the subject of a report in the All England Law Reports in which an Appeal Committee of the House of Lords has, subsequent to the publication of that report, refused leave to appeal. Where the result of a petition for leave to appeal was known prior to the publication of the relevant report a note of that result appears at the end of the report.

Flora v Wakom (Heathrow) Ltd [2006] 4 All ER 982. Leave to appeal refused 6 December 2006 (Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Mance).

Forbes v Secretary of State for the Home Dept [2006] 4 All ER 799. Leave to appeal refused 22 November 2006 (Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Carswell).

Harding v Wealands

[2006] UKHL 32

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD WOOLF, LORD HOFFMANN, LORD RODGER OF EARLSFERRY AND LORD CARSWELL

2–4 MAY, 5 JULY 2006

Conflict of laws – Tort – Damages – Assessment – Proper law of tort law of New South Wales – Whether provisions of New South Wales statute restricting allowable damages applicable – Whether statutory provisions substantive – International Law (Miscellaneous Provisions) Act 1995, s 14(3).

The claimant was English and the defendant was Australian. They were together on holiday in New South Wales when the claimant was injured in a motor accident. The circumstances were that the claimant had been a passenger in a vehicle driven by the defendant. The vehicle belonged to the defendant and was insured with an Australian insurance company. After the accident the claimant and the defendant returned to England. The claimant brought an action for damages for personal injury. The relevant Australian law was contained in the Motor Accidents Compensation Act 1999 of New South Wales (the MACA) which limited the amounts which could be recovered in damages. Liability was conceded and trial of a preliminary issue was ordered as to the assessment of damages and the 'applicable law' selected in accordance with the rules in Pt III of the Private International Law (Miscellaneous Provisions) Act 1995. Part III of the 1995 Act abolished the common law rules of double actionability and provided rules for the choice of the applicable law in questions of private international law. Once the applicable law had been chosen it was to be used to determine the issues arising in a claim. Section 14(2)[a] provided that nothing in Pt III affected any rules of law except those abolished and sub-s (3)(b), without prejudice to the generality of sub-s (2), provided, inter alia, that nothing in Pt III 'authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum'. The judge held that English law, not the MACA, applied to the assessment of damages as the assessment of damages was a matter of procedure and so governed by the law of the forum. The Court of Appeal allowed the defendant's appeal, holding that the restrictions in the MACA were

a Section 14, so far as material, is set out at [31], below

not procedural but substantive law. The claimant appealed to the House of Lords.

Held – The amount of damages for an injury actionable by the applicable law had to be determined according to the law of the forum in accordance with s 14(3)(b) of the 1995 Act because the question was one of procedure. In Pt III of the 1995 Act Parliament had not enacted a comprehensive scheme and a number of exceptions. The common law distinction between questions of liability and questions of remedy or procedure had been unaffected by Pt III. Part III had abolished the requirement of double actionability and the exceptions to that rule; it had substituted a general rule as to the applicable law and provided for the displacement of that general rule where it was substantially more appropriate for the applicable law to be different. But s 14 provided that nothing in Pt III affected any rules of law other than those abolished and although s 14(3)(b) referred only to 'questions of procedure' as being not authorised to be determined otherwise than in accordance with the law of the forum that did not mean that the common law rule that remedies were a matter for the law of the forum was to be abolished and the rule preserved only so far as it related to questions which could strictly speaking be regarded as procedure. In that context 'remedy' and 'procedure' had been regularly used interchangeably. When Parliament had legislated it was generally understood that for the purposes of private international law questions as to the quantification of damages for actionable heads of claim related to the remedy and so were classified as procedural. There was no basis on which altering that interpretation could be justified. The relevant provisions of the MACA were to be characterised as procedural for the purposes of s 14(3)(b) of the 1995 Act and therefore inapplicable by an English court. Accordingly, the appeal would be allowed (see [1], [2], [12], [13], [31]–[33], [39], [42], [48], [51], [53], [58], [60], [63]–[66], [69], [72], [77]–[79], [84], below).

Chaplin v Boys [1969] 2 All ER 1085, *Stevens v Head* (1993) 112 ALR 7, *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625 and *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961 considered.

Decision of the Court of Appeal [2005] 1 All ER 415 reversed.

Notes

For the law covering procedural matters: damages, see 8(3) *Halsbury's Laws* (4th edn reissue) para 22.

For the Private International Law (Miscellaneous Provisions) Act 1995, s 14, see 45 *Halsbury's Statutes* (4th edn) (2003 reissue) 1856.

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Adams v Cape Industries plc [1991] 1 All ER 929, [1990] Ch 433, [1990] 2 WLR 657, CA.

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.

Caltex Singapore Pte Ltd v BP Shipping Ltd [1996] 1 Lloyd's Rep 286.

Chaplin v Boys [1969] 2 All ER 1085, [1971] AC 356, [1969] 3 WLR 322, HL.

Cope v Doherty (1858) 2 De G & J 614, CA; *affg* (1858) 4 K & J 367.

De La Vega v Vianna (1830) 1 B & Ad 284, 109 ER 792.

Don v Lippmann (1837) 5 Cl & Fin 1, 7 ER 303, HL.

Huber v Steiner (1835) 2 Bing NC 203, 132 ER 80.

Lowsley v Forbes (t/a LE Design Services) [1998] 3 All ER 897, [1999] 1 AC 329, [1998] 3 WLR 501, HL.

Machado v Fontes [1897] 2 QB 231, [1895–9] All ER Rep Ext 1832, CA.

McKain v RW Miller & Co (SA) Pty Ltd (1991) 104 ALR 257, (1991) 174 CLR 1, Aus HC.

Mitchell v McCulloch 1976 SC 1, Ct of Sess.

Panozza (Allan J) & Co Pty Ltd v Allied Interstate (Qld) Pty Ltd [1976] 2 NSWLR 192, NSW CA.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

Pfeiffer (John) Pty Ltd v Rogerson (2000) 172 ALR 625, (2000) 203 CLR 503, Aus HC.

Phillips v Eyre (1870) LR 6 QB 1.

Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556, [1980] AC 827, [1980] 2 WLR 283, HL.

R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] 1 All ER 195, [2001] 2 AC 349, [2001] 2 WLR 15, HL.

R (on the application of Jackson) v A-G [2005] UKHL 56, [2005] 4 All ER 1253, [2006] 1 AC 262, [2005] 3 WLR 733.

Red Sea Insurance Co Ltd v Bouygues SA [1994] 3 All ER 749, [1995] 1 AC 190, [1994] 3 WLR 926, PC.

Regie National des Usines Renault SA v Zhang (2002) 187 ALR 1, (2002) 210 CLR 491, Aus HC.

Robinson v Bland (1760) 2 Burr 1077, 97 ER 717.

Roerig v Valiant Trawlers Ltd [2002] EWCA Civ 21, [2002] 1 All ER 961, [2002] 1 WLR 2304.

Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] 1 All ER 545, [1981] AC 800, [1981] 2 WLR 279, HL.

Stevens v Head (1993) 112 ALR 7, (1993) 176 CLR 433, Aus HC.

Tolofson v Jensen, Lucas v Gagnon (1994) 120 DLR (4th) 289, Can SC.

Western Regent, The, Seismic Shipping Inc v Total E & P UK plc [2005] EWCA Civ 985, [2005] 2 All ER (Comm) 515.

Wilson v First County Trust Ltd [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816, [2003] 3 WLR 568.

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Abidin Daver, The [1984] 1 All ER 470, [1984] AC 398, [1984] 2 WLR 196, HL.

Amalia, The (1863) 2 Moo PCCNS 471.

Amor v Macpak Pty Ltd (1989) 95 FLR 10, NSW SC.

Anderson v Eric Anderson Radio & TV Pty Ltd [1966] ALR 423, (1965) 114 CLR 20, Aus HC.

Aries Tanker Corp v Total Transport Ltd, The Aries [1977] 1 All ER 398, [1977] 1 WLR 185, HL.

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Boys v Chaplin [1968] 1 All ER 283, [1968] 2 QB 1, [1968] 2 WLR 328, CA.

Breavington v Godleman (1988) 80 ALR 362, (1988) 169 CLR 41, Aus HC.

Chief Adjudication Officer v Foster [1993] 1 All ER 705, [1993] AC 754, [1993] 2 WLR 292, HL.

Computers (OT) (in administration), Re [2004] EWCA Civ 653, [2004] 2 All ER (Comm) 331, [2004] Ch 317, [2004] 3 WLR 886.
Cooke v United Bristol Healthcare NHS Trust, Sheppard v Stibbe, Page v Lee [2003] EWCA Civ 1370, [2004] 1 All ER 797, [2004] 1 WLR 251.
Cookson v Knowles [1978] 2 All ER 604, [1979] AC 556, [1978] 2 WLR 978, HL.
Coupland v Arabian Gulf Petroleum Co [1983] 3 All ER 226, [1983] 1 WLR 1136, CA.
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Davidsson v Hill [1901] 2 KB 606, DC.
Edmunds v Simmonds [2001] 1 WLR 1003.
Esso Malaysia, The, Cox v The Esso Malaysia (Owners) [1974] 2 All ER 705, [1975] 1 QB 198, [1974] 3 WLR 341.
General Iron Screw Collier Co v Schurmanns (1860) 1 John & H 180.
Giambrone v JMC Holidays Ltd (formerly Sunworld Holidays Ltd) (No 2) [2004] EWCA Civ 158, [2004] 2 All ER 891.
Grayan Building Services Ltd (in liq), Re [1995] 1 BCLC 276, [1995] Ch 241, [1995] 3 WLR 1, CA.
Hadmor Productions Ltd v Hamilton [1982] 1 All ER 1042, [1983] 1 AC 191, [1982] 2 WLR 322, HL.
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Hunt v Severs [1994] 2 All ER 385, [1994] 2 AC 350, [1994] 2 WLR 602, HL.
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John v MGN Ltd [1996] 2 All ER 35, [1997] QB 586, [1996] 3 WLR 593, CA.
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Koop v Bebb [1952] ALR 37, (1951) 84 CLR 629, Aus HC.
Kuwait Oil Tanker Co SAK v Al Bader [2000] 2 All ER (Comm) 271, CA.
Liverpool, Brazil and River Plate Steam Navigation Co Ltd v Benham, The Halley (1868) LR 2 PC 193, PC.
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M'Elroy v M'Allister 1949 SC 110, Ct of Sess.
Matthews v Ministry of Defence [2003] UKHL 4, [2003] 1 All ER 689, [2003] 1 AC 1163, [2003] 2 WLR 435; *affg* [2002] EWCA Civ 773, [2002] 3 All ER 513, [2002] 1 WLR 2621.
Norowzian v Arks Ltd (No 2) [1999] IP & T 223, [2000] FSR 363, CA.
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Pozniak v Smith (1982) 41 ALR 353, (1982) 151 CLR 38, Aus HC.
Pro Sieben Media AG v Carlton UK Television Ltd [1999] 1 WLR 605, CA.
R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38, [2002] 4 All ER 654, [2002] 1 WLR 2956.
R v Warwickshire CC, ex p Johnson [1993] 1 All ER 299, [1993] AC 583, [1993] 2 WLR 1, HL.
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Wells v Wells [1998] 3 All ER 481, [1999] 1 AC 345, [1998] 3 WLR 329, HL.
Wild Ranger, The (1862) Lush 553.
Wong v Wei (1999) 10 WWR 296, BC SC.
Zollverein, The (1856) Sw 96.

Appeal

Giles Christian Harding appealed with permission of the Court of Appeal from its decision on 17 December 2004 (Arden LJ and Sir William Aldous, Waller LJ dissenting) ([2004] EWCA Civ 1735, [2005] 1 All ER 415) allowing the appeal of Tanya Wealands from the decision of Elias J on 27 May 2004 ([2004] EWHC 1957 (QB), [2004] All ER (D) 428 (May)) on a preliminary issue as to the applicable law under ss 11, 12, 14 of the International Law (Miscellaneous Provisions) Act 1995 in relation to the assessment of damages in an action for damages for personal injury brought by Mr Harding against Ms Wealands. The facts are set out in the opinion of Lord Hoffmann.

Charles Haddon-Cave QC and *Michael McParland* (instructed by *Stewarts*) for the appellant.
Howard Palmer QC and *Charles Dougherty* (instructed by *Kennedys*) for the defendant.

Their Lordships took time for consideration.

5 July 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, I am in full agreement with the opinions of my noble and learned friends Lord Hoffmann and Lord Rodger of Earlsferry, which I have had the advantage of reading in draft. For the reasons which they give, I also would allow the appeal and restore the order of Elias J.

LORD WOOLF.

[2] My Lords, I am able to confine my opinion to a single issue because I agree with the opinions of Lord Hoffmann and Lord Rodger of Earlsferry which I have read in draft.

[3] I have also had the advantage of reading the opinion of Lord Carswell in draft. While Lord Carswell agrees with Lord Hoffmann's and Lord Rodger's 'reasons' and 'conclusions', he does so subject to 'one slight qualification' (see [79], below).

[4] Lord Carswell makes his qualification because of his understanding of what is the natural meaning of the word 'procedure' (see [83], below). As to this, Lord Carswell is in agreement with the judgments of Arden LJ and Sir William Aldous in the Court of Appeal (see [2004] EWCA Civ 1735, [2005] 1 All ER 415, [2005] 1 WLR 1539). Arden LJ accepted (at [58]) that 'Damages are

not naturally regarded as procedure' and Sir William suggests (at [86]) that the natural meaning of 'procedure' is 'the mode or rules used to govern and regulate the conduct of the court's proceedings'. Lord Carswell adds, however, that in the field of private international law the word 'procedure' has a 'special meaning' which is wider than that which might be regarded as 'natural' (see [83], below). a

[5] Lord Carswell, having adopted this approach to the natural meaning of procedure, treats the 'special meaning' as justifying reliance on *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 to resolve the significant issue of construction at the heart of this appeal. b

[6] I am in agreement with Lord Carswell that, if it is necessary to rely on *Pepper (Inspector of Taxes) v Hart* to decide the meaning of 'procedure' in s 14(3)(b) of the Private International Law (Miscellaneous Provisions) Act 1995, the evidence of what was said in Parliament by the then Lord Chancellor conclusively resolves this issue in the appellant's favour. Lord Carswell rightly points out that this is an outstanding example of a case where the evidence as to what was said during the passage of the legislation through the parliamentary process makes it abundantly clear that it was the intention of Parliament by enacting s 14(3)(b) that the law of this country and not that of New South Wales is to be applied by the courts of this jurisdiction to the calculation of the appellant's damages. This is despite the fact that the appellant's accident occurred and his injuries were caused as the result of negligence of the respondent in New South Wales. c d

[7] However, I unfortunately differ from Lord Carswell as to his reasoning for relying on *Pepper (Inspector of Taxes) v Hart*. The word 'procedure' is frequently used in contrast to 'substance' in order to distinguish between questions of procedural law and substantive law. Thus, unsurprisingly it is used together with the word 'practice' in this context in s 1 of and Sch 1 to the Civil Procedure Act 1997 to identify the scope of the CPR. The scope of the language is wide enough to encompass the contents of a civil procedure code which deals with evidence and remedies. e f

[8] In determining the meaning of the word 'procedure' the context in which the word is being used is of the greatest significance. In s 14(3)(b) of the 1995 Act 'procedure' is used in conjunction with 'rules of evidence, pleading or practice'. In that context it is natural to regard the assessment of damages as being a matter of procedure rather than substance. g

[9] The fact that the present context is one in the field of conflicts of law does not mean that 'procedure' is being used in a special sense rather than in the sense in which you would expect it to be used having regard to the context in which it appears. It makes good practical sense to draw a distinction between the treatment of questions of procedure and questions of substance; the former to be dealt, as you would expect in accordance with the procedure normally applied by the court in which the proceedings are brought. h

[10] This does not however mean that a cap on the amount of damages is obviously a question of procedure rather than a question of substance and if I had been left in doubt as to the correct answer I would certainly have been prepared to apply *Pepper (Inspector of Taxes) v Hart*. j

[11] The limits on the amount of damages on which the respondent seeks to rely are contained in the Motor Accidents Compensation Act 1999 of New South Wales. That Act contains in Chs 3, 4, 5 and 6 a detailed statutory procedural code containing the machinery for recovering compensation for motor accident injuries, including the way damages are to be assessed. The code is clearly one

that has provisions which it would be very difficult, if not impossible, to apply in proceedings brought in this country, even though they may be capable of being applied in other parts of Australia. To have different parts of that code dealt with by different systems of law would not be an attractive result and in some cases this would produce an impractical result. (See for example s 132 which requires, in the case of a dispute over non-economic loss, for the degree of impairment to be assessed by a medical assessor in New South Wales.) The greater part of the code is clearly procedural and those parts which could be arguably regarded as substantive should be treated as being procedural as well.

[12] For these reasons, as well as those given by Lord Hoffmann and Lord Rodger, I would allow this appeal and restore the judgment of Elias J.

LORD HOFFMANN.

[13] My Lords, the issue is whether damages for personal injury caused by negligent driving in New South Wales should be calculated according to the applicable law selected in accordance with Pt III of the Private International Law (Miscellaneous Provisions) Act 1995 (hereafter 'Pt III') or whether it is a question of procedure which falls to be determined in accordance with English law. The Court of Appeal, by a majority ([2004] EWCA Civ 1735, [2005] 1 All ER 415, [2005] 1 WLR 1539: Arden LJ and Sir William Aldous, Waller LJ dissenting) held that it should be determined in accordance with the applicable law, which they decided was the law of New South Wales. In my opinion the dissenting opinion of Waller LJ was correct and the question is one of procedure governed by the law of the forum. I also agree with the speech to be delivered by my noble and learned friend Lord Rodger of Earlsferry, which I have had the advantage of reading in draft.

[14] The accident happened on 3 February 2002 on a dirt track near Huskisson in New South Wales, when the respondent Ms Wealand lost control of the vehicle she was driving and it turned over. Negligence is admitted. The appellant Mr Harding, who was a passenger, was severely injured and is now tetraplegic. Mr Harding is English and Ms Wealand Australian. They had formed a relationship when Mr Harding visited Australia in March 2001 and in consequence Ms Wealand had come to England in June 2001 to live with Mr Harding. At the time of the accident they had gone together to Australia for a holiday and a visit to Ms Wealand's parents. The vehicle belonged to Ms Wealand and she was insured with an Australian insurance company. After the accident, Mr Harding and Ms Wealand returned to England.

[15] The action was tried by Elias J (see [2004] EWHC 1957 (QB), [2004] All ER (D) 428 (May)), who applied English law to the assessment of damages for two reasons. First, because the assessment of damages was a matter of procedure governed by the lex fori and secondly, because even if it was a matter of substantive law, it was in this case 'substantially more appropriate' to apply English law (see s 12 of Pt III). The Court of Appeal, as I have said, allowed the appeal on the first point by a majority and allowed it unanimously on the second. I shall first address the question of substance and procedure.

[16] Personal injury caused by negligence is an actionable wrong in Australian common law. In New South Wales, common law liability for transport accidents was briefly abolished by the Transport Accidents Compensation Act 1987 (New South Wales) and a statutory scheme of compensation substituted but the Motor Accidents Act 1988 (New South Wales) repealed the 1987 Act and s 6 reinstated the common law:

> 'The law relating to a right to or a claim for damages or compensation or any other benefit (pecuniary or non-pecuniary) against any person for or in respect of the death of or bodily injury to a person caused by or arising out of a transport accident . . . shall be as if the [1987 Act] had not been passed and the common law and the enacted law (except that Act) shall have effect accordingly.'

[17] The 1988 Act did however contain detailed provisions concerning awards of damages for injuries suffered in motor accidents. These have been replaced by Ch 5 of the Motor Accidents Compensation Act 1999 (hereafter 'MACA'), which was in force at the time of the accident. Section 123 provides that 'A court cannot award damages to a person in respect of a motor accident contrary to this Chapter'. The provisions of Ch 5 which would have been relevant to an award of damages by a court in New South Wales are: (a) the maximum recoverable for non-economic loss (pain and suffering, loss of amenities of life, loss of expectation of life, disfigurement) is $A309,000 subject to indexation (see s 134); (b) in assessing loss of earnings, an excess of net weekly earnings over $A2,500 must be disregarded (see s 125); (c) there is no award for the loss of the first five days of earning capacity (see s 124); (d) no award may be made for gratuitous care which does not exceed six hours a week and is for less than six months and the amount recoverable for care exceeding these minima is limited to sums specified in s 128; (e) the discount rate for calculating the present value of future economic loss is prescribed as 5% (see s 127); (f) credit must be given for payments made to the claimant by 'an insurer' (see s 130); (g) no interest is payable on damages for gratuitous care or non-economic loss and entitlement to interest on other damages is subject to conditions, principally relating to the timely provision of information by the claimant (see s 137).

[18] None of these provisions forms part of English law. Perhaps the most striking difference is the 5% discount rate, compared with the 2·5% rate set by the Lord Chancellor under the Damages (Personal Injury) Order 2001, SI 2001/2301 pursuant to his power under s 1 of the Damages Act 1996 as the rate appropriate to ensure that the claimant is fully compensated. The claimant says that under the provisions of MACA he would recover about 30% less than he would under English law.

[19] Until Pt III was enacted, the English common law rule for determining whether damage caused by acts committed abroad was actionable in tort was that laid down by the Court of Exchequer Chamber in *Phillips v Eyre* (1870) LR 6 QB 1 at 28–29:

> 'As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done.'

[20] I observe in passing that, since the common law of Australia is on this point the same as the law of England, there is no doubt that the damage suffered by Mr Harding would have satisfied this double actionability test. But Willes J, giving the judgment of the court, went on to say (at 29): 'the law is clear that, if the foreign law touches only the remedy or procedure for enforcing the obligation . . . such law is no bar to an action in this country . . .'

[21] What distinction was Willes J seeking to draw by saying that the foreign law would not affect an action in this country if it touched 'only the remedy or procedure'? He referred to *Huber v Steiner* (1835) 2 Bing NC 203, 132 ER 80, which concerned an action brought in 1835 on a French promissory note made in 1813 and payable in 1817. The defendant pleaded that by French law an action upon the note was prescribed but Tindal CJ held that, upon its true construction, the French law did not extinguish the debt but only barred the creditor from obtaining a remedy. It was therefore a matter of French procedure which an English court would disregard. Conversely, *Don v Lippmann* (1837) 5 Cl & Fin 1, 7 ER 303 was an action brought in Scotland in 1829 on two French bills of exchange accepted in 1810. The House of Lords held the defendant entitled to rely on the Scottish six-year period of prescription because, as Lord Brougham said ((1837) 5 Cl & Fin 1 at 13, 7 ER 303 at 307): 'whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made.'

[22] Lord Brougham in turn referred to *De La Vega v Vianna* (1830) 1 B & Ad 284, 109 ER 792 in which the plaintiff, a Spaniard, had the defendant, a Portuguese, arrested in England for non-payment of a debt contracted in Portugal. The defendant claimed to be released on the ground that in Portugal imprisonment for debt had been abolished in 1774. Lord Tenterden CJ ((1830) 1 B & Ad 284 at 288, 109 ER 792 at 793) was unmoved:

> 'A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to.'

[23] An even earlier case touching upon the same distinction between the cause of action and the remedy is *Robinson v Bland* (1760) 2 Burr 1077, 97 ER 717, an action upon a bill of exchange given in Paris in payment of gaming debts. By English law the debt was unenforceable but the plaintiff alleged that in France the debt could be enforced in a Court of Honour. Wilmot J said ((1760) 2 Burr 1077 at 1084, 97 ER 717 at 721: 'I cannot help thinking, that where a person appeals to the law of England, he must take his remedy according to the law of England, to which he has appealed.'

[24] In applying this distinction to actions in tort, the courts have distinguished between the kind of *damage* which constitutes an actionable injury and the assessment of compensation (ie *damages*) for the injury which has been held to be actionable. The identification of actionable damage is an integral part of the rules which determine liability. As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable *for* something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether there is liability for the damage in question. On the other hand, whether the claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy.

[25] This was the distinction made by the House of Lords in *Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356, in which the plaintiff had been injured in a traffic accident in Malta. By the law of Malta, non-economic damage (pain and suffering, loss of amenity) was not actionable. Only financial loss was compensatable. The plaintiff brought proceedings in England and one of the questions raised by the appeal was whether the rule excluding liability for non-economic damage was part of the substantive law of Malta or concerned only the remedies which a Maltese court could provide.

[26] Lord Hodson, Lord Wilberforce and Lord Pearson agreed that the rule was part of the substantive law of tort liability. In Malta, causing non-economic damage was not an injuria; not an actionable wrong. Lord Hodson said ([1969] 2 All ER 1085 at 1903, [1971] AC 356 at 379):

> 'questions such as whether loss of earning capacity or pain and suffering are admissible heads of damage must be questions of substantive law. The law relating to damages is partly procedural and partly substantive, the actual quantification under the relevant heads being procedural only.'

[27] Lord Wilberforce said ([1969] 2 All ER 1085 at 1102, [1971] AC 356 at 389):

> 'The broad principle should surely be that a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed. This non-existence of exclusion may be for a variety of reasons and it would be unwise to attempt a generalisation relevant to the variety of possible wrongs. But in relation to claims for personal injuries one may say that provisions of the lex delicti, denying, or limiting, or qualifying recovery of damages because of some relationship of the defendant to the plaintiff, or in respect of some interest of the plaintiff (such as loss of consortium) or some head of damage (such as pain and suffering) should be given effect to.'

[28] Lord Pearson said ([1969] 2 All ER 1085 at 1106, [1971] AC 356 at 394):

> 'If the difference between the English law and the Maltese law could be regarded only as a difference of procedural (or adjectival or non-substantive) law, there would be an easy solution of the problem in this appeal. On that basis the nature and extent of the remedy would be matters of procedural law regulated by the lex fori, which is English and the proper remedy for the plaintiff in this case according to English law would be that he should recover damages for all the relevant consequences of the accident, including pain and suffering as well as pecuniary expense and loss . . .
>
> But I am not convinced that the difference between the English law and the Maltese law can reasonably be regarded as only a difference of procedural law. There is a radical difference in the cause of action, the right of action, the jus actionis. A claim to be reimbursed or indemnified or compensated for actual economic loss is substantially different in character from a claim for damages for all the relevant consequences of the accident to the [plaintiff], including pain and suffering. If an accident caused no economic loss, but only pain and suffering, there would be a cause of action according to English law, but not according to Maltese law. Surely that must be a matter of substantive law.'

[29] On the other hand, Lord Guest said ([1969] 2 All ER 1085 at 1096, [1971] AC 356 at 382) that:

> 'It would not be correct, in my view, to talk of compensation for pain and suffering as a head of damage apart from patrimonial loss. It is merely an element in the quantification of the total compensation'

—and Lord Donovan said ([1969] 2 All ER 1085 at 1097, [1971] AC 356 at 383) that once the claim was actionable in an English court, 'it was right that it should award its own remedies'.

[30] Thus the majority held that the Maltese law denying liability for non-economic damage was substantive law to be governed by the lex causae while the minority thought that it was a matter of remedy to be governed by the lex fori. All of them agreed that the quantification of the damages to be awarded for actionable heads of damage was a question of remedy or procedure.

[31] The next question is whether this distinction between questions of liability and questions of remedy or procedure was affected by Pt III. Section 10 abolishes the *Phillips v Eyre* (1870) LR 6 QB 1 requirement of double actionability 'for the purpose of determining whether a tort or delict is actionable' and the common law exceptions to that rule created by cases like *Chaplin v Boys* and *Red Sea Insurance Co Ltd v Bouygues SA* [1994] 3 All ER 749, [1995] 1 AC 190. Section 11 substitutes a 'general rule' that the applicable law is the 'law of the country in which the events constituting the tort or delict in question occur'. Section 12 provides for displacement of the general rule in certain cases in which it is 'substantially more appropriate' for the applicable law to be different. This was the provision applied by Elias J on his alternative hypothesis that the MACA restrictions were substantive. But s 14 provides:

> '. . . (2) Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above.
>
> (3) Without prejudice to the generality of subsection (2) above, nothing in this Part . . . (b) affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum . . .'

[32] It will be noticed that whereas the older cases spoke of questions of 'remedy' being governed by the lex fori and Willes J in *Phillips v Eyre* (1870) LR 6 QB 1 at 29 spoke of 'remedy or procedure', s 14(3)(b) refers only to 'procedure'. Does that mean that the old rule that *remedies* were a matter for the lex fori was to be abolished and the rule preserved only so far as it related to questions which could strictly speaking be regarded as *procedure*? In my opinion this would be absurd. In this context, the terms 'remedy' and 'procedure' had been regularly used interchangeably. Thus in *Chaplin v Boys* Lord Hodson said ([1969] 2 All ER 1085 at 1092, [1971] AC 356 at 378) that 'the nature of a plaintiff's remedy is a matter of procedure to be determined by the lex fori. This includes the quantification of damages . . .'. Lord Guest posed the question ([1969] 2 All ER 1085 at 1095, [1971] AC 356 at 381) as: 'Assuming that the conduct was actionable in Malta, what law is to be applied to the ascertainment of the damages? Is it to be the substantive law, the law of Malta, or is to be the procedural law which is the lex fori?'

[33] Furthermore, s 14(3) is expressed to be without prejudice to the generality of s 14(2), which says that nothing in Pt III is to affect any rules of law except those abolished by s 10. Section 10 is concerned with the rules which

determine 'whether a tort . . . is actionable' and not with the rules concerning the remedies available for actionable injury. a

[34] The conclusion that the amount of damages for an injury actionable by the lex causae must be determined according to the lex fori was to be left untouched is confirmed by the Report of the Law Commission and the Scottish Law Commission (*Private International Law: Choice of Law in Tort and Delict* (Law Com no 193, Scot Law Com no 129), published in 1990, on which Pt III was based. b Paragraph 3.38 (p 22) dealt with damages:

> 'The Consultation Paper [Law Commission Working Paper no 87 and Scottish Law Commission Consultative Memorandum no 62, which had been published in 1984] provisionally recommended that there should be no change in the present law on the question of damages, which we confirm. c Accordingly, the applicable law in tort or delict determines the question of the availability of particular heads of damages whereas the measure or quantification of damages under those heads is governed by the *lex fori* . . .'

[35] There are several statements in the Consultation Paper to the same effect, d which it is unnecessary to cite.

[36] Mr Haddon-Cave QC, who appeared for the appellant, said that if the House thought that the language of s 14(2) and (3) was ambiguous or obscure, it should resolve the ambiguity by reference to a statement made in Parliament by the Lord Chancellor during the passage of the bill. For my part, I do not think e that there is any ambiguity or obscurity. Of course, taken out of context, the word 'procedure' is ambiguous. In its narrow and perhaps most usual sense it means, as La Forest J expressed it in *Tolofson v Jensen, Lucas v Gagnon* (1994) 120 DLR (4th) 289 at 321 those rules which 'make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties'. Or it can have a wider meaning which embraces what Mason CJ in f *Stevens v Head* (1993) 112 ALR 7 at 14, (1993) 176 CLR 433 at 445 called 'the traditional equation drawn between matters relating to a remedy and matters of procedure'. This is the sense it which the term has always been used in English private international law. If s 14 is read in its context, against the background of the existing rules of common law and the report of the Law Commission, there g can be no doubt that the latter meaning was intended. For my part, therefore, I see no need for Mr Haddon-Cave to resort to Hansard.

[37] If, however, there had been any ambiguity which needed to be resolved, I am bound to say that this is as clear a case within the principle stated in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 as anyone could hope h to find. At the Report stage in the House of Lords, Lord Howie of Troon put down an amendment to add a further paragraph to what is now s 14(3), so that it would read '[nothing in this Part] (d) authorises any court of the forum to award damages other than in accordance with the law of the forum'. Lord Howie declared an interest on behalf of Cape Industries plc, which had a few years earlier been sued in Texas for asbestos-related injuries (see *Adams v Cape Industries plc* j [1991] 1 All ER 929, [1990] Ch 433) and was anxious that Pt III should not import American scales of compensation into English courts. In the debate on 27 March 1995 the Lord Chancellor, Lord Mackay of Clashfern, made what was obviously a carefully prepared statement (562 HL Official Report (5th series) cols 1421–1422):

'With regard to damages, issues relating to the quantum or measure of damages are at present and will continue under Part III to be governed by the law of the forum; in other words, by the law of one of the three jurisdictions in the United Kingdom. Issues of this kind are regarded as procedural and, as such, are covered by Clause 14(3) (b).

It follows from this that the kind of awards to which the noble Lord referred of damages made in certain states, in particular in parts of the United States, will not become a feature of our legal system by virtue of Part III. Our courts will continue to apply our own rules on quantum of damages even in the context of a tort case where the court decides that the "applicable law" should be some foreign system of law so far as concerns the merits of the claim.

Some aspects of the law of damages are not regarded as procedural and, in accordance with the views of the Law Commissions in their report on the subject, Part III does not alter this. These aspects concern so-called "heads of damages"—the basic matter which is being compensated for—such as special damage relating to direct financial loss. Whether a particular legal system permits such a head of damage is not regarded as procedural but substantive and therefore not automatically subject to the law of the forum. This seems right given the intimate connection between such a concept and the particular nature of the case in issue. But again, I foresee no significant increase in awards of damages because a particular head of damage permitted by some foreign system of law would continue, so far as the quantum allocated to it in any finding is concerned, to be regulated by our own domestic law of damages.

I hope the noble Lord will feel reassured . . .'

[38] Lord Howie declared himself reassured and did not move his amendment. The Lord Chancellor's statement clearly satisfied the requirements of being (a) clear and (b) made by the minister promoting the bill.

[39] My Lords, the next question is whether the provisions of MACA to which I have referred should be characterised as relating to the actionability of the economic and non-economic damage suffered by Mr Harding or to the remedies which the courts of New South Wales provide for such damage. On this point we could not have better authority than that of the High Court of Australia in *Stevens v Head* (1993) 112 ALR 7, (1993) 176 CLR 433. The majority (Brennan, Dawson, Toohey and McHugh JJ) analysed the equivalent damages-limitation provisions of the Motor Accidents Act 1988 ((1993) 112 ALR 7 at 21–26, (1993) 176 CLR 433 at 454–460), and concluded that they were concerned with quantification rather than heads of damage. Although MACA is more restrictive of the court's power to award damages than the 1988 Act, the character of the relevant provisions is in my opinion the same. Thus the majority said of s 79(3) of the 1988 Act, which provided that the maximum amount ('only in a most extreme case') which might be awarded for non-economic loss was $A 180,000:

> '[It] is plainly a provision which affects the measure of damages but does not touch the heads of liability in respect of which damages might be awarded. It is simply a law relating to the quantification of damages and that, as we have seen, is a matter governed solely by the lex fori.' (See (1993) 112 ALR 7 at 25, (1993) 176 CLR 433 at 459.)

[40] These extracts are from the opinion of the majority. But there is nothing in the dissenting judgments by Mason CJ and Deane and Gaudron JJ to suggest that, if they had accepted that the court should apply the traditional distinction between actionability and remedy, including quantification of damages, they would have disagreed with the way the majority characterised the provisions of the 1988 Act. It was the traditional distinction itself which the minority rejected. Thus Mason CJ proposed ((1993) 112 ALR 7 at 14, (1993) 176 CLR 433 at 445) that the court should adopt—

> 'a new criterion for the substance-procedure distinction which ... characterise[s] as procedural "those rules which are directed to governing or regulating the mode or conduct of court proceedings". All other provisions or rules are to be classified as substantive.'

[41] Deane J likewise said ((1993) 112 ALR 7 at 28, (1993) 176 CLR 433 at 462) that the lex fori should be applied 'only to the extent that it was procedural in the narrow sense of being directed to regulating court proceedings in that State' and Gaudron J adopted the same test (see (1993) 112 ALR 7 at 33–34, (1993) 176 CLR 433 at 469–470).

[42] In principle, therefore, I think that the relevant provisions of MACA should be characterised as procedural and therefore inapplicable by an English court. But Mr Palmer QC, who appeared for the defendant, submitted that in English private international law a limit or 'cap' on the damages recoverable is regarded as substantive. There is, it is true, some authority for this proposition. The seventh edition of *Dicey's Conflict of Laws* (1958), edited by Dr JHC Morris, contained the statement (p 1092), 'statutory provisions limiting a defendant's liability are prima facie substantive; but the true construction of the statute may negative this view' with a footnote: 'This is suggested by two dicta in *Cope v Doherty* (1858) 4 K & J 367, 384-385 and (1858) 2 De G & J 614, 626.'

[43] *Cope v Doherty* concerned an application by the owners of an American ship which had collided with and sunk another American ship to limit its liability pursuant to s 504 of the Merchant Shipping Act 1854. Wood V-C held that the section did not apply to collisions between foreigners. The owners argued that the limitation rule was procedural and should therefore be applied as part of the lex fori. I should have thought that the short answer was that whether the rule was substantive or procedural, Parliament had said that it should not apply to foreigners and that was the end of the matter. But the Vice-Chancellor dealt with the argument on its own terms ((1858) 4 K & J 367 at 384–385):

> 'clearly an Act, which limits the damages to which the ship owner is to be liable under circumstances like the present, deals with the substance and not the form of the procedure. It in effect forms a contract, that, whereas by the natural law, the owner of the ship or property that has been injured would be entitled to damages to the full extent of the loss he has sustained, all those persons upon whom the Legislature can impose such a contract, that is to say, all its own subjects, shall forego that which the natural law—the common law, as we should call it in *England*—would give them, and shall be entitled only to the amount of the value of the ship by which the injury has been inflicted, and of the freight due or to grow due in respect of such ship during the voyage.'

[44] Thus his reasoning was that the statute operates as if it imposed a contractual term limiting the damages recoverable. In fact, one of the reasons

why the Vice-Chancellor held that the statute did not apply to foreigners was that he thought that, as a matter of international law, the United Kingdom could only impose such a deemed contract upon British ships. Such a term in a contract would clearly be a modification of the substantive obligations of the parties. As Lord Diplock said in *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 at 566, [1980] AC 827 at 849:

> 'The contract . . . is just as much the source of secondary obligations as it is of primary obligations; and like primary obligations that are implied by law secondary obligations too can be modified by agreement between the parties . . .'

[45] When *Cope v Doherty* went to the Court of Appeal, Turner LJ dealt with the point very briefly ((1858) 2 De G & J 614 at 626):

> 'An attempt was made on the part of the Appellants to bring this case within *Don v Lippman* and cases of that class, but I think those cases have no bearing upon the point. This is a question of liability, and not of procedure.'

[46] In my opinion the proposition in *Dicey* was too widely stated. *Cope v Doherty* is authority for the proposition that a contractual term which limits the obligation to pay damages for a breach of contract or a tort, or a statutory provision which is deemed to operate as such a term, qualifies the substantive obligation. It is not part of the rules of the lex fori for the assessment of damages. I therefore agree with the opinion of Street CJ in *Allan J Panozza & Co Pty Ltd v Allied Interstate (Qld) Pty Ltd* [1976] 2 NSWLR 192 at 196–197 that a statutory limitation on damages deemed to be incorporated into a contract of carriage is 'an express limitation upon the substantive liabilities'. But, as the majority said in *Stevens v Head* (1993) 112 ALR 7 at 24–25, (1993) 176 CLR 433 at 458:

> 'Where the sources of the rights and obligations of contracting parties are in part the express terms of the contract and in part the provisions of its proper law, the courts of the forum are constrained to ascertain the parties' rights and obligations from those sources, not from the lex fori. In our respectful opinion, there is no valid analogy between the rules for determining the contractual rights and obligations arising in part from the proper law of the contract and the conflict of law rules governing the assessment of damages in respect of extraterritorial torts.'

[47] The Merchant Shipping (Amendment) Act 1862 extended the right to limit liability to all ships of whatever nation and thereafter it became impossible to regard such a provision as equivalent to a contractual term imposed upon British subjects. In my opinion, therefore, Clarke J was right in *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep 286 to treat a modern limitation statute (in that case, of Singapore) as a procedural provision, limiting the remedy rather than the substantive right: see also *The Western Regent, Seismic Shipping Inc v Total E & P UK plc* [2005] EWCA Civ 985 at [52], [2005] 2 All ER (Comm) 515 at [52].

[48] There is accordingly in my opinion no English authority to cast any doubt upon the conclusion of the Australian High Court in *Stevens v Head* that, for the purposes of the traditional distinction between substance and procedure which treats remedy as a matter of procedure, all the provisions of MACA, including limitations on quantum, should be characterised as procedural. This was also the view of the Court of Appeal in *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 All ER 961, [2002] 1 WLR 2304. In *John Pfeiffer Pty Ltd v Rogerson* (2000)

172 ALR 625, (2000) 203 CLR 503, however, the High Court reversed itself, abandoned the traditional rule (at least for torts committed in Australia) and confined the role of the leges fori of the Australian States to procedure in the narrow sense of rules 'governing or regulating the mode or conduct of court proceedings' (see (2000) 172 ALR 625 at 651, (2000) 203 CLR 503 at 543–544). This change was said to be required by constitutional imperatives of Australian federalism. In a later decision (*Regie National des Usines Renault SA v Zhang* (2002) 187 ALR 1 at 21, (2002) 210 CLR 491 at 520 (para 76)) the court left open the question of whether it would apply to foreign torts. But the decision in *John Pfeiffer Pty Ltd v Rogerson* clearly influenced the judgments of the majority in the Court of Appeal in this case, to which I must now turn.

[49] Arden LJ said ([2005] 1 All ER 415 at [52], [2005] 1 WLR 1539) that 'The meaning of substance and procedure for the purposes of s 14 of the 1995 Act must be sought in the context of the 1995 Act'. That, if I may respectfully say so, seems to me plainly right. But then, instead of putting the 1995 Act into the context of the previous common law and the proposals of the Law Commission, she approached the matter in a more abstract way, saying that a reference to the law of the forum must be 'justified by some imperative which, relative to the imperative of applying the proper law, has priority'. Such a reason, she suggested, might be the inability of the English court to 'put itself into the shoes of the foreign court' and adopt some procedure which was not available in this country. But otherwise, she thought that the principle adopted in *John Pfeiffer Pty Ltd v Rogerson* should be applied and restrictions on the right to recover damages in the foreign law should not be regarded as procedural.

[50] Arden LJ may have been influenced in her approach to the construction of s 14(3)(b) by her view, expressed earlier in her judgment (at [51]) that what she called 'the damages principle', ie the rule that the assessment of damages is governed by the lex fori, was 'one of uncertain meaning and application'. So she felt that she was entitled to start on the basis that s 14(3)(b) was, so to speak, written on a clean sheet of paper. Of course there were peripheral uncertainties and differences of opinion. We have seen that in *Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356 Lord Guest and Lord Donovan were willing to give the concept of procedure wider application than the majority, although, if I may say so with respect, the majority were in my opinion plainly right. There was also some uncertainty, largely generated by *Dicey*'s interpretation of *Cope v Doherty* (1858) 2 De G & J 614;(1858) 4 K & J 367, about whether a statutory limitation on damages could be construed as substantive. I could add other possible uncertainties which have not yet come before the courts. For example, there may be rules of foreign or domestic law, under which a tort or other wrongful act gives rise to a liability to pay a conventional sum of money, which make it impossible to separate the concept of actionable damage from the concept of a remedy for that damage. It might be more realistic to say that the rule simply lays down the conditions under which the claimant is entitled to payment of a prescribed sum of money. But I do not propose to explore this or other hypothetical cases because they do not arise in this case and, so far as I know, have not arisen in the past.

[51] There can however be no doubt about the general rule, stated by Lord Mackay in the House of Lords debate, that 'issues relating to the quantum or measure of damages' are governed by the lex fori. And this was the rule which Parliament intended to preserve. Even if there appeared to be more logic in the principle in *John Pfeiffer Pty Ltd v Rogerson* (and the thirteenth edition of *Dicey and*

Morris (2000) Vol 1, p 172 (para 7-039), supports Arden LJ on this point) the question is not what the law should be but what Parliament thought it was in 1995. As Lord Lloyd of Berwick said of a provision in the Limitation Act 1980 in *Lowsley v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 at 906, [1999] 1 AC 329 at 342:

> 'It is Parliament's understanding of the existing law when enacting the Limitation Amendment Act 1980 that matters, not what the law is subsequently shown to have been. As Lord Simon of Glaisdale said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 845, [1975] AC 591 at 648:
>
> > "Once it is accepted that the purpose of ascertainment of the antecedent defect in the law is to interpret Parliament's intention, it must follow that it is Parliament's understanding of that law as evincing such a defect which is relevant, not what the law is subsequently declared to be."
>
> If common error can make the law, so can parliamentary error.'

[52] Sir William Aldous likewise said ([2005] 1 All ER 415 at [86], [2005] 1 WLR 1539) that the term 'procedure' in s 14(3)(b) 'should be given its natural meaning'. He placed considerable reliance upon *John Pfeiffer Pty Ltd v Rogerson*, despite the express statements in that case that it was, for Australian reasons, departing from traditional principles of English law. Such a construction was, he said, supported by *Dicey and Morris*, which is true, and by the Law Commission's Report, which in my opinion is not true. The only passage in the Commission's Report which may be said to support the conclusion reached by Sir William Aldous (although not his reasoning) is para 3.39 (p 22), which reproduces *Dicey's* comment that 'a statutory ceiling on damages' is a question of substance. But the Law Commission appears to have thought this proposition could be reconciled with its statement in the previous paragraph (3.38) which I have already quoted (at [34], above). In my opinion, that paragraph is consistent neither with the narrow construction of 'procedure' adopted by Sir William Aldous nor with a characterisation of limits on damages as not being procedural in the broader sense.

[53] In my opinion, therefore, Elias J was right to treat the MACA restrictions as entirely inapplicable. In the circumstances it is unnecessary to decide whether, if they had been properly characterised as substantive, it was open to the Court of Appeal to reverse his judgment that it was substantially more appropriate to apply English law. The hypothesis necessary to raise this question is in my view somewhat artificial, because most of the reasons why it may be more appropriate to apply English law are the reasons why the assessment of damages is traditionally characterised as a matter for the lex fori. I would therefore prefer not to express a view on this question. In my opinion the appeal should be allowed and the judgment of Elias J restored.

LORD RODGER OF EARLSFERRY.

[54] My Lords, in January 2002 the claimant and the defendant were living together in London. The defendant, who is Australian, travelled to New South Wales to attend a family wedding. A fortnight later the claimant flew out to join her. On 3 February near Huskisson, New South Wales, the claimant was a passenger in a car driven by the defendant when it was involved in an accident. As a result of the accident the claimant was rendered tetraplegic. He

subsequently commenced the present action for damages for his injuries against the defendant who was living in England at the time. She admits liability. The claimant contends that the English court should assess the damages according to English law, while the defendant contends that the assessment of damages is regulated by the law of New South Wales which limits the amounts which can be recovered.

[55] Until comparatively recently, any private international law questions in a case like the present would have been decided according to the common law. A person who had suffered damage abroad and who wished to bring proceedings to recover compensation for that damage in the English courts had to show that his claim, or any particular head of claim, relating to the damage was actionable both under English law, the lex fori, and under the law of the country where the injury had been sustained, the lex loci delicti (see *Phillips v Eyre* (1870) LR 6 QB 1). In *Machado v Fontes* [1897] 2 QB 231, [1895–9] All ER Rep Ext 1832 the Court of Appeal had relaxed the rule to a certain extent by holding that it was sufficient if the act was wrongful in the country where it was committed, even though any damage would not have been actionable in civil proceedings there. In *Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356 this House overruled *Machado v Fontes* and declared that, in general, the damage or head of damage had indeed to be actionable under the lex loci delicti as well as under English law. Provided that the claim passed this test, the foreign law then fell out of the picture and the defendant's liability for the damage or head of damage was determined in accordance with English law (see [1969] 2 All ER 1085 at 1098–1099, [1971] AC 356 at 385–386 per Lord Wilberforce). The remedy to make good the plaintiff's damage was, however, a matter for the law of the forum. So, in assessing and awarding damages, an English court would apply English law.

[56] When this House restored the double actionability rule to its full rigour in *Chaplin v Boys*, there was a somewhat increased risk that the test would exclude certain claims which it would actually be just to admit. Recognising this, the House held that, in appropriate cases, a claim or head of claim could proceed even though it was not actionable under the lex loci delicti. The flexible test for recognising these situations which Lord Wilberforce formulated came to win acceptance. In *Red Sea Insurance Co Ltd v Bouygues SA* [1994] 3 All ER 749, [1995] 1 AC 190, the Privy Council held, conversely, that, where justice required in particular circumstances, an action could proceed in the courts of the forum on the basis of the lex loci delicti, even though the damage or head of damage would not be actionable under the lex fori.

[57] In the eyes of their supporters, in this version the common law rules for determining whether damage or a head of damage was actionable in an English court displayed a welcome pragmatic flexibility; to their critics, the rules were too uncertain to provide sure guidance for practitioners. In 1990 in a joint report, *Private International Law: Choice of Law in Tort and Delict* (Law Com no 193, Scot Law Com no 129), the English and Scottish Law Commissions sided with the critics and recommended that the common law rules for determining actionability should be replaced by a statutory scheme. The Commissions confirmed, however, that 'the measure or quantification of damages . . . [should be] governed by the *lex fori*' (see p 22 (para 3.38)). In due course Parliament enacted the Private International Law (Miscellaneous Provisions) Act 1995, Pt III of which makes provision for new choice of law rules in tort and, for Scotland, in delict.

[58] The first step which Parliament had to take was to abolish the pre-existing common law rules of double actionability which were perceived to be causing the problem. Except for defamation claims, where the common law is preserved by s 13, Parliament abolished these rules in s 10. Indeed Pt III affects these rules and no others. This is stated expressly in s 14(2): 'Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above.' This provision serves to delimit the scope of the enactment in Pt III and means that there is no room for arguing that the abolition of the rules covered by s 10 must have impliedly effected a change in some other rule of law. More particularly, it immediately suggests that Pt III does not affect the assessment of damages since that matter was never governed by the double actionability rules which were abolished by s 10. If that is so, the assessment of damages must continue to be governed by the lex fori.

[59] The abolition of the common law rules was just the first step in the reform. The next step was to replace them with new rules. That is what Pt III is designed to do. As s 9(1) explains, the rules in Pt III are to apply for choosing the law ('the applicable law') to be used for determining 'issues relating to tort or (for the purposes of the law of Scotland) delict'. So Pt III does three things. First, it provides that the English court is to use a particular law (the applicable law) to determine whether an actionable tort has occurred (see s 9(4)). In effect, this replaces the double actionability test. But, secondly, s 9(4), read along with sub-s (1), goes on to provide that the applicable law is to be used to determine other 'issues relating to tort'. Finally, ss 11 and 12 provide the rules by which the applicable law, which is to be used to determine these issues, is to be chosen. Under s 12 the English court can separate out various issues relating to the tort and, where appropriate, a different law is to be used to determine different issues (dépeçage).

[60] Where matters are in dispute, the first step will be for the court to use the rules in ss 11 and 12 to decide what the applicable law is. Rather as, under *Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356, there was a general rule of double actionability which could be disapplied in certain circumstances, so too s 11 gives the general rule for choosing the applicable law, while s 12 provides for that general rule to be displaced where it would be substantially more appropriate for the law of another country to apply. Once the court has chosen the applicable law or laws in accordance with these sections, the judge will use the chosen system or systems to determine whether an actionable tort has occurred and any other issue 'relating to [the] tort' which arises. Parliament has not defined 'issues relating to tort', but it has at least indicated certain matters which do not fall within that category. These are to be found in s 14(3) which provides inter alia:

> 'Without prejudice to the generality of subsection (2) above, nothing in this Part ... (b) affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.'

This provision reinforces s 14(2) by spelling out three types of rule which Pt III is not to affect and one approach which it is not to authorise. It is not to affect any rules of evidence, pleading or practice and it is not to authorise a court to determine 'questions of procedure in any proceedings' otherwise than in accordance with its own law. So, while Pt III authorises—indeed requires—an English court to use the applicable law to determine 'issues relating to tort', it

does not authorise the court to use anything other than English law to determine any 'questions of procedure' which arise in the proceedings.

[61] Here the defendant argues that under ss 11 and 12 the applicable law relating to the issue of the assessment of damages is the law of New South Wales. So the claimant is not entitled to recover any more by way of damages for his personal injuries than he would be entitled to recover under the Motor Accidents Compensation Act 1999 of New South Wales (MACA). For his part, the claimant says that questions relating to the assessment of damages are 'questions of procedure' and so, in accordance with s 14(3)(b), the English court must determine them by using English law. By a majority (Arden LJ and Sir William Aldous, Waller LJ dissenting), the Court of Appeal upheld the defendant's contention that the MACA rules should be applied to the assessment of damages. The result is that the maximum which the claimant could recover by way of damages for his injuries is substantially less than he would be able to recover if the judge had to apply English law.

[62] The critical question concerns the interpretation of the expression 'questions of procedure' in s 14(3)(b). In the Court of Appeal ([2004] EWCA Civ 1735, [2005] 1 All ER 415, [2005] 1 WLR 1539) Arden LJ explained (at [52]) how, in her view, the English court should approach it:

> '. . . In the context of s 14, a principled approach requires the court to start from the position that it has already decided that the proper law of the tort is not the law of the forum, ie that some other law applies to the tort, either because it is the lex loci delicti or because it is substantially more appropriate than the lex loci delicti. On this basis, a reference to the law of the forum must be the exception, and it must be justified by some imperative which, relative to the imperative of applying the proper law, has priority . . .'

Later, Arden LJ held (at [66]) that there was 'a guiding principle' that '[o]nce the court has decided that the law of New South Wales is the proper law of the tort, it is logical, so far as possible, to apply the law of New South Wales throughout'. Adopting this approach, she considered (at [61]) that the context of s 14 suggested that 'the approach of Mason CJ in *[McKain v RW Miller & Co (SA) Pty Ltd* (1991) 104 ALR 257, (1991) 174 CLR 1] that procedure covers matters as to the mode and conduct of trial is the basic approach of s 14'. On that basis the assessment of damages was not a question of procedure and so was, presumably, to be included among the 'issues in the claim' which s 9(4) directs the court to determine by using the applicable law.

[63] In my respectful view Arden LJ was wrong to see s 9(4) as containing a guiding principle and s 14(3)(b) as containing an exception which the court can invoke only where there is some overriding imperative for doing so.

[64] In Pt III Parliament did not enact a comprehensive scheme and a number of exceptions. It simply provided that the law chosen in accordance with ss 11 and 12 is to be used to determine certain issues, while the law of the forum is to continue to be used to determine others. The matters where the United Kingdom courts are to continue to use the law of the forum are spelled out in s 14(3). In particular, Parliament has decided not to authorise an English court to use anything other than English law to determine 'questions of procedure'. This policy may be criticised as being liable to encourage forum shopping or on some other ground, but it is the policy of the legislature and, as such, it is entitled to exactly the same weight and respect as the policy in s 9(4) that certain other issues are to be determined by the law chosen in accordance

with ss 11 and 12. There is accordingly no reason to regard the rule requiring an English court to use English law to determine questions of procedure as 'the exception', for which some overriding imperative must be found. On the contrary, the words of s 14(3)(b) should be interpreted and applied in a straightforward fashion, giving them the meaning which is appropriate in the context in which they occur.

[65] So, does the expression 'questions of procedure' in s 14(3)(b) include questions relating to the assessment of damages? Like Arden LJ, Sir WilliamAldous adopted a restrictive interpretation of those words: for him, 'the word "procedure" in the 1995 Act should be given its natural meaning namely, the mode or rules used to govern and regulate the conduct of the court's proceedings' (see [2005] 1 All ER 415 at [86], [2005] 1 WLR 1539). In many contexts something like that might well be regarded as the appropriate meaning and it might very well not include the assessment of damages. But here the expression 'questions of procedure' is being used within Pt III of a statute on private international law. So it is a fair assumption that Parliament meant the expression to be understood in the way that it would be understood in the field of private international law. In fact, the scheme of Pt III would not work on any other basis. In a case like the present, the English court has to decide whether to characterise the relevant aspects of the assessment of damages as issues relating to tort, to be governed by the applicable law, or to regard them as questions of procedure, to be governed by English law. Given that the characterisation under s 9(2) is 'for the purposes of private international law', in carrying it out, the court must have regard to the general principles of private international law. To be consistent, the court must apply the same general approach when considering the other side of the question, which involves interpreting and applying s 14(3)(b).

[66] By the time Parliament legislated in 1995, it was generally understood that, for the purposes of private international law, some questions relating to damages were substantive while others were procedural. Questions relating to the actionability of heads of claim were substantive, while questions as to the quantification of damages for actionable heads of claim related to the remedy and so were classified as procedural. So, for instance, Lord Hodson said in *Chaplin v Boys* [1969] 2 All ER 1085 at 1093, [1971] AC 356 at 379:

> 'I am now, however, persuaded that questions such as whether loss of earning capacity or pain and suffering are admissible heads of damage must be questions of substantive law. The law relating to damages is partly procedural and partly substantive, the actual quantification under the relevant heads being procedural only.'

Lord Wilberforce was somewhat dismissive of an analysis purely in terms of what he called 'the accepted distinction between substance and procedure' (see [1969] 2 All ER 1085 at 1104, [1971] AC 356 at 392–393), but none the less he too envisaged that certain questions relating to damages were to be classified as 'procedure' and so as a matter for the application of the lex fori. Similarly, Lord Pearson spoke ([1969] 2 All ER 1085 at 1106, [1971] AC 356 at 394) of 'procedural (or adjectival or non-substantive) law' which would regulate the recovery of damages. In *Mitchell v McCulloch* 1976 SC 1 at 7, Lord McDonald referred to counsel for the pursuer's argument that 'procedural matters, including the measure of damages are determined solely by the *lex fori*'. In *Stevens v Head* (1993) 112 ALR 7 at 15, (1993) 176 CLR 433 at 447, Mason CJ summarised the current thinking:

'The law relating to damages is partly procedural and partly substantive. According to the traditional application of the substance-procedure distinction, the question whether legislative provisions dealing with awards of damages are substantive or procedural has been approached by asking whether the provisions affect the character of the wrong actionable or go only to the measure of compensation. This approach is consistent with the equation traditionally drawn between matters of procedure and matters relating to remedies.'

[67] These references, which could be multiplied, demonstrate that questions of the quantification or assessment of damages had long been regarded as 'procedural' as opposed to 'substantive'. I have accordingly no doubt that when Parliament used the expression 'questions of procedure' it was intended to cover questions relating to the assessment of damages. Indeed, if that were not so and the assessment of damages were to be regarded as an issue relating to tort to be determined by reference to the applicable law, Parliament would have made a major change in this aspect of the law—despite the Law Commissions' recommendation that the existing state of the law should be preserved.

[68] Counsel for the defendant contended, however, that, even if Parliament had used the expression 'questions of procedure' in that way when it passed the 1995 Act, the common law was not set in stone and an 'updating construction' should be given to s 14(3)(b), to take account of developments since 1995. In particular, the High Court of Australia, which would, in 1995, have accepted that the assessment of damages was procedural (see *Stevens v Head*), had now changed direction and held, in the words of the majority, that '*all* questions about the kinds of damage, or amount of damages that may be recovered, would . . . be treated as substantive issues governed by the lex loci delicti' (see *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625 at 651, (2000) 203 CLR 503 at 544 (para 100)). In making this change, members of the court had regard to the view of La Forest J, giving the opinion of the Supreme Court of Canada in *Tolofson v Jensen, Lucas v Gagnon* (1994) 120 DLR (4th) 289 at 321, that—

'the purpose of substantive / procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.'

Counsel for the defendant submitted that the expression 'questions of procedure' in s 14(3)(b) should now be interpreted in a way which took account of this development. In effect, by adopting the High Court's revised classification of questions relating to the assessment of damages as matters of substance, Arden LJ and Sir William Aldous accepted that argument.

[69] In my view, however, the argument falls down for a variety of reasons. This is not a case of the kind envisaged by Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] 1 All ER 545 at 564–565, [1981] AC 800 at 822, where a new state of affairs, or a fresh set of facts bearing on policy, has come into existence since the 1995 Act was passed and the courts have to consider whether they fall within the parliamentary intention expressed in the words of the enactment. Indeed the decision of the Supreme Court of Canada in *Tolofson v Jensen* antedated the 1995 Act—but Parliament did not follow its lead. All that the appellant can point to, therefore, is a change in the way that the High Court of Australia classifies questions about the quantum of damages for purposes of the common law rule in intra-Australian

cases. As is plain from the judgments in *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, (2000) 203 CLR 503, however, their Honours were knowingly altering what had previously been well-settled law. Moreover, they were doing so because they felt impelled by what they saw as a requirement of the federal nature of the constitution. A similar consideration influenced the Canadian Supreme Court in *Tolofson v Jensen*. It remains to be seen whether the High Court will hold that all questions about the kind or amount of damages are to be determined by the lex loci delicti in international cases (see *Regie National des Usines Renault SA v Zhang* (2002) 187 ALR 1 at 21, (2002) 210 CLR 491 at 520 (para 76)). These decisions of the Canadian and Australian courts, which show how the common law can be reshaped, may give ammunition, or food for thought, for critics of the policy adopted by Parliament in the 1995 Act. But they contain nothing which can justify the House in altering what would otherwise be the appropriate interpretation of the statute.

[70] The passage which Lord Hoffmann has quoted (at [37], above) from the Hansard report of the speech of the Lord Chancellor, Lord Mackay of Clashfern (562 HL Official Report (5th series) cols 1421–1422), in reply to the probing amendment in the name of Lord Howie of Troon, confirms the construction which I would, in any event, have placed on the words in s 14(3)(b). But more importantly, perhaps, it shows that Parliament was assured that the provision would prevent damages being awarded by reference to the law and standards of other countries. The particular problem raised by Lord Howie related to the high level of damages in the United States which he was anxious should not be replicated here. But it would be equally unacceptable if, say, United Kingdom courts had to award damages according to a statutory scale which, while adequate in another country because of the relatively low cost of services etc there, would be wholly inadequate in this country, having regard to the cost of the corresponding items here. As Parliament was assured by the Lord Chancellor, s 14(3)(b) guards against such eventualities. The interpretation advocated by the defendant would undermine the basis on which Parliament legislated.

[71] The defendant relies on the provisions of MACA. So the ultimate question is whether the relevant provisions are to be regarded as procedural or substantive for the purposes of private international law. If they are procedural, they are to be disregarded since questions of procedure are to be regulated by the law of the forum in accordance with s 14(3)(b). If they are substantive, then they would apply if the law of New South Wales were the applicable law, as the Court of Appeal held, reversing Elias J ([2004] EWHC 1957 (QB), [2004] All ER (D) 428 (May)).

[72] Lord Hoffmann has analysed the passage in Dicey and Morris *Conflict of Laws* to the effect that 'statutory provisions limiting a defendant's liability are prima facie substantive; but the true construction of the statute may negative this view'. I respectfully agree with his analysis. In any event, as the passage recognises, in any given case the answer to the question must depend on the construction of the relevant provision in the context of the particular statute. In the present case the defendant relies on various provisions in Ch 5 of MACA, headed 'Award of damages'. Many of them derive from equivalent provisions in the Motor Accidents Act 1988. The restrictions on the damages recoverable for non-economic loss under that Act were considered by the High Court of Australia in *Stevens v Head* (1993) 112 ALR 7, (1993) 176 CLR 433. Applying the customary common law approach in private international law, the High Court

classified them as procedural. That decision is not conclusive of any or all of the matters in dispute, but it does provide useful guidance from the highest court in the country.

[73] Section 122(1) of MACA explains that Ch 5 applies to, and in respect of, 'an award of damages' relating to death or injury in motor accidents. Section 123 provides that 'A court cannot award damages to a person in respect of a motor accident contrary to this Chapter'. While, of course, it may be necessary to look beneath the surface of a statutory provision to ascertain its nature, the legislature is here signalling that the provisions in Ch 5 are directed to what a New South Wales court can award by way of damages. In other words, prima facie at least, they are concerned, not with the scope of the defendant's liability for the victim's injuries as such, but with the remedy which the courts of New South Wales can give to compensate for those injuries. For purposes of private international law, prima facie they are procedural in nature.

[74] Of course, when it enacted MACA the Parliament of New South Wales was not concerned with the categories of private international law. So, not surprisingly, Ch 5 contains provisions on matters which would traditionally fall on the substantive side of the line for purposes of private international law. This is the case, for example, with mitigation of damages in s 136. The same goes for s 138, on contributory negligence, and s 140, on volenti non fit injuria.

[75] Nevertheless, in Pts 5.2 and 5.3, dealing respectively with damages for economic and non-economic loss, the provisions are formulated in a way that emphasises their nature as directions to the courts of New South Wales. For instance, where the legislature refers to 'an award of damages', it is referring to something that can only be made by a court. So, under s 125(2), in 'an award of damages' for economic loss, 'the court is to disregard' any amount by which the injured person's weekly earnings would have exceeded $A2,500, subject to indexation. Under s 127(1), 'Where an award of damages is to include compensation' for future economic loss, the present value of that future loss 'is to be qualified by adopting the prescribed discount rate'—clearly a direction to a judge who is going to include this kind of compensation in an award of damages as to how to go about it. Similarly, under s 134, the maximum amount 'that a court may award' for non-economic loss is now $A309,000, again subject to indexation.

[76] Undoubtedly, in practice these and other provisions can be expected to govern the amounts for which claims are settled outside the courts. But that does not make them substantive. It merely means that litigants, who know what the court can and cannot award, will settle their claims accordingly. More particularly, it does not mean that the provisions are to be regarded as substantive rather than procedural for purposes of private international law. In that context, the brocard ubi remedium ibi ius would be an unsafe guiding principle.

[77] I would accordingly hold that the provisions of Ch 5 of MACA on which the defendant relies relate to the remedy which the courts of New South Wales can award and are procedural for the purposes of s 14(3)(b) of the 1995 Act. That being so, they fall to be ignored when the English court awards damages for the claimant's injuries. I recognise that this means that the defendant's insurers may have to meet a higher claim for damages than would be the case if the provisions of MACA applied. I recognise also that making a higher award would conflict with certain of the overall objects set out in s 5 of MACA. But I do not regard that as a compelling consideration since, as defendant's counsel was careful to

acknowledge, the impact on the scheme of applying a different scale of damages in claims litigated in this country is unlikely to be anything other than marginal.

[78] For these reasons, as well as for those given by Lord Hoffmann, with whose speech I am in full agreement, I would allow the appeal and hold that the quantification of damages is to be determined in accordance with English law. Since all the issues in dispute relate to the quantification of damages, it is unnecessary to decide which law would be the applicable law for determining issues relating to tort in accordance with s 9(1) and (4) of the 1995 Act.

LORD CARSWELL.

[79] My Lords, I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Hoffmann and Lord Rodger of Earlsferry. I fully agree with their reasons and conclusions, with one slight qualification on one aspect of the case, on which I shall add a few words.

[80] Your Lordships have found it possible to decide the question of construction of s 14(3)(b) of the Private International Law (Miscellaneous Provisions) Act 1995 without recourse to external aids. The appellant's counsel also relied strongly, however, on the statement made in the House of Lords on 27 March 1995 by the then Lord Chancellor, Lord Mackay of Clashfern, set out in para [37] of Lord Hoffmann's opinion. This was not just an expression of the government's intention from a most authoritative source, it was a reassurance to Lord Howie of Troon that his amendment was not necessary, since issues relating to the quantum or measure of damages would come within the ambit of the words 'questions of procedure' in s 14(3)(b). As Lord Hoffmann has said (at [37], above), it is as clear a case for the application of the principle stated in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 as anyone could hope to find. If the officious bystander had volunteered his opinion on the point, it could have been nothing short of conclusive.

[81] *Pepper (Inspector of Taxes) v Hart* has been out of judicial favour in recent years (no doubt largely because there were some instances of its over-use, though there have been some trenchant and irreconcilable critics), and courts have constantly striven to avoid resorting to it. I do consider, however, that the principle has a place in statutory interpretation. As Lord Nicholls of Birkenhead remarked in *R (on the application of Jackson) v A-G* [2005] UKHL 56 at [65], [2005] 4 All ER 1253 at [65], [2006] 1 AC 262, it would be unfortunate if *Pepper (Inspector of Taxes) v Hart* were now to be sidelined, as there are occasions when ministerial statements are useful in practice as an interpretative aid, perhaps especially as a confirmatory aid. I would simply remark myself that it would be wilful blindness for courts to deprive themselves of its assistance in proper cases.

[82] The conditions for the application of the *Pepper (Inspector of Taxes) v Hart* principle have been authoritatively stated in a number of cases and do not require repetition. It is sufficient to refer to the opinion of Lord Browne-Wilkinson in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 at 64–65, [1993] AC 593 at 634–635 and to the several expressions by Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195 at 215–218, [2001] 2 AC 349 at 396–399, *Wilson v First County Trust Ltd* [2003] UKHL 40 at [56]–[59], [2003] 4 All ER 97 at [56]–[59], [2004] 1 AC 816 and *R (on the application of Jackson) v A-G* [2005] 4 All ER 1253 at [65]–[66], [2006] 1 AC 262.

[83] I would regard the essential precondition of ambiguity as satisfied in the present case. I agree with the remarks of Arden LJ in the Court of Appeal ([2004]

EWCA Civ 1735 at [58], [2005] 1 All ER 415 at [58], [2005] 1 WLR 1539) that 'Damages are not naturally regarded as procedure' and Sir William Aldous (at [86]) that the natural meaning of 'procedure' is 'the mode or rules used to govern and regulate the conduct of the court's proceedings'; cf La Forest J in *Tolofson v Jensen, Lucas v Gagnon* (1994) 120 DLR (4th) 289 at 321 on the purpose of the substantive/procedural classification. In the field of private international law, however, the word bears a special meaning, as your Lordships have indicated. It is the context which gives it the wider meaning than that which might be regarded as natural (see [36], above, per Lord Hoffmann). So long as one could be quite satisfied that in using the words 'questions of procedure' in s 14(3)(b) Parliament intended that special meaning to be adopted, then the interpretation is clear. There are strong reasons, as your Lordships have set out, for concluding that it did intend to adopt the special meaning, and it is quite possible to say that no ambiguity exists. In my opinion there may, however, be said to be sufficient possible ambiguity to justify resort to the Lord Chancellor's statement in Hansard as a confirmatory aid. The other conditions in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 are obviously satisfied. When one does so, the intention of Parliament is entirely clear and the correctness of the conclusions reached by your Lordships on the construction of s 14(3)(b) is fully confirmed.

[84] I would allow the appeal and restore the judgment of Elias J.

Appeal allowed.

Dilys Tausz Barrister.

Astley and others v North Wales Training and Enterprise Council Ltd (trading as Celtec Ltd)

[2006] UKHL 29

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD HOPE OF CRAIGHEAD, LORD RODGER OF EARLSFERRY, LORD CARSWELL AND LORD MANCE

4 APRIL, 21 JUNE 2006

Employment – Continuity – Transfer of trade, business or undertaking – Employment by transferor immediately before transfer – Employees seconded from transferor to transferee – Employees later electing to resign from transferor and take up employment with transferee – Employees seeking to establish continuity of service to retain benefit of terms and conditions of previous employment – Reference to European Court of Justice to establish date of transfer of undertaking – Following European judgment employees seeking to advance new argument – Whether employees to be permitted to argue new point – Whether employees having decided freely not to continue with relationship with transferee so as to exclude themselves from claiming continuity of service – Council Directive (EEC) 77/187, art 3(1).

The employees were civil servants responsible for vocational training in North Wales. The Department of Education transferred part of its vocational training responsibilities to training and enterprise councils (TECs). In September 1990, the employees were seconded to the North East Wales Training and Enterprise Council, whose successor was Celtec. In 1993, the employees resigned from the civil service and became employed by Celtec. The employees sought a determination by the employment tribunal as to the length of their period of continuous employment. They relied, inter alia, on Council Directive (EEC) 77/187 (on the approximation of laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses). By art 3(1)a[a] of the directive the transferor's rights and obligations arising from a contract of employment existing on the date of a transfer were, by reason of the transfer, transferred to the transferee. The employment tribunal found that the employees had continuous employment from the start of their employment with the civil service as there had been a transfer commencing in September 1990 and continuing until 1996 when the last of the secondments from the civil service came to an end. The Employment Appeal Tribunal subsequently allowed Celtec's appeal against that decision. The Court of Appeal quashed that decision. Celtec appealed to the House of Lords, which stayed the proceedings and referred questions to the Court of Justice of the European Communities (ECJ). The ECJ ruled that art 3(1) had to be interpreted as meaning that the date of a transfer within the meaning of that provision was the date on which responsibility as employer for carrying on the business of the unit transferred moved from the transferor to the transferee, namely

a Article 3, so far as material, is set out at [20], below

September 1990. It also held that for the purposes of applying that provision, contracts of employment or employment relationships existing on the date of the transfer were deemed to be handed over, on that date, from the transferor to the transferee, regardless of what had been agreed between the parties in that respect with the sole reservation that the workers themselves, following a decision taken freely by them, were at liberty not to continue the employment relationship with the transferee. The matter came back before their Lordships. Celtec submitted that, in the light of the ECJ's rulings as to the date of the transfer, the appeal should be allowed and that it be determined that the employees' periods of continuous service began when, after resigning from the civil service, they took up direct employment with Celtec. The employees contended that the only issue that had to be determined was whether, in the light of the ECJ judgment, the employees' continuity of employment was broken in 1993 when they resigned from the civil service and accepted an offer of employment with Celtec. They argued that, assuming that the date of the transfer was in September 1990 and not over a period as they had previously submitted, their accrued rights were protected by the directive because their contracts of employment were deemed to have been handed over at the date of the transfer. Issues, therefore, arose as to (i) whether the employees should be permitted to run the new argument and, if so, whether that issue could be determined by their Lordships on the information available or whether it had to be remitted to the employment tribunal for its determination; and (ii) whether the employees were caught by the reservation.

Held – (1) The effectiveness of the provision for the making of a reference to the ECJ for a preliminary ruling would be impaired if the national court were prevented from forthwith applying Community law in its entirety in accordance with the decision or the case law of the court. It followed that every national court had, in a case within its jurisdiction, to apply Community law in its entirety and protect the rights which the latter conferred on individuals. In the instant case, in view of the ECJ's ruling that contracts of employment existing on the date of the transfer between the transferor and workers assigned to the undertaking transferred were deemed to be handed over from the transferor to the transferee on the date of the transfer, it was the duty of the national court to give the employees the opportunity to put forward their additional argument (see [8], [41]–[43], [77], [92], [93], [114], below); *Amministrazione delle Finanze dello Stato v Simmenthal SpA (No 2)* Case 106/77 [1978] ECR 629 applied.

(2) (Lord Rodger and Lord Mance dissenting) The extent of the sole reservation was that it was open to an employee, whose contract of employment would otherwise be transferred automatically from the transferor to the transferee, on the date of the transfer of his own free will to withdraw from that arrangement by declining to enter the employment of the transferee. The application of the rule that the employee could withdraw from the arrangement, however, depended on two things: first, that the employee was in a position to choose whether or not to enter the employment of the transferee after the date of the transfer; and, second, that he in fact exercised that choice by deciding of his own free will not to do so. The general rule was that contracts of employment of workers assigned to the undertaking transferred were automatically transferred from the transferor to the transferee on the date of the transfer. It was clear from Community jurisprudence it was not possible for the general rule to be derogated from in a manner

unfavourable to employees. The rights conferred on them by the directive could not be made subject to the consent either of the transferor or transferee nor the consent of the employees' representatives or the employees themselves. The gulf between what the parties themselves might have contemplated and what the rule required might be large, but the rule had to prevail. On the other hand it was the fundamental right of the employee to be free to choose his employer. He could not be obliged to work for an employer whom he had not freely chosen. In the instant case, the reservation did not apply. The employees had continuous employment with Celtec from the start of their employment with the civil service by virtue of the directive. They were in a position on or after the date of the transfer to choose of their own free will not to work for Celtec. They did not make that choice and therefore their contracts of employment were transferred automatically to Celtec with continuity of employment on the date of transfer (see [9], [54], [55], [61], [92], below); *Botzen v Rotterdamsche Droogdok Maatschappij BV* Case 186/83 [1985] ECR 519, *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* Case 105/84 [1985] ECR 2639, *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* Case 324/86 [1988] IRLR 315, *Berg v Besselsen* Joined cases 144/87 and 145/87 [1989] IRLR 447, *d'Urso v Ercole Marelli Elettromeccanica Generale SpA* Case C-362/89 [1992] IRLR 136 and *Katsikas v Konstantinidis* Joined cases C-132/91, C-138/91 and C-139/91 [1993] IRLR 179 considered.

(3) (Lord Mance dissenting) Accordingly, the appeal would be dismissed. It would not be necessary for the case to be remitted to the employment tribunal for further determination. Their decision would be affirmed, although on different grounds, that the employees had continuous employment with Celtec from the start of their employment with the civil service by virtue of the directive (see [9], [62], [90], [93], below).

Notes

For employees' rights under Community law on transfers of undertakings, see 52 *Halsbury's Laws* (4th edn) para 21.20.

Cases referred to in judgment

Amministrazione delle Finanze dello Stato v Simmenthal SpA (No 2) Case 106/77 [1978] ECR 629, ECJ.

Berg v Besselsen Joined cases 144/87 and 145/87 [1989] IRLR 447, [1990] ICR 396, [1988] ECR 2559, ECJ.

Botzen v Rotterdamsche Droogdok Maatschappij BV Case 186/83 [1985] ECR 519, ECJ.

d'Urso v Ercole Marelli Elettromeccanica Generale SpA Case C-362/89 [1992] IRLR 136, [1991] ECR I-4105, ECJ.

Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar Case 105/84 [1985] ECR 2639, ECJ.

Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S Case 324/86 [1988] IRLR 315, [1988] ECR 739, ECJ.

Foster v British Gas plc [1991] 2 All ER 705, [1991] 2 AC 306, [1991] 2 WLR 1075, HL.

Katsikas v Konstantinidis Joined cases C-132/91, C-138/91 and C-139/91 [1993] IRLR 179, [1992] ECR I-6577, ECJ.

Leicestershire CC v UNISON [2005] IRLR 920, EAT.

Moloney v Hampshire Training & Enterprise Council Ltd (30 September 1996, unreported), ET.

North Staffordshire Railway Co v Edge [1920] AC 254, HL.

Redmond Stichting (Dr Sophie) v Bartol Case C-29/91 [1992] IRLR 366, [1992] ECR I-3189, ECJ.

Rotsart de Hertaing v J Benoidt SA (in liq) Case C-305/94 [1997] All ER (EC) 40, [1996] ECR I-5927, ECJ.

Rygaard v Strø Mølle Akustik A/S Case C-48/94 [1996] ICR 333, [1995] ECR I-2745, ECJ.

Spijkers v Gebroeders Benedik Abbatoir CV Case 24/85 [1986] ECR 1119, ECJ.

Cases also referred to in list of authorities

Archambault v Archambault [1902] AC 575, PC.

Brady v Brady [1988] 2 All ER 617, [1989] AC 755, [1988] 2 WLR 1308, HL.

Connecticut Fire Insurance Co v Kavanagh [1892] AC 473, PC.

Hay v George Hanson (Building Contractors) Ltd [1996] IRLR 427, EAT.

Jones v Governing Body of Burdett Coutts School [1998] IRLR 521, [1999] ICR 38, CA.

Kumchyk v Derby CC [1978] ICR 1116, EAT.

Landsorganisationen i Danmark v Ny Mølle Kro Case 287/86 [1989] IRLR 37, [1989] ICR 330, [1987] ECR 5465

Perkowski v Wellington Corp [1958] 3 All ER 368, [1959] AC 53, [1958] 3 WLR 564, PC.

Senior Heat Treatment Ltd v Bell [1997] IRLR 614, EAT.

Teesside Times Ltd v Drury [1980] IRLR 72, [1980] ICR 338, CA.

United Marketing Co v Hasham Kara [1963] 2 All ER 553, [1963] 1 WLR 523, PC.

Appeal

The North Wales Training and Enterprise Council Ltd (trading as Celtec Ltd), petitioned the House of Lords for leave to appeal against the order of the Court of Appeal ([2002] EWCA Civ 1035, [2002] IRLR 629), of 19 July 2002, filed on behalf of the employees, John Astley, Julie Owens and Deborah Hawkes from the order of the Employment Appeal Tribunal ([2001] IRLR 788), dated 5 October 2001, allowing the employees' appeal and quashing the decision of the Employment Appeal Tribunal, sent to the parties on 23 December 2001, and restoring the decision of the employment tribunal. The employees had raised the proceedings in the employment tribunal as representatives of a group of employees to which they belonged. On 6 March 2003, the House of Lords gave leave to appeal in order to allow questions to be referred to the Court of Justice of the European Communities (ECJ) on the interpretation of art 3(1) of Council Directive (EEC) 77/187. Following delivery of the ECJ judgment, on 26 May 2005 ([2005] IRLR 647), Celtec sought to argue that the issue referred had been determined in their favour. The facts are set out in the opinion of Lord Hope of Craighead.

John Bowers QC and *Jeremy Lewis* (instructed by *Mace & Jones*, Manchester) for the appellant.

Gavin Millar QC and *Thomas Linden* (instructed by *Russell Jones & Walker*) for the respondents.

Their Lordships took time for consideration.

21 June 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Mance. I am greatly indebted to them for their summary of the facts, materials and decisions relevant to this appeal, which I need not attempt to repeat. I shall for convenience refer throughout to Celtec Ltd (Celtec), since nothing turns on the transfer from Newtec Ltd to it.

[2] If an employer transferred his business undertaking to another party, the position at common law of an employee who worked for the first employer before the transfer and for the new employer after it was in principle clear. His previous contract of employment was not varied, because the second contract was made between different parties. But the first contract was the subject of an express or implied novation, involving the termination of the first contract and its replacement by a new contract. This was a readily intelligible and rational analysis. But it could work disadvantageously to the employee in any situation where his rights depended on showing that his employment had been continuous for a given period, since a novation necessarily involved a discontinuity. It was this disadvantage which the legislation now under consideration was intended to obviate. The benign intent of the legislation is not in question. But its effect is, inevitably, to introduce a fictional element into this tripartite relationship, since (where the legislative conditions are satisfied) the employee is treated as having been employed by the new employer all along and ex hypothesi such is not the case. The Court of Justice of the European Communities (ECJ) acknowledges this in its judgment on the reference in this case, when it rules that:

> '. . . the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties to the transfer process in that respect.' (See [2005] IRLR 647 at 658, [2005] ICR 1409 at 1434–1435 (para 43).)

In legal parlance, a matter is only deemed to be the case when it is not, or may not, in fact be so, or would not or might not be thought to be so if not deemed to be so. The complexity of this case, I think, derives from the fiction which underlies it.

[3] Certain very important questions, which were the subject of discussion and argument below, have effectively ceased to be controversial. The employment tribunal began, in a logical way, by seeking to define the undertaking whose transfer was in issue. Its answer (in para 11 of its reasons) was clear:

> '. . . the management of the government-funded post-16 vocational training and enterprise activities in England and Wales together with the information systems and database, some staff and some premises. That we think is a recognisable and definable economic entity.'

It went on to observe (at para 12) that the undertaking in question was a 'labour intensive' undertaking, and therefore the movement of staff from the

Department of Education (the department) to Celtec was an important defining part of the undertaking and transfer. The Employment Appeal Tribunal (EAT) did not understand Celtec to attack this description (see [2001] IRLR 788 at 794 (para 46)) and thought the tribunal's description could not be faulted. The Court of Appeal took the same view ([2002] EWCA Civ 1035 at [7], [2002] IRLR 629 at [7], [2002] ICR 1289).

[4] The employment tribunal then asked (at para 13) whether the individual respondents were assigned to the undertaking at the time of the transfer commencing. In its view they clearly were. The Court of Appeal considered (at [30]) that the tribunal had been fully entitled to conclude that the management skills of such of the department's employees as were happy to continue in work under the supervision of Celtec formed part of the undertaking which was being transferred.

[5] It was of course necessary for the employment tribunal to decide whether the undertaking it had defined had been transferred. It concluded (at paras 11–12) that it had. In the EAT (at paras 3, 43) Celtec accepted that there had been a transfer of an undertaking. In the Court of Appeal (at [7](ii)) it was effectively agreed that the undertaking had been transferred.

[6] What was and remains the divisive question is when the transfer occurred. The employment tribunal assumed (at para 20) that September 1990 when Celtec commenced business was the date on which the transfer commenced, but thought transfer was a long process 'starting some time in 1990 as affects these applicants and ending on a national basis some time in 1996'. In the EAT ([2001] IRLR 788 at 800 (para 99)) the majority view was that the tribunal, rightly directing itself, would have concluded that the transfer was probably completed in about September 1990 and certainly long before 1993. The Court of Appeal accepted (at [32]) the tribunal's test and its conclusion. In the statement of facts and issues agreed in the House it was accepted that Celtec became operational in September 1990 (see para 12). In summarising the essential facts agreed between the parties in its reference to the ECJ the House recorded (in para 13) that the respondent employees were 'full-time employees whose work was dedicated to the undertaking and they were therefore assigned to the undertaking prior to the transfer', and the summary continued (in para 14):

> 'On the day in September 1990 when NEWTEC commenced operations there was no difference between the work they did and the work they had done as civil servants the day before. They worked from the same desks, in the same building. The programmes which the Government had guaranteed to provide for prospective, and current, trainees had to be continued. The careers of young people depended on these and there could be no interruption of activities. The Government had a responsibility to the trainees which could not be interrupted. A seamless transition was important even if the economic structure was to change with time.'

In its written case on this appeal Celtec affirms that Celtec 'commenced operations in September 1990 when it took over the premises, information systems and databases of the [department] area offices'.

[7] As the opinions of my noble and learned friends make clear, the arguments of the parties were advanced below on a basis somewhat different from that which they now put forward. Celtec said that the transfer was in September 1990; but the respondent employees were not (in effect) part of what was then

transferred; so they cannot gain the benefit of the legislation. The respondent employees contended that the transfer took place over a period, and each of the respondent employees was part of what was transferred from time to time, so that they could claim the benefit of the legislation. The ECJ accepted neither of these approaches, ruling (if I understand the judgment correctly) that transfer must take place on a single date on which responsibility as employer for carrying on the business transferred moves from the transferor to the transferee and that this date cannot be postponed to another date at the will of either. It seems to me to follow inexorably that the transfer took place in September 1990 and the later dates of transfer agreed with the individual respondent employees are to be disregarded.

[8] In agreement with my noble and learned friend Lord Hope I conceive it to be the duty of this House to give effect to the law as declared in Luxembourg. But I agree, of course, that if it would unfairly prejudice Celtec to do so without giving it an opportunity to adduce further evidence or argument that course would have to be followed, however reluctantly after the lapse of so many years. In this instance, I agree with my noble and learned friend that such a course need not be followed, for two main reasons: (1) Celtec have long accepted September 1990 as the date of effective transfer. This is a matter partly of fact, partly of law. But the factual element is very prominent. The facts cannot be changed because an unforeseen legal argument makes them damaging to Celtec's case. (2) It is plain from the findings made below that Celtec set up in business in September 1990 and the employees seconded from the department were the core of the business: without them there could have been no effective transfer. It is scarcely an exaggeration to say that they were the business. I readily accept that the respondent employees did not think that they became employees of Celtec in September 1990, and it was not intended that they should become employees then. There are other potential difficulties and problems in concluding that they did. But these spring from the fiction to which I alluded at the outset, and from the government's decision to structure the transfer in this unusual way.

[9] For the reasons given by Lord Hope, and these brief reasons of my own, I would dismiss this appeal and invite written submissions on costs within 21 days.

LORD HOPE OF CRAIGHEAD.

[10] My Lords, this case arises out of a dispute between the appellant, North Wales Training and Enterprise Council Ltd, trading as Celtec Ltd (Celtec), and a group of its employees about the length of their continuous employment with the company for the purpose of establishing redundancy entitlements and other accrued rights. The dispute relates to the interpretation and application of art 3(1) of Council Directive (EEC) 77/187 (on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses) (OJ 1977 L061 p 26) (the acquired rights directive), which has now been consolidated with subsequent amendments and repealed by Council Directive (EC) 2001/23 (OJ 2001 L082 p 16).

[11] The respondents, John Astley, Julie Owens and Deborah Lynn Hawkes, were all employed by the Department of Employment (the DoE) as civil servants before they took up direct employment with a predecessor of Celtec following the transfer of part of the DoE's undertaking to the predecessor as part of a

privatisation initiative. They contend that their periods of continuous employment with Celtec and its predecessor should include their periods of service with the civil service prior to the date when they entered into the direct employment of the predecessor. Celtec contend that the respondents' periods of service with the civil service should be excluded from the computation. The respondents raised proceedings for determination of this issue in the employment tribunal as representatives of the group of employees to which they belong. The issue affects a large number of other civil servants who transferred from the civil service to other employers in the private sector during the early 1990s in similar circumstances.

BACKGROUND

[12] Until 1989 the DoE managed the training of young people and unemployed adults in England and Wales through about 60 local area offices. These area offices were all staffed by civil servants. In December 1988 the government published a White Paper entitled *Employment for the 1990s* (Cm 540) which set out an agenda for action for the next decade. Among the changes which it envisaged was the transfer of part of the DoE's vocational training responsibilities to bodies to be known as training and enterprise councils (TECs). The TECs were to plan and deliver training and to promote and support the development of small businesses and self-employment within their area under contracts with the government. They were to take over all the training work that had previously been carried on in the area offices. These proposals were put into effect, and 82 TECs were set up. By November 1991 all the TECs in England and Wales had become operational.

[13] It was understood from the outset between the TECs and the DoE, on whom the TECs were dependent for the funding of their operations, that the TECs were to be entitled to recruit their own staff. Most of them did so from the date they became operational. But they were new organisations, and the work to be undertaken required an understanding of the government policy that the contracts were designed to deliver. So the DoE, with the agreement of the TECs, issued an invitation to staff in its area offices to volunteer for secondment to the newly created TECs. They were invited to do so initially for a period of three years. Those who wished to volunteer were told that during the secondment period they would continue to be civil servants employed by the DoE. As such, they would retain their normal pay and terms and conditions of employment as embodied in the DoE's personnel handbook. They were also told that they could, if they wished, accept additional payments and benefits offered to them by the TEC, but that the right to any such payments or benefits would cease at the end of their secondment. They would not form part of their terms and conditions of employment as civil servants.

[14] The TECs welcomed the contribution made by the seconded staff. But they made it clear that, as private companies, they wanted to employ all their own staff on terms and conditions determined by them. In 1991 discussions took place with the TECs, seconded staff and the relevant trade unions about future staffing arrangements. All seconded staff were informed that they would be free to choose any offer of employment that a TEC might make or, if they preferred, to return to the DoE or the wider civil service for redeployment. In December 1991 the Secretary of State announced that secondments would be phased out by the end of each TEC's fifth year of operation. The DoE agreed

with the TECs that it would reimburse them should a court or tribunal decide, in the case of a dismissal of a former civil servant, that his or her period of employment with the TEC must be deemed to have been continuous with that in the civil service for the purpose of calculating that person's rights on redundancy.

[15] The area offices of the DoE in Wrexham and Bangor were taken over by the North East Wales TEC (Newtec). It had a board of directors drawn from local businessmen. It became operational in September 1990. On 1 April 1997 Newtec and the TEC for North West Wales, called Targed, were merged by the creation of a new body called Celtec. 43 civil servants were initially seconded to Newtec. When the secondments ended 18 of them resigned from the civil service and took up employment with Newtec. Ten chose to remain as civil servants, and they were redeployed. 13 resigned from the civil service, and two left the civil service for other reasons. Of the 40 civil servants seconded to Targed, ten resigned to take up employment with the TEC, nine retired and the rest left for other reasons.

[16] Mr Astley, Ms Hawkes and Ms Owens entered the civil service on 31 August 1973, 4 November 1985 and 21 April 1986 respectively. As civil servants they were responsible for vocational training in North Wales. Their work was entirely devoted to that service prior to its transfer to Newtec. They were all seconded to Newtec when it commenced operations on 17 September 1990. There was no difference between the work they did before and after the date of their secondment. They worked from the same desks in the same building. This arrangement ensured that there was a seamless transition from the old system to the new in the provision of the programmes which the government had undertaken to provide for the trainees. Towards the end of the period of their secondment they resigned from civil service to become direct employees of the TEC. Ms Hawkes and Ms Owens resigned from the civil service on 30 June 1993. Mr Astley resigned on 31 August 1993. Ms Hawkes's and Ms Owens's contract of employment with the TEC commenced on 1 July 1993. Mr Astley's contract commenced on 1 September 1993. There was no gap in time between their resignations from the civil service and their employment by Newtec.

[17] In 1998 Ms Hawkes was dismissed by Celtec on the ground of redundancy. The DoE took the view that there was no continuity of service between the periods of her employment with the civil service and the TEC, as she had chosen freely to resign from the civil service to take up employment with an employer in the private sector. Mr Astley and Ms Owens feared that they too were at risk of being dismissed for redundancy. All three sought a determination by the employment tribunal as to the length of the period of continuous employment on which they were able to rely. Their argument was that it should include their periods of employment with the civil service as well as those with Newtec and Celtec.

THE LEGISLATION

[18] The respondents all rely on the provisions of the acquired rights directive and s 218 of the Employment Rights Act 1996. Mr Astley also relies on reg 5 of the Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981/1794 (TUPE), as amended by s 33 of the Trade Union Reform and Employment Rights Act 1993 with effect from 30 August 1993. As from that date,

which was the day before Mr Astley resigned from the civil service, the definition of the expression 'undertaking' in reg 2(1) of TUPE which had previously been restricted to commercial organisations was amended to include any trade or business. It is common ground however that Celtec fails to be treated as an emanation of the state for present purposes and that Mr Astley's primary claim is under the acquired rights directive.

[19] The preamble to the acquired rights directive stated that it was adopted because it was 'necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'. Article 1(1) provided: 'This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.' Article 2 provided:

> 'For the purposes of this Directive: (a) "transferor" means any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the business; (b) "transferee" means any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the business . . .'

[20] Article 3(1) of the acquired rights directive was in these terms:

> 'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.
>
> Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.'

[21] The acquired rights directive was transposed into domestic law by TUPE. Regulation 5(1) of TUPE, as amended by s 33 of the 1993 Act, provides:

> 'Except where objection is made under paragraph (4A) below, a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.'

[22] Part XIV of the 1996 Act contains the interpretation provisions for the purposes of the statutory employment rights conferred by the Act. Chapter 1 of that Part deals with the concept of continuous employment, which is entirely a creature of statute. Section 210(1) states that references in any provision of the Act to a period of continuous employment are to a period computed in accordance with that chapter. Section 218 deals with how that period is to be computed in the event of a change of employer. Subsections (1) and (2) of that section are in these terms:

> '(1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer.

a (2) If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another—(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and (b) the transfer does not break the continuity of the period of employment.'

b

THE PROCEEDINGS

[23] On 22 December 1999 an employment tribunal sitting at Abergele determined that all three respondents had continuous employment from the start of their employment with the civil service under s 218 of the 1996 Act and the c acquired rights directive, and that Mr Astley also had continuity of employment by virtue of art 5(1) of TUPE. It found that there had been a TUPE transfer commencing in September 1990 when Newtec started business. It also found that the transfer took place over a number of years until 1996 when the last of the secondments to TECs from the civil service came to an end. In para 20 of its d determination the tribunal said:

'Our analysis is that each time a seconded employee became directly employed by the TEC there was another transaction and immediately before that transaction ("any transaction") that employee was employed by the transferor, ie by the civil service and therefore that employee's rights passed e over to the transferee which was the TEC. We see no reason in principle why such a very long period should not be found to be a period of the transfer when that was plain from the outset.'

[24] On 5 October 2001 the Employment Appeal Tribunal, by a majority, f allowed an appeal by Celtec against the employment tribunal's determination (see [2001] IRLR 788). It had been accepted for the purposes of that appeal that the tribunal's conclusion that there was a transfer of an undertaking was not open to challenge. The appeal was directed to the question when the transfer took place. It was held that the test for determining the time at which a transfer is completed was when the new employer was in actual occupation and control of g the old business. On that basis the tribunal ought to have concluded that the transfer was probably completed in about September 1990 and certainly long before 1993. It followed that the respondents remained employed by the civil service after the transfer, and their continuity of employment was not preserved when they accepted employment with Newtec.

h [25] On 19 July 2002 the Court of Appeal (Schiemann and Laws LJJ, Jackson J) allowed an appeal by the respondents against the determination of the Employment Appeal Tribunal (see [2002] EWCA Civ 1035, [2002] IRLR 629, [2002] ICR 1289). Delivering the opinion of the court, Schiemann LJ said that the employment tribunal was entitled to hold that the management skills of j the seconded employees formed part of the undertaking that was being transferred (see [30]). Addressing then the question whether the wording of the acquired rights directive implied that the transfer of the undertaking must take place at a moment in time, he said that the acquired rights directive was sufficiently wide in its terms to embrace a transfer of a business which took place over a period (see [31]). At [32] he said:

'. . . Once one accepts that a business can be transferred over a period of time, the establishment of the period of time during which the transfer takes place is a task for the tribunal of fact. We see no legal error in what was done by the [employment tribunal].'

[26] Celtec appealed against that decision to your Lordships' House. The parties were agreed that the respondents remained employees of the civil service during the period of their secondments. They were also agreed that the issue in the appeal was whether the employment tribunal erred in law in finding that the relevant transfer took place over a long period of time. They submitted that a reference should be made to the Court of Justice of the European Communities (ECJ) under art 234 EC for a preliminary ruling on this point. On 10 November 2003 the House referred the following questions to the ECJ:

'1. Are the words "the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer" in Article 3(1) of Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses to be interpreted as meaning that there is a particular point of time at which the transfer of the undertaking or part thereof is deemed to have been completed and the transfer of rights and obligations pursuant to Article 3(1) is effected?

2. If the answer to question 1 is "yes", how is that particular point of time to be identified?

3. If the answer to question 1 is "no", how are the words "on the date of a transfer" in Article 3(1) to be interpreted?'

[27] Celtec's contention before the ECJ was that the relevant words in art 3(1) of the acquired rights directive should be interpreted as meaning that there was a particular point of time at which a transfer of an undertaking or part thereof was deemed to have been complete and the rights and obligations of the transferor arising from a contract of employment existing on the date of the transfer were transferred to the transferee. They submitted that any later movement of employees from the transferor to the transferee was not within the scope of the acquired rights directive. The respondents' contention was that, while it was necessary to identify a date on or by which a transfer of an undertaking had been completed, this did not preclude the national court from finding that the transfer took place in stages, or over a period of time, or was effected by a series of transactions. They submitted that employees who remained employed in the undertaking during the process of transfer, or who were employed at the time of the stages or transactions by which the transfer was effected and who did not resign from the transferor's employment voluntarily or otherwise object to the transfer, are entitled to the protection of the acquired rights directive.

[28] On 26 May 2005 the ECJ made the following rulings (see [2005] IRLR 647 at 658, [2005] ICR 1409 at 1435 (para 46)):

'1. Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses must be interpreted as meaning that the

date of a transfer within the meaning of that provision is the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee.

2. For the purposes of applying that provision, contracts of employment or employment relationships existing on the date of the transfer within the meaning stated in para. 1 of the operative part between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties in that respect.'

THE ISSUES BEFORE THE HOUSE

[29] One might have expected the rulings by the ECJ as to whether the transfer took place over period of time to have resolved the issue between the parties. The case has been argued hitherto on the assumption that the respondents remained civil servants during their secondment to Newtec. A statement to this effect appears in para 7 of the statement of facts and issues. Celtec submit that in the light of the ECJ's ruling as to the date of the transfer the appeal should be allowed and that it be determined that the respondents' periods of continuous service began when, after resigning from the civil service, they took up direct employment with Newtec.

[30] The respondents submit however that the only issue that has to be determined is whether, in the light of the ECJ's judgment, their continuity of employment was broken in 1993 when they resigned from the civil service and accepted an offer of employment with Newtec. They contend that, assuming now that the date of the transfer was in September 1990 and not over a period as they had previously submitted, their accrued rights were protected by the acquired rghts directive. This is because their contracts of employment are deemed to have been handed over to Newtec at the date of the transfer. This, they say, is the inevitable consequence of art 3 of the acquired rights directive as interpreted by the ECJ.

[31] Mr Bowers QC for Celtec pointed out that the argument which the respondents were now seeking to advance is a new argument. The premise on which the case had been sent for a preliminary ruling was that the only question between the parties was whether there had to be a single date for the transfer. It had been assumed that the answer to that question would determine the case. He submitted that the respondents ought not to be permitted to raise this new point at this stage. In any event, the effect of the ECJ's ruling was that the employment tribunal had been proceeding on a false premise when it assumed that the transfer could take place over a long period. As a result the basis on which the respondents chose to remain with the transferor after the date of the transfer was not before the tribunal for its determination. So it had not been asked to consider whether it was by their own decision that the respondents agreed to be seconded to Newtec while remaining as employees of the DoE If this question was to be considered now it would have to be remitted to the tribunal for its determination.

[32] There are then two preliminary questions which your Lordships must consider before applying the rulings by the ECJ to the facts of this case. These are whether the respondents should be permitted to argue that the effect of the ruling by the ECJ is that the continuity of their employment was not broken in 1993

despite the fact that the transfer of the undertaking to Newtec must now be held to have taken place on a single date in September 1990 and, if so, whether that issue can be determined by the House on the information that is available or must be remitted to the tribunal for its determination.

THE ECJ'S JUDGMENT

[33] There is no doubt that the ECJ's ruling went further than was strictly necessary for a determination of the question whether the transfer of the undertaking took place on a single date or over a period. It went out [of] its way to make it plain, in its answer in para 1 to the questions on which a preliminary ruling had been sought, that that date was a particular point of time which could not be postponed to another date at the will of the transferor or transferee. And it went further still when it ruled in para 2, drawing on its previous case law, that contracts of employment existing on the date of the transfer between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over on that date from the transferor to the transferee regardless of what has been agreed between the parties in that respect.

[34] I take this to be a clear indication that, notwithstanding the court's ruling that the transfer took place on a particular point of time and not over a period, it was open to the national court to hold that the respondents' continuity of employment was not broken when they accepted employment with Newtec in 1993. This feature of the decision makes it necessary to examine the court's reasoning more closely.

[35] The reasoning on which the first sentence of the ruling in para 1 was based appears in paras 26–36 of the ECJ's judgment (see [2005] IRLR 647 at 657–658, [2005] ICR 1409 at 1432–1434). In para 26 the court referred to what it has repeatedly held to be the purpose of the acquired rights directive in, for example, *d'Urso v Ercole Marelli Elettromeccanica Generale SpA* Case C-362/89 [1992] IRLR 136 at 138, [1991] ECR I-4105 at 4142–4143 (para 9). It is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the new employer on the same conditions as those agreed with the transferor. Its purpose is to ensure, as far as possible, that the contract of employment continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer. Accordingly art 3(1) of the acquired rights directive covers the transferor's rights and obligations arising from a contract of employment existing on the date of the transfer and entered into with employees who, in order to carry out their duties, were assigned to the undertaking transferred (see [2005] IRLR 647 at 657, [2005] ICR 1409 at 1432–1433 (para 28)). In para 29 the court said that the protection of art 3(1) covers workers assigned to the unit affected by the transfer whose contract of employment or employment relationship is in force on the 'date of a transfer', and not those who have ceased to be employed by the transferor on that date or those who were engaged by the transferee after that date.

[36] In para 30 the court added this observation, the effect of which was to emphasise the close link that exists between establishing the date of the transfer and the protection of workers whose contracts of employment were in force at that date:

> 'Both the choice of the word "date" and reasons of legal certainty indicate that, in the mind of the Community legislature, the workers entitled to

benefit from the protection established by Article 3(1) of Directive 77/187 must be identified at a particular point in the transfer process and not in relation to the length of time over which that process extends.'

The court concluded this part of its discussion with these words (at para 36):

'In those circumstances, the term "date of a transfer" in Article 3(1) of Directive 77/187 must be understood as referring to the date on which responsibility as employer for carrying on the business of the unit in question moves from the transferor to the transferee.'

[37] The court then turned its attention to the issue which it saw as lying at the heart of the reference. This was the subject of the second sentence of its ruling in para 1 and of its ruling in para 2. It introduced this part of the discussion with these observations ([2005] IRLR 647 at 658, [2005] ICR 1409 at 1434):

'37. As the court has already held, implementation of the rights conferred on employees by Article 3(1) of Directive 77/187 may not be made subject to the consent of either the transferor or the transferee nor to the consent of the employees' representatives or the employees themselves, with the sole reservation, as regards the workers themselves, that, following a decision freely taken by them, they are at liberty, after the transfer, not to continue the employment relationship with the new employer (see [*Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* Case 105/84 [1985] ECR 2639 at 2651 (para 16)] and [*d'Urso v Ercole Marelli Elettromeccanica Generale SpA* Case C-362/89 [1992] IRLR 136 at 138, [1991] ECR I-4105 at 4143 (para 11)]).

38. It follows that, with that sole reservation, contracts of employment or employment relationships existing on the date of the transfer referred to in Article 3(1) of Directive 77/187 between the transferor and the workers assigned to the undertaking transferred are automatically transferred from the transferor to the transferee by the mere fact of the transfer of the undertaking (see [*d'Urso v Ercole Marelli Elettromeccanica Generale SpA* Case C-362/89 [1992] IRLR 136 at 138, [1991] ECR I-4105 at 4145 (para 20)], and [*Hertaing v J Benoidt SA (in liq)* Case C-305/94 [1997] All ER (EC) 40 at 50, [1996] ECR I-5927 at 5945–5946 (para 18)]).'

[38] In para 40 the court referred, in support of that interpretation, to the second subparagraph of art 3(1) which gives member states the option of providing that, after the date of the transfer, the transferor is to be liable, alongside the transferee, for the obligations arising from a contract of employment or employment relationship. It said that this rule implies that in any event those obligations are transferred to the transferee on the date of the transfer. It added ([2005] IRLR 647 at 658, [2005] ICR 1409 at 1434 (para 42)) that to allow the transferor or transferee the possibility of choosing the date from which the contract of employment or employment relationship is transferred would amount to allowing employers to derogate, at least temporarily, from the provisions of the acquired rights directive. As those provisions are mandatory, it is not possible to derogate from them in a manner unfavourable to employees.

[39] The court concluded this part of the discussion with these observations (at para 43):

'For the same reasons as those stated in paragraphs 40 to 42 of this judgment, it must be held that, for the purposes of applying Article 3(1) of

Directive 77/187, contracts of employment or employment relationships existing on the date of the transfer referred to by that provision between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties to the transfer process in that respect.'

[40] The court's judgment shows that the respondents' original position, that the continuity of employment which they sought was preserved because the transfer took place over a period of time, was based on a misunderstanding of the effect of art 3(1) of the acquired rights directive. But it also shows that there were two aspects to that misunderstanding. The first relates to the date of the transfer. The second relates to the question whether that date can be postponed at the will of the transferor or the transferee. The respondents' argument had assumed that it was not possible for their contracts of employment to be transferred to the transferee during the period of their secondment. The court's ruling that contracts of employment existing on the date of the transfer between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over from the transferor to the transferee on the date of the transfer casts an entirely different light on this argument.

SHOULD LEAVE BE GIVEN TO ARGUE THIS POINT?

[41] The question then is whether the respondents should be permitted to argue that the effect of the ruling by the ECJ is that the continuity of their employment was not broken when they resigned from the civil service and accepted an offer of employment by Newtec, notwithstanding the fact that this took place after the date of the transfer. In effect, the question is whether your Lordships should decline to give effect to the ECJ's judgment because the ruling which it has given has raised a point that was not previously argued. I would hold that the answer to this question is to be found by applying the principles described in *Amministrazione delle Finanze dello Stato v Simmenthal SpA (No 2)* Case 106/77 [1978] ECR 629. It is necessary also to have regard to art 10 EC, which provides that member states shall take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty and abstain from any measure which could jeopardise the attainment of those obligations.

[42] In the *Simmenthal* case the court said that direct applicability of a provision of Community law means that rules of Community law must be fully and uniformly applied in all the member states as from the date of their entry into force and for so long as they continue in force (see 643 (para 14)). Referring to the structure of art 177 of the EC Treaty (now art 234 EC) which provides for the making of a reference to the court for a preliminary ruling, it said that the effectiveness of that provision would be impaired if the national court were prevented from forthwith applying Community law in its entirety in accordance with the decision or the case law of the court and that it followed that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals (see 644 (paras 19, 20)).

[43] In the light of that guidance I would reject Celtec's contention that it is not open to the respondents to argue at this stage that, for the purposes of art 3(1) of the acquired rights directive, their contracts of employment must be deemed to have been handed over to Newtec on the date of the transfer. In my opinion

it is the duty of the national court to give them that opportunity, in view of the ECJ's ruling that contracts of employment existing on the date of the transfer between the transferor and workers assigned to the undertaking transferred are deemed to be handed over from the transferor to the transferee on the date of the transfer.

SHOULD THE HOUSE DETERMINE THE ISSUE?

[44] There remains however the question whether Celtec's argument that the respondents' contracts of employment were not transferred to Newtec on the date of the transfer because they freely decided to remain in the civil service can be determined by the House on the information that is available. This question is best divided into two parts. It is first necessary to identify the precise extent of the sole reservation from the general rule that contracts of employment are automatically transferred from the transferor to the transferee on the date of the transfer. It is then necessary to decide whether the question whether the reservation applies to this case can be answered on the existing material or must be remitted to the employment tribunal for its determination.

(a) *The extent of the reservation*

[45] The ECJ dealt with the consent issue in para 37 of its judgment ([2005] IRLR 647 at 658, [2005] ICR 1409 at 1434: see [37], above). The basic proposition which is set out in that paragraph is that implementation of the rights conferred on employees by art 3(1) of the acquired rights directive may not be made subject to the consent of either the transferor or the transferee nor to the consent of the employees' representatives or the employees themselves. From this it follows that the fact that it was agreed between the DoE and the TECs that the staff who understood the government policy that the contracts were designed to deliver would be provided to the TECs on secondment initially for a period of three years is irrelevant to the question whether the respondents' employment contracts are to be deemed to have been handed over to Newtec on the date of the transfer. So too is the fact that it was agreed between the DoE and those who volunteered for secondment that they would continue to be employed by the civil service during the period of their secondment. But the basic proposition is subject to the sole reservation as regards the workers themselves referred to in para 37, that they are at liberty after the transfer, following a decision freely taken by them, not to continue the employment relationship with the transferee. Are the respondents' cases caught by that reservation?

[46] Celtec's argument is that the reservation applies to the respondents' cases because they freely decided to remain civil servants after the date of the transfer by volunteering for secondment to Newtec. It is not in doubt that they volunteered for secondment on the terms that were offered to them. They were to continue to be civil servants employed by the DoE, and they were to retain their normal pay and terms and conditions of employment during the period of their secondment. But is this the kind of arrangement that the ECJ had in mind when expressing what it described as 'the sole reservation' (para 37)? Mr Millar QC for the respondents submitted that it applied only to cases where the workers objected to taking up employment with the transferee in circumstances where taking up that employment was an option that was available.

[47] To answer this question it is necessary to examine the two cases to which reference is made at the end of para 37 of the ECJ's judgment. These are *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* Case 105/84 [1985] ECR 2639, sometimes referred to as the *Mikkelsen* case after the name of the person whose action against the defendant company led to the making of the reference, and *d'Urso v Ercole Marelli Elettromeccanica Generale SpA* Case C-362/89 [1992] IRLR 136, [1991] ECR I-4105.

[48] In the *Mikkelsen* case Mr Mikkelsen was employed by the transferor Danmols Inventar A/S as works foreman. The undertaking of that company was transferred to Danmols Inventar og Møbelfabrik A/S. He continued to carry out his duties as works foreman in the new company. He did the same work and he received the same pay in that capacity as before the transfer (see [1985] ECR 2639 at 2647 (para 4)). But, unlike his previous situation where he [was] doing his work under a contract of employment, he was a shareholder in the new company. He held 33% of its shares, was chairman of the Board of Directors and held 50% of its voting rights. One of the questions in the case was whether the expression 'employee' in art 3(1) of the acquired rights directive must be interpreted as applying to persons who were employed by the transferor at the date of the transfer but who did not continue to work as employees of the transferee. The court answered this question in the negative. In para 16 (at 2651) it said that the protection which the acquired rights directive was intended to guarantee is redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer, adding:

> 'That is the case where the employee in question terminates the employment contract or employment relationship of his own free will with effect from the date of the transfer, or where that contract or relationship is terminated with effect from the date of the transfer by virtue of an agreement voluntarily concluded between the worker and the transferor or the transferee of the undertaking. In that situation Article 3(1) of the directive does not apply.'

[49] In *d'Urso*'s case Mr d'Urso was one of a group of 518 employees of a company called EMG which was made subject to a special administration procedure in 1981 but was authorised to continue trading. In 1985 its entire undertaking was transferred to a new company called Nuova EMG. Pursuant to the contract of transfer, and in accordance with agreements reached with the trade unions, 940 of the employees of the transferor were transferred into the service of the transferee. But Mr d'Urso and the other employees in his group remained in the service of the transferor. One of the questions in the case was whether art 3(1) of the acquired rights directive was to be interpreted as meaning that all the contracts and relationships of employment existing at the date of the transfer are automatically transferred to the transferee by the mere fact of the transfer. The court said ([1992] IRLR 136 at 138, [1991] ECR I-4105 at 4143 (para 10)) that it followed from its case law that art 3(1) covered the rights and obligations of the transferor arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, in order to carry out their duties, are assigned to the part of the undertaking or business transferred (see *Botzen v Rotterdamsche Droogdok Maatschappij BV* Case 186/83 [1985] ECR 519 at 528 (para 16)). In para 11 it referred to its decision in *Foreningen*

af Arbejdsledere i Danmark v Daddy's Dance Hall A/S Case 324/86 [1988] IRLR 315 at 317, [1988] ECR 739 at 754 (para 14), that the rules of the acquired rights directive had to be considered mandatory. It was not possible to derogate from them in a manner unfavourable to employees. The court then added these words:

> '... the implementation of the rights conferred on employees by the Directive may not therefore be made subject to the consent of either the transferor or the transferee nor the consent of the employees' representatives or the employees themselves, with the sole reservation, as regards the workers themselves, that, following a decision freely taken by them, they are at liberty, after the transfer, not to continue the employment relationship with the new employer (judgment in [*Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* Case 105/84 [1985] ECR 2639 at 2651 (para 16)]).'

In para 12 the court said that it followed that, in the event of the transfer of an undertaking, the contract of employment or employment relationship between the staff employed by the undertaking transferred may not be maintained with the transferor. It is automatically continued with the transferee.

[50] In *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* Mr Tellerup was employed as a restaurant manager by the transferor, Irma Catering A/S. When its lease was terminated Irma Catering dismissed all its staff including Mr Tellerup, whose statutory period of notice expired on 30 April 1983. But it continued to run the business with the same staff until 25 February 1983, with effect from which date a new lease was concluded between the landlord and Daddy's Dance Hall A/S. Daddy's Dance Hall immediately re-employed the employees of the former lessee including Mr Tellerup to do the same jobs as before. The new management contract which was concluded with Mr Tellerup provided that his remuneration, which had previously been in the form of commission, would take the form of a fixed salary. At his request a trial period of three months was agreed on, during which either side could give 14 days' notice. This was a shorter period of notice than that to which Mr Tellerup was entitled if his employment with the transferor was taken into account. He was dismissed on 26 April 1983 with 14 days' notice. One of the questions was whether an employee may waive rights conferred on him by the acquired rights directive if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position. The court gave a qualified answer to this question. In para 14 ([1988] ECR 739 at 754) it said that the purpose of the acquired rights directive is to ensure that the rights of employees affected by the transfer of an undertaking are safeguarded, adding that:

> 'Since this protection is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees.' (See also [1988] IRLR 315 at 317.)

In para 15 the court said that it followed that employees are not entitled to waive the rights conferred on them by the acquired rights directive, and that those rights cannot be restricted even with their consent. But in para 16 the court said that the acquired rights directive could be relied on only to ensure that the

employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the member state. In para 17 it said:

> 'Consequently, in so far as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking, in particular as regards their protection against dismissal, such an alternative is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer.'

[51] Mr Millar referred to two other cases to illustrate the application of these principles. These were *Berg v Besselsen* Joined cases 144/87 and 145/87 [1989] IRLR 447, [1990] ICR 396 and *Katsikas v Konstantinidis* Joined cases C-132/91, C-138/91 and C-139/91 [1993] IRLR 179, [1992] ECR I-6577.

[52] In *Berg v Besselsen* Mr Berg had been employed by a Mr Besselsen who operated a bar-discothèque. The operation of the establishment was taken over by a third party under a lease-purchase agreement entered into between Mr Besselsen and a commercial partnership. The agreement provided that the object sold should not become the property of the purchaser by the mere transfer. Mr Berg continued to work in the establishment following its transfer to the purchaser. The lease-purchase agreement was later terminated on the ground of the purchaser's non-performance and restored to Mr Berg's former employer. Mr Berg then applied for an order against Mr Besselsen for payment of his arrears of salary for the period while the establishment was managed by the purchaser. The court said that an analysis of art 3(1) showed that the transfer of an undertaking entails the automatic transfer from the transferor to the transferee of the employer's obligations arising from a contract of employment or an employment relationship, subject to the right of the member state to provide for joint liability of the transferor and the transferee following the transfer. It followed that, unless the member states availed themselves of that possibility, the transferor was released from his obligations as an employer by reason of the transfer. That consequence was not conditional on the consent of the employees (see [1989] IRLR 447 at 450, [1990] ICR 396 at 405 (para 11)). The court then said ([1990] ICR 396 at 405 (para 12)), referring to its judgment in the *Daddy's Dance Hall* case, that the acquired rights directive was intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to work for the transferee under the same conditions as those agreed with the transferor:

> 'Its purpose is not, however, to ensure that the contract of employment or the employment relationship with the transferor is continued where the undertaking's employees do not wish to remain in the transferee's employ.' (See also [1989] IRLR 447 at 450.)

[53] In *Katsikas v Konstantinidis* Joined cases C-132/91, C-138/91 and C-139/91 [1993] IRLR 179, [1992] ECR I-6577 Mr Katsikas objected to continuing to work for the transferee after the date of the transfer. One of the questions in his case was whether he was entitled to do so. The court, referring to its judgment in the *Daddy's Dance Hall* case, said that, while the acquired rights directive allowed the employee to remain in the employ of his new employer on the same conditions as were agreed with the transferor, it could not be interpreted as

obliging the employee to continue his employment relationship with the transferee (see [1993] IRLR 179 at 183, [1992] ECR I-6577 at 6609 (para 31)). The court then went on to say this ([1992] ECR I-6577 at 6609 (para 32)):

> 'Such an obligation would jeopardize the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen.' (See also [1993] IRLR 179 at 183.)

[54] From this jurisprudence I would draw these conclusions as to the extent of the reservation. The starting point is to be found in the general rule that the contracts of employment of workers assigned to the undertaking transferred are automatically transferred from the transferor to the transferee on the date of the transfer. Then there is the fact that it is not possible for this rule to be derogated from in a manner unfavourable to the employees. The rights conferred on them by the acquired rights directive may not be made subject to the consent either of the transferor or the transferee nor the consent of the employees' representatives or the employees themselves (see *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* Case 324/86 [1988] IRLR 315 at 317, [1988] ECR 739 at 754 (para 14); *d'Urso v Ercole Marelli Elettromeccanica Generale SpA* Case C-362/89 [1992] IRLR 136 at 138, [1991] ECR I-4105 at 4143 (para 11)). The gulf between what the parties themselves may have contemplated and what the rule requires may be quite large, as it is in this case. My noble and learned friend Lord Rodger of Earlsferry says that this puts in place a fictional version of events in place of what actually happened. But, as I read paras 37 and 38 of the court's judgment, it is the rule that must prevail. So I cannot agree with him that, to accommodate the arrangements that the parties thought they were entering into, the date of transfer must be taken to be 1 July 1993. The transfer took place in September 1990 when responsibility as employer for carrying on the business of the unit transferred moved to the TECs from the DoE.

[55] On the other hand it is a fundamental right of the employee to be free to choose his employer. So he cannot be obliged to work for an employer whom he has not freely chosen (see *Katsikas v Konstantinidis* Joined cases C-132/91, C-138/91 and C-139/91 [1993] IRLR 179 at 183, [1992] ECR I-6577 at 6609 (para 32)). From this it follows that it is open to an employee whose contract of employment would otherwise be transferred automatically from the transferor to the transferee on the date of the transfer of his own free will to withdraw from this arrangement by declining to enter the employment of the transferee (see the *Mikkelsen* case [1985] ECR 2639 at 2651 (para 16); *Berg v Besselsen* Joined cases 144/87 and 145/87 [1989] IRLR 447 at 450, [1990] ICR 396 at 405 (para 12); *Katsikas v Konstantinidis* Joined cases C-132/91, C-138/91 and C-139/91 [1993] IRLR 179 at 183, [1992] ECR I-6577 at 6609 (para 32)). That, then, is the extent of the sole reservation referred to in para 37. It does not, as my noble and learned friend Lord Mance suggests, work the other way round. It does not enable effect to be given to an employee's wish to continue to be employed by the transferor while continuing to be employed in the unit to which he has been assigned after its transfer to the transferee. But the application of the rule that he can withdraw from the arrangement depends on two things: first, that the employee is in a position to choose whether or not to enter the employment of the transferee after the date of the transfer; and

second, that he in fact exercises that choice by deciding of his own free will *not* to do so.

(b) *The facts*

[56] The crucial question then is whether, in the light of that jurisprudence, the reservation to which the ECJ referred (in para 37) applies in this case. Were the respondents in a position on or after the date of the transfer to choose whether or not to enter the employment of Newtec? And did they in fact exercise that choice by deciding of their own free will not to do so?

[57] Celtec's position before the ECJ, as noted by Advocate General Poiares Maduro in his opinion ([2005] IRLR 647 at 652, [2005] ICR 1409 at 1435 (para 45)), was that the respondents implicitly refused to allow their contracts of employment to be transferred to Newtec. This was because they entered into a voluntary agreement with the DoE that they were to be seconded to the TECs whilst remaining DoE employees. This, Celtec argued, must be taken as a refusal by them to transfer their contracts of employment to the TECs. In para 46 the Advocate General said:

> 'Such an analysis cannot be accepted, since Celtec acknowledged at the hearing that the Department of Employment employees had not been offered a contract of employment with the TECs in September 1990. In any event, to accept that employees can tacitly refuse to transfer their contracts of employment would run counter to the spirit of Directive 77/187, which instead provides for the automatic transfer of contracts of employment as the consequence of the transfer . . .'

[58] I have not been able to find anything in the material before your Lordships that is inconsistent with the opinion on this issue which was formed by the Advocate General. The arrangements for the setting up of the TECs are described in a note by Andrew Tabor of the Operations Directorate in the Department for Education and Employment, which was formed on the merger of the DoE and the Department of Education in 1996. He makes it clear in para 8 of this note that the arrangement which led to the invitation to staff in the DoE's area offices to volunteer for secondment was arrived at by agreement between the DoE and the TECs. There is no suggestion that it was envisaged that the staff were to be presented with the option of taking up employment direct with the TECs at that stage. Nor is there any mention in the letters which were issued to the staff, of which the letter written to Mr Astley on 3 September 1990 is an example, of any such option. The only choice that he was offered was whether or not to apply for secondment.

[59] The letters did not address the problem about continuity of employment that would arise in the event of the staff being involved in a TUPE transfer of the unit to which they were assigned to Newtec. But the effect of what the letters did say ought not to be underestimated. Mr Astley was told that he would continue to be a civil servant during the secondment period, and he appears to have acted on this assurance. It was not suggested at any time during the hearing before your Lordships that giving effect to the judgment of the ECJ in the way I have indicated would deprive the staff of the benefit of any pension rights accrued between September 1990 and the summer of 1993. That is not surprising, in view of the assurances they were given that they would retain their normal pay and conditions during that period. It should be noted

too that the judgment of the ECJ does not affect those civil servants who decided in September 1990 to be deployed elsewhere rather than volunteer for secondment to a TEC. They had no need of the continuity of employment that the judgment gives to employees who are involved in a TUPE transfer. It is to employees in that position, and to them only, that the concept of the deemed transfer applies.

[60] Of course it can be said that the respondents were in a position on the date of the transfer to choose not to work for Newtec. They could have made their position plain by declining to accept secondment. The effect of the DoE's invitation was that they were free to decline secondment if they wished. They could also have withdrawn from their agreement to accept secondment by refusing to work for Newtec as soon as the management of the area offices in which they were employed were transferred to it by the DoE. But it is equally plain that this was not what they chose to do. They continued to work in the area offices after the date of the transfer. The arrangement which the DoE had entered into with the TECs that their services were made available to them not as direct employees but under secondment did not affect the respondents' right to continuity of employment under the acquired rights directive, as their contracts were transferred to Newtec automatically on the date of the transfer.

[61] It seems to me to be plain in these circumstances that the sole reservation to the general rule to which the ECJ referred in para 37 of its judgment does not apply in this case. The respondents were in a position on or after the date of the transfer to choose of their own free will not to work for Newtec. But they did not make that choice. The fact is that they continued to do the same work in the area offices after the transfer of the undertaking to Newtec, albeit in the belief that they remained in the employment of the DoE This leads inevitably to the conclusion that their contracts of employment were transferred automatically to Newtec with continuity of employment on the date of the transfer.

CONCLUSION

[62] I would hold that it is not necessary for the case to be remitted to the employment tribunal for a further determination. I would affirm the decision of the employment tribunal, although on different grounds, that the respondents had continuous employment with Celtec from the start of their employment with the civil service by virtue of the acquired rights directive. I would dismiss the appeal.

LORD RODGER OF EARLSFERRY.

[63] My Lords, the respondents in these appeals worked at one time as civil servants in the Department of Employment (the department) in Wrexham. (No point is taken about the precise nature of the employment of civil servants and therefore I shall for convenience refer to the respondents as having had contracts of employment with the department.) The respondents were subsequently employed by the North East Wales Training and Enterprise Council Ltd (Newtec) whose successor is the appellant. The respondents each received from Newtec a statement of terms and conditions of employment as required by s 1 of the Employment Rights Act 1996. Each statement gave a date in 1993 (1 July or, in the case of John Astley, 1 September) as the date of commencement of the respondent's continuous employment with Newtec.

The respondents challenged that date and, in 1998, under s 11 of the 1996 Act they required a reference to be made to the employment tribunal to determine the appropriate date of commencement of their continuous employment. In their statements of complaint they all contended that they had become employees of Newtec on 31 August 1993 but that their employment with Newtec should be regarded as continuous with their employment with the department. Therefore the appropriate date of commencement of continuous employment was the date on which each of them had first been employed as a civil servant.

[64] In advancing this contention the respondents argued that, when they became employees of Newtec in 1993, there had been a transfer of the undertaking in which they worked from the department to Newtec in terms of the Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981/1794 (the TUPE regulations). As a result, by virtue of reg 5(1), their contracts with the department had effect after the transfer as if they had originally been made between the respondents and Newtec. For its part the appellant contended inter alia that, if there had been a transfer of part of the undertaking of the department to Newtec, that transfer had taken place at the time, or over the period, when Newtec became established and operational in September 1990. The respondents became employees some three years after that time or period and accordingly could not have continuity of employment under the TUPE regulations or the antecedent Council Directive.

[65] The TUPE regulations were made to give effect in United Kingdom law to Council Directive (EEC) 77/187 (on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses) (OJ 1977 L061 p 26), commonly known as the acquired rights directive (the directive). Notoriously, reg 2(1) of the TUPE Regulations was originally drafted so as to exclude from the definition of an 'undertaking' any undertaking or part of an undertaking which was not in the nature of a commercial venture. In May 1992, however, in *Dr Sophie Redmond Stichting v Bartol* Case C-29/91 [1992] IRLR 366, [1992] ECR I-3189, the European Court of Justice held ([1992] ECR I-3189 at 3219 (para 18)), that 'the fact that in this case the origin of the operation lies in the grant of subsidies to foundations or associations whose services are allegedly provided without remuneration does not exclude that operation from the scope of the Directive' (see also [1992] IRLR 366 at 369). The definition of 'undertaking' in reg 2 of the TUPE regulations required to be amended to take account of that decision and this was done by s 33(2) of the Trade Union Reform and Employment Rights Act 1993 which came into force on 30 August 1993 and removed the exclusion. According to the relevant documentation, the respondent John Astley became an employee of Newtec on 1 September 1993 and therefore he can properly frame his case in terms of the TUPE regulations—although, in my view, it ultimately falls to be determined by reference to the directive.

[66] According to the documentation in their cases, the respondents Deborah Hawkes and Julie Owens became employees of Newtec on 1 July 1993. So, by reason of the exclusion of non-commercial undertakings in reg 2(1) at the time, they cannot rely on the TUPE regulations. But the directive was, of course, binding on the government and on any emanation of the state. So any failure to transpose the directive correctly would make no

difference to the position of the department: the directive bound it. Equally, it would make no difference to the position of Newtec if it was an emanation of the state in terms of decisions such as *Foster v British Gas plc* [1991] 2 All ER 705, [1991] 2 AC 306. Although at one stage the appellant argued that Newtec had not been an emanation of the state, it now accepts that it was. It follows that at all relevant times the department and Newtec were bound by the directive in so far as the events in question involved, in terms of art 1(1), 'the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'. In particular, they were bound by art 3, which provides inter alia:

> '1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.
>
> Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship . . .
>
> 3. [Paragraph 1] shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States . . .'

The appellant now also accepts that art 3 had direct effect and so Deborah Hawkes and Julie Owens can rely on it, so far as it may have been applicable to the events in question. In practice, the issues under the TUPE regulations and the directive are, for the most part, the same and so I shall concentrate on the directive.

[67] The events in the present case have to be seen against a somewhat wider backdrop. In 1988, as their White Paper *Employment for the 1990s* (Cm 540) explained, the then government decided that training could be better delivered and the development of small businesses and self-employment could be better promoted and supported if these activities were carried on by locally based training and enterprise councils (TECs), which would be companies with directors, including top-level employers, who were familiar with local conditions. Under contracts with the department, the TECs would, for instance, run the training agency offices which the department had previously run, but they would have an extended remit. Newtec was set up to carry out these functions in the area which included Wrexham. It started work in September 1990.

[68] From the outset the policy appears to have been that, eventually, all the services would be delivered by employees of the TECs. At that stage it would be up to the individual TECs to decide how many employees they required and who they should be. To begin with, however, while the TECs recruited some staff, the people with the relevant experience in providing the core services were those who had been doing so in the training agency area offices as civil servants in the department. So, if a break in the provision of the training and enterprise programme was to be avoided, these civil servants had to continue to do this work when the TECs took over.

[69] The terms and conditions on which government civil servants are employed have been formulated in negotiations with the relevant trade unions over many years. Those which applied to department civil servants in September 1990 were to be found in the current version of its personnel handbook. Prominent among the available benefits was, of course, an entitlement to a civil service pension. The employment tribunal made no detailed findings in fact about exactly what happened when Newtec was due to take over the department's activities in North East Wales in 1990. But Mr Millar QC, who appeared for the respondents, did not dispute that civil servants in the department (and their trade union representatives) would have been understandably apprehensive that, if they stopped being civil servants and became employees of the TECs, they would lose the benefit of their civil service terms and conditions. Another cause for possible concern would have been that they might face a less certain future with the untried TECs, whose financial position was not secured for the longer term and whose ethos might turn out to be rather different from that of the department.

[70] In fact, however, in 1990 no immediate change in the status of the department civil servants was in contemplation, partly at least because the government had not yet worked out a scheme which would be acceptable to the TECs. Instead, the civil servants were to remain civil servants, entitled to all their existing terms and conditions, but they were be seconded to the TECs for an initial period of three years. After that, there might be a further period of secondment. For North East Wales this was spelled out, for instance, in the letter to Mr Astley of 3 September 1990 from the Head of Personnel for Wales in the training agency:

> 'During the secondment period you will continue to be a Civil Servant employed by the Department of Employment and as such will retain your normal pay and Terms & Conditions of Employment as embodied in the Department's Personnel Handbook. A summary outlining the main Terms & Conditions is enclosed with this letter. You may, if you wish, accept additional payments and benefits which may be offered by the TEC, but [indistinct word] will be for you to discuss and agree with the TEC. The Department of Employment accepts no liability for any agreement entered into between you and the TEC on such matters. The right to any such payments or benefits will cease at the end of your secondment and will not form part of your Terms & Conditions of employment as a civil servant.
>
> These arrangements will apply for the duration of the secondment period.
>
> If you are willing to accept secondment on the basis set out, please sign the Declaration form enclosed with this letter and return it to me within seven days.'

At some point Mr Astley and the other respondents must have signed and returned the necessary declaration forms.

[71] What the department and the TECs therefore envisaged was that initially the civil servants would not be offered employment by the various TECs but would be seconded to them. There the 'secondees' would remain employed as civil servants but would do what was required for the TECs to

carry on their enterprise and training activities. And—so far as anyone could see—that was indeed exactly what happened. The department continued to regard the secondees working in the TECs as department civil servants, drawing their salaries from the department and enjoying all the benefits, including the pension, to which civil servants of their grades were entitled. More particularly, the respondents were not offered employment by Newtec, but when they started work with the company in September 1990, as the employment tribunal found, at para 13 of its decision, 'there was no difference between tasks they performed with Newtec and the tasks they had with the Department of Employment the day before'. They were working in an office that was now run by Newtec, but they were doing so as civil servants of the department on secondment. They continued to work in this way until the summer of 1993.

[72] In the meantime the government had gone on developing its policy on the future of the TECs and, in particular, on the status of those working in the TECs. On 16 December 1991 the Secretary of State announced the arrangements which were to enable all TECs to become employers of their own staff by the end of their fifth year of operation. A question and answer briefing of the same date shows that there had been meetings with various interested parties, including the trade unions. The unions had 'refused to accept the principle that secondments should end'. Although the decision that TECs should employ their staff had been announced, correspondence available to the employment tribunal shows that a lot more work still needed to be done behind the scenes because the TECs were apprehensive about the costs which they would incur if it were held that, when the secondments ended and the civil servants became their employees, the TUPE regulations applied so as to make for continuity of employment. There were also concerns about any liability for pensions. Eventually, however, a package was worked out and the necessary funding arrangements were put in place with effect from 1 January 1993.

[73] Newtec then moved to implement the policy of ending the use of secondees and of employing only its own staff. In May 1993 the managing director wrote to the respondents offering them employment and enclosing a summary of the general terms and conditions of employment negotiated with the union. Civil servants, such as the respondents, were not obliged to take up the offer of employment: they could, if they wished, ask for a post elsewhere in the department, but they could not continue to work for Newtec as seconded civil servants. Both the respondents Deborah Hawkes and Julie Owens agreed to take up the offer of direct employment with Newtec from 1 July. Miss Hawkes intimated her wish to resign from the civil service with effect from 1 July in a letter dated 2 July. Miss Owens wrote on 1 July protesting at the way that she had 'been resigned', and adding that '[w]hilst I am happy with my offer of employment and generally satisfied with the terms and conditions I would have preferred to remain on long term secondment from the Department. I realise that this is not on offer'. John Astley and four others indicated that they intended to return to the Employment Service, but Mr Astley must later have changed his mind since the documents show that he became an employee of Newtec on 1 September 1993. The respondents then worked as employees of Newtec until 1998 when Miss Hawkes was dismissed on the grounds of redundancy. All three respondents then

referred the question of the length of their period of continuous employment to the tribunal.

[74] In each case the respondent's statement of complaint to the tribunal in 1998 was in similar terms and began: 'On 31 August 1993 I became employed full time by Newtec and remained so until it was merged in April 1997 to form CELTEC.' Why the date of 31 August, rather than 1 July or 1 September 1993, was chosen is not clear—perhaps in the hope of avoiding any question about the applicability of the TUPE regulations which had been amended with effect from the previous day. For present purposes what matters, however, is that, when applying to the tribunal, all three respondents proceeded on the basis that they had been employed by the department until the summer of 1993 and that it was only when they then resigned from the department and accepted the offer of direct employment with Newtec that they became employees of Newtec. This is hardly surprising since, as the narrative of events shows, that was precisely how the whole matter was seen by the department, by the TECs, by the trade unions and, of course, by the respondents themselves. It would have come as a considerable shock to the respondents, for example, if they had suddenly been told in the summer of 1993 that ever since September 1990 they had not, in fact, been civil servants and so their service during that period had not counted towards their civil service pension.

[75] At the hearing on the disposal of the appeal in light of the answers returned by the European Court of Justice to the questions referred by the House, it was common ground that the ruling of the European Court of Justice meant that the relevant part of the department's undertaking was transferred to Newtec in September 1990. For the appellant, Mr Bowers QC submitted that the appeal should accordingly be allowed, since the respondents' case had all along been perilled on the proposition that, in terms of art 3(1) of the directive, the transfer to Newtec of the relevant part of the department's undertaking, and hence of its obligations from its employment relationship with the respondents, occurred in 1993. If, as the European Court of Justice judgment now confirmed, the transfer of the relevant part of the undertaking occurred in 1990, then there was no transfer of the respondents' rights under their contracts of employment with the department when, three years later, they became direct employees of Newtec. By contrast, counsel for the respondents now argued that, since the directive was to be interpreted as meaning that the relevant part of the department's undertaking transferred in September 1990, by virtue of art 3(1) the department's obligations under its employment relationship with the respondents must also have transferred to Newtec at that time. So the directive still operated to maintain the respondents' continuity of employment—even though not in a way that their legal representatives had envisaged at any previous stage in the proceedings from the lodging of their applications with the employment tribunal until now.

[76] Counsel for the appellant submitted that it was too late for the respondents to perform this somersault and the House should not entertain the argument. If, however, the House were prepared to do so, the matter should be remitted to the employment tribunal so that the appellant could have an opportunity, if so advised, of leading further evidence about what happened in 1990. In the light of that further evidence, the appellant would hope to persuade the tribunal that, even though normally the effect of transferring the

relevant part of the undertaking would have been to transfer the employer's obligations from the department to Newtec, this case should be regarded as exceptional since the respondents had so clearly decided that they wished to remain civil servants in the department, rather than to transfer to the employment of Newtec. Their deliberate choice should be respected. Counsel was not unaware of the potential difficulty posed for any such contention by the fact that, in paras 37 and 38 of its judgment ([2005] IRLR 647 at 658, [2005] ICR 1409 at 1434), under reference to its previous case law, the European Court of Justice envisages as 'the sole reservation' to the transfer of the employment obligations from the transferor to the transferee the situation where 'following a decision freely taken by [the workers themselves], they are at liberty, after the transfer, not to continue the employment relationship with the new employer'.

[77] At the end of the hearing, I was satisfied that, since this is a test case, it would not be appropriate to refuse to consider the respondents' new argument—even though it was a complete volte face. On the other hand, it seemed to me that, precisely because the entire proceedings had been conducted on a completely different basis, justice to the appellant required that the matter should be remitted to the employment tribunal. This would at least give the appellant an opportunity to advance its fallback argument on the basis of a more detailed examination of the events in 1990 than had been required in a hearing where the focus had been on the position in 1993. The resulting further delay in the proceedings would be unfortunate but any resulting decision in the test case would be that much more securely based. Essentially, my position was the same as Lord Mance's. So, but for what I now go on to say, I would have taken much the same approach as he is to adopt in [114] and [115] of his speech.

[78] More fundamentally worrying for me throughout the hearing, however, was the idea, implicit in both parties' submissions, that, unless a new exception could be recognised—which would assuredly require a further reference to the European Court of Justice—in this case art 3(1) of the directive had the effect of obliterating what had actually happened and of putting in its place an entirely fictitious version of events. In that alternative world the department's civil servants were never seconded to Newtec in September 1990, never worked as secondees, never resigned from the civil service and never accepted an offer of employment from Newtec in 1993. The special terms in that supposed offer of employment, which were designed to provide additional protection in respect of redundancy and certain other employment rights, would never have been needed and could never have had any effect. For, it must now be held, by 1993 the civil servants were civil servants no more: since September 1990 they had all along been working as employees of Newtec—blissfully unaware that they were not earning any enhancement to their civil service pension since, by virtue of art 3(3), the department's pension obligations had not transferred to Newtec. Similarly, the complex negotiations between the government and the TECs in 1991 and 1992 had been in vain since, unbeknown to anyone, the department's obligations under its employment relationship with the relevant civil servants had already passed to those TECs, like Newtec, which had commenced operations.

[79] If the directive really had to be interpreted as having this effect, this legal fiction would play as spectacular a role in the law of the European Community as fictions ever played in the law of ancient Rome. More to the

point perhaps, the fiction would produce apparently absurd and impractical results and difficulties. What, for instance, would be the status of any pension 'rights' which had apparently, but not actually, accrued between September 1990 and the summer of 1993? a

[80] Happily, closer inspection of the decision of the European Court of Justice which is supposed to have spawned this troublesome fiction reveals a rather different picture. b

[81] The second recital in the preamble to the directive ('Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded') reminds us that the only purpose of the directive is to provide protection to employees in the event of a change in their employer. In para 26 of its decision in the present case, the European Court of Justice emphasises this point when it refers to its earlier case law and says ([2005] IRLR 647 at 657, [2005] ICR 1409 at 1432): c

> 'Directive 77/187 is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the new employer on the same conditions as those agreed with the transferor. The purpose of the Directive is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer . . .' d e

[82] If one stops and asks whether in September 1990 the respondents were in need of the protection of a directive which has this purpose, the answer is surely that they were not, because there was no change in their employer and it was never intended that there should be: they remained, and were intended by all concerned to remain, employees of the department with exactly the same rights as before, the only difference being that they had been seconded to work for Newtec for three years. Employees need the protection of the directive when there is a change of employer and they are at risk of finding that they have no job or that their conditions of employment have been changed for the worse. Neither eventuality arose in September 1990. f

[83] The European Court of Justice draws attention to the fact that the directive applies to transfers 'to another employer' in paras 31 and 32 of its opinion ([2005] IRLR 647 at 657, [2005] ICR 1409 at 1433): g

> '31. As is apparent from the actual wording of Article 3(1) of Directive 77/187, the term transfer in the expression "date of a transfer" in that provision is to be understood "within the meaning of Article 1(1) [of that Directive]". h
>
> 32. It is apparent from the latter provision that Directive 77/187 applies to transfers of an undertaking, business or part of a business "to another employer". In the words of the second recital in the preamble to the Directive, the Directive is intended to protect employees "in the event of a change of employer". In Article 2 of the Directive, the terms "transferor" and "transferee" are defined by reference to, respectively, ceasing to be or becoming "the employer in respect of the undertaking, business or part of the business".' j

This in turn leads on to the court's identification of the decisive criterion for establishing whether there is a transfer for the purposes of art 3(1). The court says ([2005] IRLR 647 at 657–658, [2005] ICR 1409 at 1433–1434):

> '34. To establish whether there is a transfer within the meaning of Directive 77/187, it is necessary to assess whether the unit in question retains its identity, which follows in particular from the fact that its operation is actually continued or resumed *by the new employer*, with the same or similar economic activities (see [*Spijkers v Gebroeders Benedik Abbatoir CV* Case 24/85 [1986] ECR 1119 at 1112, 1113 (paras 11, 12 and 15)], and [*Rygaard v Strø Mølle Akustik A/S* Case C-48/94 [1995] ECR I-2745 at 2763–2764, [1996] ICR 333 at 345 (paras 15, 16)]).
>
> 35. It follows that the decisive criterion for establishing whether there is a transfer for the purposes of Article 1(1) of Directive 77/187 is whether *a new employer* continues or resumes the operation of the unit in question, retaining its identity.
>
> 36. In those circumstances, the term "date of a transfer" in Article 3(1) of Directive 77/187 must be understood as referring to the date on which responsibility *as employer* for carrying on the business of the unit in question moves from the transferor to the transferee.' (My emphases.)

This conclusion is reflected in para 1 of the operative part of the judgment ([2005] IRLR 647 at 658, [2005] ICR 1409 at 1435 (para 46)):

> 'Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses must be interpreted as meaning that the date of a transfer within the meaning of that provision is the date on which responsibility *as employer* for carrying on the business of the unit transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee.'

Again, I have emphasised the words 'as employer' which are an essential part of the court's conclusion.

[84] The decisive criterion identified by the European Court of Justice in para 35 of its judgment has to be applied to the facts as found by the employment tribunal. In considering the facts it must be borne in mind that the tribunal specifically found, at para 22 of the extended reasons, that there had been no attempt whatsoever for purposes of the TUPE regulations 'to engineer any particular outcome or to evade liabilities in the way the transfer has been structured. The rationale is justified in business and political terms'.

[85] The tribunal considered, at para 11, that the undertaking which was transferred from the department to the TECs was the management of the government-funded post-16 vocational training and enterprise activities in England and Wales, together with the information systems and database, some staff and some premises. The tribunal thought that this was a recognisable and definable economic entity. In the hearing before the House, neither side sought to challenge that description of the relevant unit or undertaking, which has, of course, to be applied to the situation in North East Wales.

[86] In para 13 the tribunal went on to consider whether the respondents were assigned to the part of the undertaking which was run by Newtec. In its view, the respondents clearly were assigned to the undertaking 'at the time of the transfer commencing'—by which the tribunal meant September 1990. The tribunal was certainly entitled to reach the view that, when Newtec began operations in September 1990 using the civil servants who had been doing the job the day before, those civil servants were included in the part of the undertaking for the management of which Newtec was then responsible.

[87] That does not mean, however, that, for the purposes of art 3(1) of the directive, there had been a transfer of the relevant part of the undertaking to Newtec in September 1990. As the European Court of Justice underlined in para 32 of its judgment, the reference back in art 3(1) to art 1(1) shows that the directive applies to transfers of an undertaking, business or part of a business 'to another employer'. And in this case, even although Newtec had taken over the running of the activities of enterprise and training, there is nothing in the tribunal's findings to show that it had done so 'as employer'. On the contrary, the picture which emerges is of a situation where, from September 1990, the essential work of the unit was being carried on by staff who were not employed by Newtec. As I have noted, Newtec did indeed employ some staff, but there is nothing in the case to suggest that they were concerned with the essentials of the operation. From all that appears in the employment tribunal's extended reasons, the essential work continued to be done by the civil servants who had the necessary experience and who remained employees of the department, but on secondment to Newtec for three years. Newtec no more employed them or intended to employ them than it would have employed or intended to employ the employees of some company with which it might have contracted for the supply of the same necessary expertise. In accordance with the understanding of all concerned—the department, Newtec and the civil servants—the civil servants did not have, and were not meant to have, a new employer. So, even though Newtec had taken over the offices, including presumably the desks and chairs on which the civil servants sat and the equipment which they operated, in terms of art 3(1) of the directive, they had not done so 'as employer' and so there was no transfer of the undertaking to them for the purposes of the directive in September 1990. Which is exactly what one would expect since at that stage there was no threat to the position of the civil servants who continued to be employed by the department and to enjoy all their rights as civil servants. There was no event or threat arising out of a change of employer for which they needed the protection of the directive and so no reason why it should apply to them. I would add that this analysis appears to me to be consistent with the approach of the European Court of Justice in *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* Case 105/84 [1985] ECR 2639, as explained by Lord Mance in [108] and [109] of his speech.

[88] Therefore, contrary to the common position adopted by counsel at the hearing, I would hold that there was no transfer for the purposes of art 3(1) in September 1990 because, to adopt the terminology in para 35 of the judgment of the European Court of Justice, the operation of the unit was not being continued by 'a new employer'. This in turn means that the directive does not stand history on its head and, to a great extent at least, the case can be considered on its real facts.

[89] In reality, then, on the facts found by the employment tribunal, the first moment when the respondents could be said to have faced the risk of suffering the kind of disadvantage for which the directive affords protection came in 1993. As part of the culmination of the government's original policy, Newtec decided to put an end to the use of secondees and, from 1 July onwards, to have the work done by its own employees. Those working at the heart of Newtec's operations could no longer do so as seconded civil servants but had to choose either to seek employment elsewhere in the department or to become employees of Newtec. From that date, not only was Newtec continuing to run the unit or undertaking which had formed part of the department's undertaking before September 1990 but, as envisaged in the overall scheme for the privatisation of the delivery of the enterprise and training activities, it was now doing so 'as employer'. In my view, therefore, 1 July 1993 is the date on which, in terms of the test in para 1 of the operative part of the judgment of the European Court of Justice ([2005] IRLR 647 at 658, [2005] ICR 1409 at 1435 (para 46)), responsibility 'as employer' for carrying on the business of the unit transferred moved from the transferor (the department) to the transferee (Newtec). On that date there was accordingly a transfer, within the meaning of art 3(1), of the relevant part of the department's undertaking to Newtec. It follows that the department's obligations under its contracts of employment with the respondents transferred to Newtec on that date. At the risk of introducing a little artificiality, I include the department's obligations to Mr Astley, since, even though he had contemplated moving to another part of the department, he changed his mind and there is nothing in the facts found by the tribunal to suggest that he was not employed by the department in the unit immediately before Newtec took over responsibility as employer on 1 July. So the department's employment obligations to Mr Astley passed to Newtec on that date, some two months before he purported to become its employee.

[90] Had there been any question of the House deciding the appeal on the basis which I have outlined, it would have been necessary to put the case out for a further hearing in order to allow counsel for both parties to make submissions on the point. Since, however, three of your Lordships are minded in any event to dismiss the appeal on the basis of the arguments at the hearing, a fresh hearing is, strictly speaking, unnecessary. In these circumstances, I can express the conclusion which I have reached on the basis of the reasoning which I have just set out. I would hold that, by virtue of the operation of art 3(1) of the directive, the respondents' employment with Newtec should be regarded as continuous with their employment with the department. So in each case the appropriate date of commencement of continuous employment is the date on which the respondent was first employed as a civil servant. In my respectful view the Court of Appeal reached the right conclusion even though, not having had the benefit of the judgment of the European Court of Justice, it did so for different reasons. In agreement with the majority of your Lordships but on quite a different basis, I would accordingly dismiss the appeal.

LORD CARSWELL.

[91] My Lords, I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead.

[92] For the reasons which they have given I agree that the date of transfer has to be taken to be September 1990 and that the respondents' contracts of employment must be deemed to have been handed over to Newtec Ltd (Newtec) on the date of the transfer. I appreciate that this may be regarded as the product of what both my noble and learned friends Lord Bingham and Lord Rodger of Earlsferry have referred to as a fiction. It is in many ways unsatisfactory: it fails to represent the commercial reality of the arrangement and very probably is the opposite of what the respondents themselves thought to be the case at the time. I am also conscious of the force of the arguments put forward by Lord Rodger and his concern about the obliteration of reality in relation to such matters as the respondents' pension rights. I nevertheless am compelled by the reasons given by Lord Bingham and Lord Hope to agree that the consequence of the decision of the Court of Justice of the European Communities must be that the date of transfer is to be regarded as September 1990.

[93] I would dismiss the appeal.

LORD MANCE.

[94] My Lords, this appeal concerns the respondents' claim, under Council Directive (EEC) 77/187 (on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers ofundertakings, businesses or parts of businesses) (OJ 1977 L061 p 26) (the directive), that their employment with the appellant North Wales Training and Enterprise Council Ltd, trading as Celtec Ltd (Celtec) and its predecessor, the North East Wales Training and Enterprise Council Ltd (Newtec) in training and enterprise activities in the 1990s is to be regarded as continuous with their prior employment in the same activities as civil servants with the Department of Employment (the department). Celtec and Newtec can for present purposes be treated as one. For simplicity I shall use 'Celtec' to embrace both. The problem which the claim has to meet is that the department transferred responsibility for such activities (the undertaking) to Celtec in September 1990, whereas the respondents remained, on the face of it, civil servants employed by the department and on secondment to Celtec until summer 1993 when they elected to forego civil servant status and to become employees of Celtec. So, the appellant asserts, there was no change of employer 'by reason of' the transfer of the undertaking within the language of arts 2 and 3 of the directive, and any change occurred separately and voluntarily some years later. Other (indeed a majority) of the civil servants ostensibly seconded by the department to Newtec from September 1990 never elected to become employees of Newtec, but retired or resigned or returned to other posts in the department from 1992 onwards.

[95] The respondents' claim succeeded in the employment tribunal, failed before the Employment Appeal Tribunal ([2001] IRLR 788), but succeeded in the Court of Appeal ([2002] EWCA Civ 1035, [2002] IRLR 629, [2002] ICR 1289). Their claim was pursued through all these instances, brought to this House and referred to the Court of Justice of the European Communities on the mutual assumption that its outcome depended upon whether the date of the transfer of an undertaking within the meaning of arts 1(1) and 3(1) of the directive is a single point in time or can take place 'progressively or in distinct stages'. Celtec have always contended for the former analysis and the respondents for the latter. The respondents have accepted, at every instance and in their written

observations to the European Court, that they 'were seconded [by the department to Celtec] rather than directly employed in the period September 1990 to 1993'. The European Court having held on 26 May 2005 ([2005] IRLR 647, [2005] ICR 1409) in favour of the appellant that transfer of an undertaking takes place at 'a particular point in time', the respondents now submit that they should have leave to advance a new argument. This is that they were neither seconded by the department nor therefore civil servants in the period September 1990–1993, but were on the contrary employed by Celtec from September 1990 onwards.

[96] The basis for this argument is that the European Court, having in its judgment determined ([2005] IRLR 647 at 658, [2005] ICR 1409 at 1433–1434 (para 36)) that the 'date of a transfer' in art 3(1) of the directive 'must be understood as referring to the date on which responsibility as employer for carrying on the business of the unit in question moves from the transferor to the transferee', went on in paras 37 and 38 to state that, where there is a transfer of an undertaking—

> 'contracts of employment or employment relationships existing on the date of the transfer . . . between the transferor and the workers assigned to the undertaking transferred are automatically transferred from the transferor to the transferee by the mere fact of the transfer of the undertaking (see [*d'Urso v Ercole Marelli Elettromeccanica Generale SpA* Case C-362/89 [1992] IRLR 136 at 138, [1991] ECR I-4105 at 4145 (para 20)] and [*Rotsart de Hertaing v J Benoidt SA (in liq)* Case C-305/94 [1997] All ER (EC) 40 at 50, [1996] ECR I-5927 at 5945–5946 (para 18)])'—'with the sole reservation, as regards the workers themselves, that, following a decision freely taken by them, they are at liberty, after the transfer, not to continue the employment relationship with the new employer (see *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* Case 105/84 [1985] ECR 2639 at 2651 (para 16)], and [*d'Urso v Ercole Marelli Elettromeccanica Generale SpA* Case C-362/89 [1992] IRLR 136 at 138, [1991] ECR I-4105 at 4143 (para 11)]).'

[97] Relying on this passage, the respondents wish to submit that, whatever they thought or said from September 1990 until the European Court's judgment on 26 May 2005, there was in September 1990 an automatic transfer of their employment relationship. This occurred because, they say, they were not offered any employment relationship with Celtec and because, on their reading of the European Court's words, such an offer must be regarded as an essential pre-requisite to or element of any 'decision freely taken . . . not to continue the employment relationship with the new employer'. The appellant resists the grant of leave to advance any such submission as well as challenging its basis and substance.

[98] I make some preliminary observations. First, the European Court was not purporting to make new law, but based itself, as appears from its own paras 37 and 38, on its previous decisions. The respondents thus concede 'with hindsight' that they should have argued at previous instances in this case that there was continuity of employment throughout, even if transfer of the undertaking occurred at a single point in time in 1990. That they should have done is highlighted by the course of the submissions in the Court of Appeal when Mr Bowers QC for the appellant explained that on the appellant's case

there had been no automatic transfer of the employment relationship in September 1990, because the respondents had freely opted to remain civil servants with the department by volunteering for secondment (cf the judgment of Schiemann LJ [2002] IRLR 629 at [20], [2002] ICR 1289). This elicited no contrary argument (late though any would have been even at that stage) from the respondents.

[99] Second, the circumstances in which the respondents came to be seconded to, rather than employed by, Celtec have not been investigated or adjudicated upon at any previous instance in this case. Third, if the respondents became (unwittingly) employees of Celtec in September 1990 (so that their continuity of employment continued in 1993, which is when they *thought* that they were choosing to become Celtec's employees), the larger number of other department employees who thought in 1990 that they were choosing to remain civil servants and volunteering to be seconded to Celtec or another training and enterprise council (TEC) must in law have ceased to be civil servants in September 1990; and their continuity of employment was broken in 1993, when, on this analysis, they chose to revert to being civil servants independently on any view of the transfer of any undertaking. A decision favourable to the respondents in this case might thus, in another case, prove unfavourable to a body of employees who thought that they had at all times maintained their employment status (in this case as civil servants) with their former employers. Fourth, I do not consider that the analysis adopted by my noble and learned friend, Lord Rodger of Earlsferry, is open, not only because it was not argued before the House, but also because, if the respondents freely chose to remain civil servants and to volunteer for secondment in September 1990, that seems to me the end of the matter, and to preclude any possibility of a later transfer of their employment relationship in connection with the transfer of the relevant TEC which on the European Court's analysis took place, once and for all, in September 1990.

[100] There is substantial Employment Appeal Tribunal and Court of Appeal authority to the effect that, even in the Employment Appeal Tribunal, new points may only in exceptional circumstances be raised (cf the cases cited in *Leicestershire CC v UNISON* [2005] IRLR 920 at 925 (para 37)). Quite apart from that, there is the authority of your Lordships' House in *North Staffordshire Railway Co v Edge* [1920] AC 254 that leave to advance a new point should be refused in this House, if there are any further matters of fact by reference to which there is 'reasonable ground for supposing' that one party 'might have been able to strengthen his case' (see 263 per Lord Birkenhead LC) or which 'would affect the argument' (see 266 per Lord Dunedin) or which 'could possibly and properly influence the judgment to be formed' (see 270 per Lord Buckmaster).

[101] The present cases were however selected by the employment tribunal as lead cases and have been pursued not simply in the interests of these particular respondents, but to enable other former department employees, who were on the face of it seconded to training enterprises from September 1990 to dates in or after 1992, to know their position. If leave is not given to raise the new point, other employees will have to bring fresh proceedings, and the three respondents to this appeal will also potentially suffer from allowing their names to be used. In these circumstances, if the new point raises no new factual matters for investigation (as the respondents submit), then I consider

that the respondents should have leave to raise it. Even if the new point raises new factual matters, I think that the House can and should, exceptionally, be prepared to contemplate both allowing it to be raised, on appropriate terms as to costs, and if appropriate remitting the matter to the employment tribunal to investigate and make findings regarding the relevant facts. I would not accept Mr Bowers QC's submission that the facts must by now be so obscure that even this would be unfair to the appellant.

[102] Does the new point raise new factual matters? The respondents submit not. They point to paras 45 and 46 in the opinion of Advocate General Poiares Maduro ([2005] IRLR 647 at 652, [2005] ICR 1409 at 1423) addressing Celtec's submission that there was a single specific date of transfer in September 1990 (a submission that the Advocate General actually rejected, but the European Court accepted). The Advocate General said:

> 'In this case, Celtec's interpretation results in the date of transfer being set at September 1990. It follows that the applicant employees could have claimed protection of the rights arising from their contracts of employment at that time. However, according to Celtec, the Department of Employment employees implicitly refused to allow their contracts of employment to be transferred. Their decision to agree to be seconded to the TECs whilst remaining Department of Employment employees must be taken as a refusal to transfer their contracts of employment to the TECs.
>
> 46. Such an analysis cannot be accepted, since Celtec acknowledged at the hearing that the Department of Employment employees had not been offered a contract of employment with the TECs in September 1990. In any event, to accept that employees can tacitly refuse to transfer their contracts of employment would run counter to the spirit of Directive 77/187, which instead provides for the automatic transfer of contracts of employment as the consequence of the transfer of an undertaking.
>
> 47. Accordingly, were Celtec's interpretation of the date of transfer for the purposes of Article 3(1) of Directive 77/187 to be accepted, the necessary conclusion would be that the Department of Employment employees' contracts of employment would be transferred to the TECs with effect from September 1990. More generally, that interpretation would require the automatic transfer of the contracts of employment on a single date, unless the employees had made clear their refusal.'

[103] The European Court did not expressly endorse these paragraphs, but instead identified the general principles which I have quoted (at [96], above). The Advocate General focused on the question whether the respondents could be said to have 'refused to allow their contracts of employment to be transferred', while the European Court spoke of 'a decision freely taken' by employees 'not to continue the employment relationship with the new employer'. Mr Millar QC submits that neither test could be met when or if the respondents were not positively offered the opportunity of employment by Celtec in September 1990. Mr Bowers submits that the circumstances in which the respondents volunteered for secondment to Celtec call for evidential investigation, and that no conclusions can on present material safely be reached as to the voluntariness of the respondents' apparent choice to continue to be employed by the department and to be seconded to Celtec.

[104] I would accept Mr Bowers's submission. As a preliminary point, I note that—whatever may have been said at the (doubtless very) short hearing before the European Court of Justice on a point which was not in issue before that court—it is not even certain that the respondents could not have been employed by Celtec if they had wanted. The unchallenged evidence of Mr Tabor (which was before the employment tribunal and is quoted in para 25 of the Employment Appeal Tribunal's decision ([2001] IRLR 788 at 791) was that:

> '8. As private companies, TECs were entitled to recruit their own staff and most, if not all, did so from the day they became operational. The Department of Employment wished to assist TECs to become operationally effective as quickly as possible. As TECs were new organisations, and the work to be undertaken required an understanding of the government policy that contracts were designed to deliver, the Department, with the agreement of TECs, issued an invitation to staff in its area offices and elsewhere seeking volunteers for secondment to TECs. This invitation was initially for a three-year period . . .'

[105] Second, I note that there were considerable potential advantages for employees in keeping civil service status—particularly in retaining their membership of the Principal Civil Service Pension Scheme (see para 9 of Mr Tabor's statement), which they could not retain if they became employees of Newtec (cf art 3(3) of the directive). The documentation before the House shows that civil service trade unions supported secondment and resisted the decision eventually taken to phase it out. Mr Bowers informed the House that, although no evidence had been called on this aspect because it was not then material, the appellant's case would be that the original arrangements for secondment were the outcome of a long period of discussion, with trade unions representing the interests of the department's employees resisting any suggestion that such employees should lose their civil service status.

[106] Third, Mr Bowers pointed out that there had been no investigation of the basis on which the respondents were engaged as civil servants. Civil servants are traditionally engaged on a mobile basis, 'to serve wherever the Crown directs', in the language of the industrial tribunal in the early decision of *Moloney v Hampshire Training & Enterprise Council Ltd* (30 September 1996, unreported), para 40. On this basis, the department had the right to deploy the respondents in any other appropriate situation, and it is clear that, if the respondents had not volunteered for secondment to a TEC in September 1990, the department would have arranged to deploy them elsewhere. Further, those respondents who wished to maintain their civil service status when the arrangements for secondment were gradually ended in and after 1992 were also offered alternative situations by the department.

[107] Fourth, neither the Advocate General nor the European Court can have had the potential implications of the third point in mind, since it was not raised by the questions put to them, was not in issue and was not even mentioned, at least until brief reference must have been made to it during the oral submissions before the court. On the respondents' submission, the European Court must none the less be taken to have laid it down as an absolute and inflexible rule of European law that an employee of the transferor of an undertaking can never retain his or her employment status with the transferor

or elect to be seconded to the transferee unless he or she has been offered and refused an employment relationship with the relevant transferee—even if the transferor would otherwise have had and exercised the right to deploy the employee in another situation. But the concern of the directive is to protect employees and to preserve continuity of employment on the same terms. It is not to give employees rights which they would not otherwise have, in particular a right to work in a particular situation, if he or she did not previously have this. These general propositions are supported by the reasoning in the previous European Court authorities to which I refer at [108]–[113], below, and I do not find in the reasoning of the present European Court decision anything which suggests a different purpose. If an employer is entitled to and would otherwise deploy an employee in another post which would preserve continuity of employment, I can no see no reason why the directive should prevent the employer from inviting the employee and the employee from agreeing, as an alternative, to stay in the same post and work on a seconded basis with the transferee of the undertaking. The civil servant employee had no previous right or obligation to work in that undertaking. His secondment, if he accepts the invitation, is freely undertaken, in circumstances where he would otherwise be employed elsewhere in accordance with his employer's contractual entitlement.

[108] Fifth, since the precise scope and application of the exception to the principle of automatic transfer of employment relationships on the transfer of an undertaking was never in issue or argued before the European Court, I do not consider that the European Court's formulation of its 'sole reservation' can or should be read as providing any axiomatic or definitive answer to it. Nothing in the underlying authorities, the effect of which the European Court said that it was simply restating, supports so rigid or formulaic an interpretation. Indeed, in *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* Case 105/84 [1985] ECR 2639, there was no suggestion that the question whether Mr Mikkelsen ceased to have continuity as an employee depended on whether or not he was offered employment with the transferee company. Advocate General Slynn said (at 2641–2642) that there would be no transfer of employment—

> 'if an employee of one employer whose business is transferred genuinely and willingly agrees with that employer or the transferee of the business, that he will not be engaged under a contract of employment, or in an employment relationship with the transferee'

—or, put another way, that the question was whether he had 'genuinely agree[d] to accept a status with the transferee which is not that of an employee' under an agreement which was 'genuine and not tainted by duress' (see 2642). These formulations would both embrace secondment by a transferor to a transferee. The European Court spoke (at 2651 (para 16)) of a case—

> 'where the employee in question terminates the employment contract or employment relationship of his own free will with effect from the date of the transfer, or where that contract or relationship is terminated with effect from the date of the transfer by virtue of an agreement voluntarily concluded between the worker and the transferor or the transferee of the undertaking . . .'

[109] If it is open to an employee who is not offered a contract of employment with the transferee to conclude a voluntary agreement for some different relationship with the transferor or transferee, no reason is apparent why it should be impossible for an employee, who is not offered such a contract and whose employment relationship with the transferor allows the transferor to deploy him or her otherwise than in the undertaking transferred, to conclude a voluntary agreement with the transferor that he will be seconded to the transferee. Civil servants were given the choice in September 1990 whether or not to be deployed elsewhere in the department rather than to volunteer for secondment to a TEC. A civil servant who, without any offer of a contract of employment from a TEC, chose deployment elsewhere in the department would not have his or her contract of employment transferred to the TEC. The European Court's citation ([2005] IRLR 647 at 658, [2005] ICR 1409 at 1434 (para 37)) of *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* shows that its reservation there regarding 'a decision freely taken . . . not to continue the employment' covers those continuing to work in or be assigned to an undertaking, but in a different capacity to that of *employee* of the transferee. It is common ground that, were a contract of employment with a TEC to have been offered and refused by a civil servant, the reservation would cover the civil servant's continuing employment by the department on secondment to the TEC. In these cases, European law pursues its aims of protecting freedom of contract and the interests of employees at the same time. Yet it is said that there is no freely taken decision within the European Court's reservation, in the situation where a civil servant volunteers to be seconded to a TEC, when the department had the right and would otherwise have transferred the civil servant elsewhere within the department, unless the civil servant has also formally been offered a new contract with the TEC which he or she almost certainly did not want and would have refused so as to retain civil service status. The enforced transfer of a contract of employment in this situation is inconsistent with both employee protection and ordinary contractual freedom.

[110] Mr Bowers further submits, correctly in my view, that none of the other previous European Court decisions touches on a situation comparable with the present. In *d'Urso v Ercole Marelli Elettromeccanica Generale SpA* Case C-362/89 [1992] IRLR 136, [1991] ECR I-4105, the 518 employees who were ostensibly not transferred to the transferee (but whose employment relationship the European Court held was in law nevertheless automatically transferred) had been laid off (see [1991] ECR I-4105 at 4108), their employment relationship had been 'suspended' and a third party, the Cassa Integrazione Guadagni Straordinaria (CIGS), had assumed 'responsibility for their pay' instead of the transferor (see also [1992] IRLR 136 at 136). Quite clearly there was nothing welcome or voluntary about any of that, as far as those employees were concerned. (One might add that their employment relationship with the transferor would also appear, effectively, to have been determined.)

[111] In *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* Case 324/86 [1988] IRLR 315, [1988] ECR 739 the European Court explained the rationale of the directive as follows ([1988] IRLR 315 at 317, [1988] ECR 739 at 754 (para 14)):

> '. . . the purpose of Directive 77/187/EEC is to ensure that the rights resulting from a contract of employment or employment relationship of

> employees *affected* by the *transfer* of an undertaking are safeguarded. Since this protection is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees.' (My emphasis.)

The directive aims therefore to protect against dismissal by reason of the transfer of an undertaking. In the present case, the offer made to employees had the same purpose and effect of safeguarding the civil servants' rights arising from their employment relationship with the department, and of protecting against dismissal by reason of the transfer. Employees were to be deployed elsewhere in the department (as Celtec maintains was the department's right) or, if they wished, they could choose to continue to work in training and be seconded to Celtec. On neither basis was there any question of cessation of their continuous employment or of dismissal. The European Court also held that, although 'employees are not entitled to waive the rights conferred on them by the directive' (see para 15), nevertheless 'the directive can be relied on only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned' (see para 16). So, the court concluded (at 755 (para 18)), 'the directive does not preclude an agreement with the new employer to alter the employment relationship, in so far as such an alteration is permitted by the applicable national law in situations other than the transfer of an undertaking'. Nothing in the directive was therefore aimed at removing or varying any right which the department had under the terms of the relevant employment relationships to deploy civil servants in different situations outside the training and enterprise activities transferred to the TECs. That being so, it is again difficult to see why employees should not instead volunteer for secondment to a transferee of the undertaking constituted by such activities, without thereby forfeiting their civil service status—contrary almost certainly to what would have been their will at the time.

[112] In *Berg v Besselsen* Joined cases 144/87 and 145/87 [1989] IRLR 447, [1990] ICR 396, the European Court spoke ([1990] ICR 396 at 405 (para 12)) of the directive as—

> 'intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the transferee under the same conditions as those agreed with the transferor. Its purpose is not, however, to ensure that the contract of employment or the employment relationship with the transferor is continued where the undertaking's employees do not wish to remain in the transferee's employ.' (See also [1989] IRLR 447 at 450.)

In para 13 it spoke also of the rules as 'intended to safeguard, in the interests of the employees, the existing employment relationships which are part of the economic entity transferred'. Neither of these statements was addressing a situation where the transferor was both entitled and willing to offer continuing employment elsewhere in its organisation, and would have done so but for the

employee's voluntary offer to continue to serve on secondment in the same area as the undertaking transferred.

[113] *Katsikas v Konstantinidis* Joined cases C-132/91, C-138/91 and C-139/91 [1993] IRLR 179, [1992] ECR I-6577 concerned employees who had objected to becoming employees of the transferee, an attitude which the transferor (who then dismissed them) argued was not open to them in the light of the directive. Not surprisingly, the European Court held that the directive did not have the purpose or effect of compulsorily transferring an employee's employment contract or relationship against his or her will, but that, in such a case, it was for the law of the relevant member state to determine whether the contract or relationship was to be regarded as terminated by the transferor or transferee or to be maintained with the transferor. The case may explain references evidently made before the European Court in the present case to situations of 'refusal' to be employed by a transferee, but its facts were far removed from the present.

[114] In summary, I consider that the respondents should have leave to argue their new point, but that it raises potentially both factual matters which it would require further investigation to resolve and legal issues which would merit further argument, at least before there could be any question of dismissing this appeal. The situation is not, of course, at all a happy one in a case which is already old. But the problem about its resolution now arises from the respondents' own admitted failure to argue the case at any previous stage on the new basis which they now belatedly seek leave to raise. One option open to the House would be to refer the matter yet again to the European Court for determination of the question of law whether—on the hypothesis that the facts are as the department, in answer to the respondents' new point, maintain—the employment relationship of civil servants who volunteered for secondment in September 1990 was, contrary to their evident intention and belief, transferred willy-nilly to the relevant TEC to which they thought they were being seconded. But even that would not necessarily resolve the case, in view of the first point made at [104], above; and anyway it is in my opinion preferable that the law should be reviewed and decided on a solid basis of findings regarding the actual facts.

[115] In my opinion, therefore, the appeal should be allowed and the Court of Appeal's decision set aside and the case should be remitted to the employment tribunal for the facts to be investigated and for appropriate findings to be made, on the basis of which the legal position should then be further considered. The parties should have 21 days in which to make submissions as to the appropriate costs order.

Appeal dismissed.

Dilys Tausz Barrister.

Gover and others v Propertycare Ltd

[2006] EWCA Civ 286

COURT OF APPEAL, CIVIL DIVISION
BUXTON, LLOYD AND RICHARDS LJJ
8 , 28 MARCH 2006

Court of Appeal – Jurisdiction – Appeal from Employment Appeal Tribunal – Approach to appeal – Employment Tribunals Act 1996, s 37(1).

In the context of appeals from the Employment Appeal Tribunal, the concern of the Court of Appeal is not simply with whether the decision of the employment tribunal was right. The court's jurisdiction is to be found only in s 37(1)[a] of the Employment Tribunals Act 1996, which provides that an appeal on any question of law lies from any decision or order of the Employment Appeal Tribunal. There is no realistic sense in which the Court of Appeal can be hearing an appeal from the Employment Appeal Tribunal if it is only concerned with whether the employment tribunal was right. An assumption that the Court of Appeal in effect repeats the exercise already performed by the expert Employment Appeal Tribunal of reviewing the decision of the employment tribunal tends in practice to impose on the Court of Appeal an exercise that is inappropriate both in its nature and in its extent (see [8], [25], [26], below).

Dicta of Sir John Donaldson MR in *Hennessy v Craigmyle & Co Ltd* [1986] IRLR 300 at 305 doubted.

Notes

For appeal from decision of the Employment Appeal Tribunal, see 16(1B) *Halsbury's Laws* (4th edn reissue) para 950.

For the Employments Tribunals Act 1996, s 37(1), see 16 *Halsbury's Statutes* (4th edition) (2005 reissue) 689.

Cases referred to in judgments

Hennessy v Craigmyle & Co Ltd [1986] IRLR 300, [1986] ICR 461, CA.
King v Eaton Ltd (No 2) [1998] IRLR 686, Ct of Sess.
Lambe v 186K Ltd [2004] EWCA Civ 1045, [2005] ICR 307.
O'Donoghue v Redcar & Cleveland BC [2001] EWCA Civ 701, [2001] IRLR 615.
Polkey v AE Dayton Services Ltd [1987] 3 All ER 974, [1988] AC 344, [1987] 3 WLR 1153, HL.
Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91, EAT.

Appeal

T Gover, Victor Haimes and eight others appealed from the decision of the Employment Appeal Tribunal (Judge McMullen QC, Ms K Bilgan and Mr T Motture) on 22 November 2005 dismissing their appeal from the decision of an Employment Tribunal (chairman: D N Milton) sitting at London South,

a Section 37, so far as material, provides: '(1) ... an appeal on any question of law lies from any decision or order of the Appeal Tribunal to the relevant appeal court ... (2) In subsection (1) the "relevant appeal court" means—(a) in the case of proceedings in England and Wales, the Court of Appeal ...'

registered on 8 June 2005, that compensation for their unfair dismissal by their employer, Propertycare Ltd, was limited to an amount relevant to the period when consultation should have taken place together with a period of notice. The facts are set out in the judgment of Buxton LJ.

John Cavanagh QC and *Martin Budworth* (instructed by *Horwich Farrelly*, Manchester) for the employees.

John Bowers QC and *Mark Trafford* (instructed by *Victoria Cushion*) for the employer.

Cur adv vult

28 March 2006. The following judgments were delivered.

BUXTON LJ.

BACKGROUND

[1] The Employment Tribunal (ET) from which an appeal in these proceedings was brought to the Employment Appeal Tribunal (EAT) ([2006] All ER (D) 137 (Jan)) held that all of the claimants had been unfairly directly dismissed with effect from 1 November 2001. The employer, as for broad convenience I will call the respondent, sold lettings insurance and related products to landlords. The claimants were sales agents, and appear to have considered themselves as self-employed. Changes in their terms, in particular in relation to commission rates, were sought to be unilaterally imposed by the employer in a period leading up to October 2001. The ET expressed its reasons for finding that the process was repudiatory of the claimants' contracts in a number of ways, which I can fairly represent by extracts from paras 63, 67, 106 and 129 of the ET's determination:

> 'Simply as a boldly stated issue about whether the halving of the commission rates was justified we have no hesitation in finding that they [sic] were not ... We repeat that the most unimpressive feature of the respondent's case on all these issues was the one-sided nature of all the business dealings between the parties in those final months ... the kind of swingeing reduction in the April–September scheme would have been a fundamental breach of a contract of employment ... In the overall picture of the repudiatory behaviour by the respondents culminating we find in an unreasonably arbitrary employment package administered in a totally unreasonable fashion without even lip service to any established concept or consultation we found particularly unimpressive and reprehensible the very tight timetable administered to the claimants to consider their positions ... the whole process of termination of employment was unfair, confrontational, based on erroneous employment law principles and lacking in sympathy and understanding at [sic] any semblance of good industrial practice and procedure ...'

[2] The claimants repaired with reasonable promptitude to the ET, but there then arose a dispute as to whether they were indeed employees and, if so, of whom. That issue was considered by the ET over a period of three days in December 2002, it holding that they were employees, and of the present respondent. A successful appeal was taken to the EAT, which in November 2003 remitted the issue to a different ET. The second ET reconsidered the issue

promptly, over four days at the end of 2003. Its determination was not, however, issued until 9 May 2004, when it confirmed the decision of its predecessor that the claimants were employees of the respondent. That cleared the way for a merits hearing, which occupied 12 days in February to May 2005, by then three and half years after the events complained of.

[3] The ET concluded as to dismissal in the terms already indicated. But it went on to find that even if the employers had as the result of proper consultation and advice proposed terms that would have been reasonable in the sense of not being in fundamental breach of the employment relationship, the employees would still not have accepted those terms. Accordingly, all that the employees had lost as a result of the employer's fault was employment during the period when consultation should have taken place, which the ET found to have been four months, with an added period of two weeks' notice. Compensation for the unfair dismissal was accordingly limited to an amount relevant to that period. The appeal to the EAT, and the further appeal to this court, complain of that limitation.

[4] The appeal in this court took a most unsatisfactory course, which raised questions as to the court's jurisdiction. In order to explain that procedural issue it is necessary first to summarise in brief terms the case that was sought to be put on appeal. A fuller account of and commentary on the case will be found later in the judgment, when I address the substance rather than the admissibility of the arguments.

THE APPELLANTS' CASE SUMMARISED

[5] In making the deduction that it did, the ET saw itself as applying a doctrine to be found in *Polkey v AE Dayton Services Ltd* [1987] 3 All ER 974, [1988] AC 344. Put shortly for the moment, the House of Lords held in that case that after a finding of unfair dismissal compensation for that dismissal can be reduced to account for a chance that the employee would have been dismissed in any event. In order to address the possibility of such a reduction, the ET has to consider what would have happened if the unfair dismissal had not occurred. The appellants contended that such an approach, leading to the reduction in compensation that we have seen, was not open to the ET in this case, for two separate reasons.

[6] First, as a matter of law, the *Polkey* principle did not apply when the dismissal would have been unfair in any event, such that whatever fair procedure and consultation had been adopted no employer could dismiss for the reason that this employer adopted. Therefore, and possibly as a sub-set of the main contention, it was not open to the ET to consider whether the employer could have subsequently dismissed fairly for a reason different from that of the actual dismissal. Although Mr Cavanagh QC did not put it like this, the first dismissal irretrievably poisoned the well against any reduction of compensation. This was said to be such a case. The ET had found, not merely that the offer of the original package was procedurally flawed, but also that an offer of that package by any means at all could never be fair. The employer could therefore not save himself by claiming that he could have fairly offered a different package, and fairly dismissed the claimants when they did not accept it.

[7] Second, the ET's findings as to what would have happened after proper consultation and advice were not open to it. The complaint was put in a variety of ways, but included lack of evidence on which the findings could be based; and that the exercise launched the ET on a sea of unreliable speculation, that indeed

contradicted findings made at the stage of considering the fairness of the dismissal.

THE JURISDICTION OF THIS COURT AND ITS APPLICATION IN THIS CASE

[8] Both sides told us that we were constrained by the observation of an extremely strong constitution of this court in *Hennessy v Craigmyle & Co Ltd* [1986] IRLR 300 at 305, [1986] ICR 461 at 470:

> 'It is too often forgotten that, in the context of appeals from the Employment Appeal Tribunal, this Court is a second-tier appellate court. It may, and usually does, obtain considerable assistance from the judgment of the Employment Appeal Tribunal, but its concern is with whether the decision of the Industrial Tribunal was right, not with whether the Employment Appeal Tribunal was right.'

I would be less than frank if I did not express some reserve about that guidance, both from the point of view of jurisdiction and from the point of view of the management of the business of this court. As to authority, this court's jurisdiction to hear this appeal, coming as it does from a statutory tribunal, is only to be found in s 37(1) of the Employment Tribunals Act 1996, which provides for an appeal *from the EAT* on a question of law only. I do not see how we can in any realistic sense be hearing an appeal from the EAT if we are only concerned with whether the ET was right. As to the business of this court, the assumption that we in effect repeat the exercise already performed by the expert EAT of reviewing the decision of the ET tends in practice to impose on this court an exercise that is inappropriate both in its nature and in its extent. It was no doubt with this jurisprudence in mind that the parties, if left to themselves, would have required two days of this court's time, and have read to us no fewer than 27 authorities.

[9] In the present case these are not merely formal concerns, because the first of the appellants' complaints, para [6], above, only appeared in the case on the morning on which the appeal opened. It was clearly not taken before the EAT, proceedings in which the appellants were represented by leading counsel, though not by Mr Cavanagh. It only came to the court's attention when a document setting out some but by no means all of the considerations attaching to it was handed to us literally as we walked into court. Mr Bowers QC told us that he had received the document the previous evening. It was as much of a surprise to him as it was to us. It was suggested that failure to take the point before the EAT was irrelevant because our task was to review the ET. That contention further reinforces my concern about the guidance given in *Hennessy*'s case, and is a contention to which, if it should arise before me as a matter of decision, I shall wish to give the most careful scrutiny.

[10] That however is not this case, because the appellants have a preliminary difficulty, that whether or not we in principle simply ignore what happened in the EAT the jurisdiction of the court is constrained by what is in the grounds of appeal and in the grant of permission. Mr Cavanagh said that the point was to be found in the third sentence of ground 4:

> 'The effect of the application of *Polkey* in this case is to construct the world as it plainly never would have been and to imagine employers as behaving in a way in which it was manifest they never would behave.'

That was a hopeless submission. The terms of that sentence assume what the argument put to us denies, that the *Polkey* jurisprudence was potentially applicable, but complain that that jurisprudence was wrongly applied. That is the second issue, [7], above, and not the first issue with which we are now concerned. And, in any event, it has been the practice for all of my time in the law, and no doubt for many years before that, that even if only as a courtesy to the court a departure from the case as put in the court below is clearly identified and permission sought for it.

[11] That this point was not in issue was also the understanding of Keene LJ when granting permission for this appeal. He said:

> '... properly arguable that the employment tribunal indulged in speculation about what would have happened and went beyond the limits indicated in *King v Eaton (No 2)* ([1998] IRLR 686) and other authorities.'

Those observations are unmistakably directed at and only at the second of the appellants' points. They demonstrate not merely that the first point was never taken in the grounds, but also that the appellants do not have permission to pursue it in this court.

[12] I am not minded to grant the appellants indulgence on this point. The judges of this court now spend many hours pre-reading material before the appeal opens. The purpose of that is, amongst other things, to save the parties cost by reducing the time that has to be spent in court by their (on the evidence of the appellants' bill of costs in this case, expensive) lawyers. It makes a mockery of that process if appellants continue to consider that they are free to arrive at the door of the court with a completely new case, and take up the time of the court in an attempt to elucidate the nature and details of the case viva voce.

[13] I would not grant the permission that was never asked for to amend the grounds of appeal. I would not grant the permission that was never asked for to extend the ambit of the permission to appeal to this court. The first of the appellants' issues therefore falls in limine. However, because I, wrongly, allowed the court to be drawn into an examination of the substance of the issue I will say something about it, however obiter those observations will be.

POLKEY

[14] As Richards LJ pointed out in the course of argument, all rules on this aspect of compensation for unfair dismissal spring from s 123(1) of the Employment Rights Act 1996:

> '... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

To that observation Mr Bowers added a plea that we should not add to the already excessive number of technical rules in this area. I respectfully and strongly agree with both of those observations. My first and overriding difficulty about the appellants' first point is that, at least as explained to us, it would introduce some very technical and verbally sophisticated rules into a

decision-making process that should be a matter for the commonsense, practical experience and sense of justice of the ET sitting as an industrial jury.

[15] The so-called '*Polkey* principle' is most conveniently to be found in the speech of Lord Bridge of Harwich ([1987] 3 All ER 974 at 984, [1988] AC 344 at 365) approving observations of Browne-Wilkinson J in *Sillifant v Powell Duffryn Timber Ltd* [1983] IRLR 91 at 96. If the likely effect of taking appropriate procedural steps is considered at the stage of assessing compensation—

> 'There is no need for an "all or nothing" decision. If the Industrial Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.'

It was that principle that the ET saw itself as applying in this case. It is necessary to set out their approach in their own words:

> '139. We had to hypothesise about the period during which it would have been reasonable to consult about a totally new contract of employment and what would have been a reasonable period and what would have been the consequences at the end of such a period. This exercise was we found particularly difficult in view of our findings on a whole number of issues about the conduct and behaviour of the respondents and trying to visualise them theoretically as "reasonable employers".
>
> 140. We took into account our own industrial experience of other industries where fundamental job changes are introduced over a period of time which are not necessarily popular with the workforce. Thus for example the tribunal panel has had experience of cases where a large workforce in the "care" world has sought to introduce shift working. That kind of exercise in our judgment would usually require particularly in special cases involving no doubt wide ranging changes to family arrangements and issues of that kind a period, say, of at least six months.
>
> 142. We supposed that if the respondents had taken the question seriously and had taken proper legal advice they could have in due course put together a package which did not amount to a fundamental breach of contract but which would nevertheless have been sufficiently unattractive to the majority of the claimants.
>
> 143. We suspect that the final package would still have been unattractive to the majority of the claimants particularly the older members of staff who still hoped to have found (as it appears they had in fact done) a business opportunity for their long-term retirement years.
>
> 144. We are satisfied that we had sufficient material before us to reach a conclusion that even the high earning claimants would have been faced after a period of consultation with a salary plus commission sort of arrangement or indeed even a commission only arrangement on a PAYE basis which would not have been particularly attractive but which would have been justifiable after proper consultation and inquiry.
>
> 145. As we have already referred to above the claimants always saw themselves as a group and we have no doubt that during such a period of consultation even more so they would have acted as a group and sought to

protect the interests of the high earning claimants and the lower earning claimants and that consultation would certainly have been justifiably protracted. Equally the respondents could have justified what the claimants would have seen as an unattractive final much more fixed rate of income albeit of course with the benefits of employment right protection on the one hand and the obligations of employers duties on the other.

146. We have come to the conclusion that the correct period for consultation, a radical overhaul of the whole employment contract terms and details would have been a period of four months terminating on 1 February 2002. At that time we are persuaded that the respondents would have been able to put together a proper contract of employment with proper terms and conditions continuity of service absence of probation period and fair industry standard wages on an employed insurance sales basis.

147. Equally we are satisfied that it is extremely probable that the higher earning and/or more elderly claimants would have found that package unacceptable because of their age and their desire to build up a business of their own and that they would not have found that acceptable. The younger/lower paid claimants we find would have maintained solidarity and also rejected the package. At that point the respondents we find would have been fairly entitled to dismiss the claimants for some other substantial reason ie non acceptance at that point of a finally worked out and properly consulted package. That dismissal would have been on noticed and therefore our overall conclusion therefore is quite simply that the claimants are entitled to a basic award calculated quite simply on two years' service at the relevant statutory maximum and loss of earnings (subject to any earnings during that period) up to 15 February 2002 ie the statutory two weeks' notice.'

[16] Quite apart from the complaint about lack of evidence, see [7], above, the appellants said that that approach was not in any event open to the ET. The argument proceeded as follows. First, there will be cases in which the court has to take into account its knowledge, by the time of trial, that the employee's employment would have terminated in any event at or shortly after the date of dismissal. Examples were the closure of the business; or, as in *O'Donoghue v Redcar & Cleveland BC* [2001] EWCA Civ 701, [2001] IRLR 615, where the applicant's behaviour was such that she could and would have been fairly dismissed. Those were not '*Polkey*' cases. That latter distinction was, as I understand it, based on the contention that in the cases just mentioned the alternative world was not hypothesised, but had actually occurred or was almost certain to occur. By contrast, in a *Polkey* case the court had to hypothesise at a more uncertain level or, as Mr Cavanagh put it, speculate. That was why it was sometimes called a 'what if' exercise. *Polkey* came into play and permitted that exercise, and only came into play, where the employer had a valid reason for dismissal, but had acted unfairly in his mode of reliance on that reason. The most obvious example was a redundancy situation, where the employee had been unfairly selected. Then, the ET had to and was permitted to ask itself the 'what if' question, as indicated in para 139 set out above. That step was, however, only open to it if the reason for the dismissal had been open to the employer in the first place, and the hypothesised future and fair dismissal would have been for that same reason. Those conditions were not fulfilled in this case. The ET's ruling on

dismissal, extracted in [1], above, was that the original 'package' had been so unreasonable that it would not have been possible to dismiss the claimants for refusing to accept it whatever procedure had been adopted. And the hypothesised eventual fair dismissal would not have been for the same reason as the actual dismissal, failure to accept the original package, but for a different reason, failure to accept a different package.

[17] I cannot accept either that the law is as thus set out; or that, if it is so limited, this case does not fall within it.

[18] As to the law, first, there is no authority for the propositions advanced. True it is that in *Polkey*'s case the House spoke of the establishment of the reason for dismissal as a preliminary to consideration of how things might have happened otherwise. But the passages to which we were referred contain no limitation as to the nature of the reason for dismissal such as was contended for before us. And the argument is inconsistent with the decision of this court in *O'Donoghue*'s case. There the reason for dismissal was animus on the part of the employer, a reason that could never be legitimate. This court, specifically applying *Polkey*'s case, upheld a reduction of compensation on the ground that the employee would eventually have been dismissed for a different reason, inappropriate behaviour. It is not open to the appellants to exclude this authority because it was not a '*Polkey* case', because it plainly was seen by this court to be such. And the distinction on which the contention rests between the degree of certainty with which the alternative worlds could be stated in *O'Donoghue*'s case on the one hand and in *Polkey* cases on the other is at best a difference of degree and not of legal kind. Unless *O'Donoghue*'s case was decided per incuriam (and that was never nor could it be suggested, because Mr Cavanagh said that the case was rightly decided) the case is fatal to the appellants' argument.

[19] Second, and more generally, the principle recognised in *Polkey*'s case is not narrowly limited to the facts of that case, as the appellants sought to suggest, but is merely an example of the general application of the requirements of s 123(1). The rigid rule sought to be drawn from that case does not follow from the observations in the case and is quite inconsistent with the statutory obligation that underpinned it. By contrast, a broad principle of the type recognised in *Polkey*'s case, of which the application in that case is only an example, does respect the statutory guidance.

[20] As to the present case, the fragility of the constructions sought to be put on its facts underlines the artificiality of the rule contended for by the appellants. First, it was said that the case is taken outside *Polkey* because the ET had found that the original dismissal could never have been fair: unlike, for instance, a genuine redundancy situation that was however unfairly managed. It is true that some parts of the ET's exposition give credence to that view. But the more realistic analysis of what they said is that the whole process was unfair because the nature of the terms originally proposed demanded extensive consultation. That is quite different from a discrete finding of an unacceptable reason for dismissal divorced from any question of procedural fairness, such as was made for instance in *O'Donoghue*'s case. Second, it was said that the hypothesised dismissal would have been for a different reason from the actual dismissal. But both cases envisaged refusal to accept terms during a legitimate reorganisation. It is hard to see that there was a difference between them at a level of generality sufficient to found the appellants' argument.

[21] For those reasons, I would in any event reject the appellants' first ground even if it were open in this appeal.

THE ET'S ERROR ON THE FACTS

[22] This complaint, summarised in [7], above, has always been part of the case. How the ET should proceed was set out in a passage of the judgment of Lord Prosser in *King v Eaton Ltd (No 2)* [1998] IRLR 686 at 691 (para 19), cited with approval by this court in *Lambe v 186K Ltd* [2005] ICR 307 at [58]:

> '. . . the matter will be one of impression and judgment, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure made no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been.'

That, when applied to an ET, indicates very strongly that an appellate court should tread very warily when it is being asked to substitute its own impression and judgment for that of the tribunal. I have set out how the ET approached the issue in this case, and despite the lengthy criticisms addressed to that treatment I am not persuaded that they went outside the very wide ambit permitted to them by *Lambe*'s case.

[23] I am fortified by the fact that I am not alone in that view. It will be recalled that in *Hennessy*'s case [1986] IRLR 300, [1986] ICR 461 it was accepted that this court would often obtain considerable assistance from the view of the EAT. This is such a case. Judge McMullen QC and his expert colleagues set out paras 139–140 of the ET's determination, quoted in [15], above, and then continued:

> '26. In that passage the tribunal is doing what it is engaged to do: to draw upon its own industrial experience of circumstances such as this and to construct, from evidence not from speculation, a framework which is a working hypothesis about what would have occurred had the respondent behaved differently and fairly. The tribunal acknowledged that there would have been a radical overhaul of all employment terms. In the passage at para 144, it has made a finding that that would have occurred and if the claimants had failed to adopt them, as they appeared particularly unattractive, their dismissals would have occurred in any event.
>
> 27. The criticism advanced by [counsel] is that in seeking to construct the hypothesis this tribunal had so many pieces of the jigsaw missing that the only correct approach was to disallow any kind of *Polkey* reduction. We do not accept that proposition because the findings based upon a careful analysis of the material which it had before it, and drawing upon its experience, do indicate that it was satisfied that there was material sufficient to make its judgment. It is true that in one place a more tentative approach, using the word "could" rather than "would" appears, but it is overwhelmed by the numerous occasions when the positive "would" is used. Similarly the use of the words "we supposed" and "we suspect" in building the blocks towards the hypothesis shows the way in which the tribunal was approaching its task correctly.

28. The tribunal was engaged in what it described as the "what if?" exercise. The tribunal made strong criticisms of the respondent but it is not necessary to describe this process as a procedural flaw or a substantive flaw; all that is necessary, adopting the highlighted extract from Lord Prosser's judgment is that the tribunal can sensibly reconstruct what would have happened. Here it made its own findings and we see no error in its approach to it.' a b

[24] I respectfully agree. The ET correctly directed itself; and brought its experience to bear on the 12 days of evidence that it had heard. It was well aware, as its analysis shows, of the difficulty and unusual nature of the task, but it did not err in law in embarking on that task. I would dismiss this appeal.

LLOYD LJ.

[25] I agree.

RICHARDS LJ.

[26] I also agree.

Appeal dismissed.

James Wilson Barrister (NZ).

Kershaw Mechanical Services Ltd v Kendrick Construction Ltd

[2006] EWHC 727 (TCC)

QUEEN'S BENCH DIVISION (TECHNOLOGY AND CONSTRUCTION COURT)
JACKSON J
27, 28 FEBRUARY, 2 MARCH 2006

Arbitration – Award – Appeal – Appeal from decision of arbitrator – Approach to be adopted by court where appeal with agreement of parties to the proceedings on a question of law – Arbitration Act 1996, s 69(2)(a).

The claimant subcontractor entered into an agreement with the defendant main contractor to supply and install mechanical services in relation to the construction of new hospital buildings. The original tender supplied by the claimant was partly based on sketches and schematics produced by a particular engineering contractor. After the defendant had successfully obtained the contract to construct the new buildings, it changed its engineering contractor and provided the claimant with a memo dated 19 April 2001 which inter alia, listed additions to and omissions from mechanical services which had been agreed since the claimant had submitted its tender. The effect of this was that the claimant's original tender figure was reduced. The defendant sent a draft order to the claimant based on this figure with amended 'DOM\2' articles of agreement and the memo of 19 April attached. The claimant introduced a qualification to the effect that where the final design information, supplied by the contractor or his consultant differed from the information previously supplied then the sub-contract sum would be adjusted. The formal sub-contract concluded in July 2001 was therefore a modified version of the DOM\2 sub-contract supplemented by correspondence between the parties. It included a term providing for an appeal under s 69(2)(a)[a] of the Arbitration Act 1996 on questions of law arising out of an award made in arbitral proceedings. Upon conclusion of the works a final account was submitted by the claimant and a dispute arose between the parties as to certain items included in the account. The dispute was referred to arbitration and the arbitrator awarded the claimant an amount which was less than it believed it was entitled to. It therefore brought an appeal under s 69(2)(a) of the 1996 Act. Inter alia, the judge considered what the correct approach of the court to an appeal under s 69(2)(a) should be. The following issues were explored: (i) what evidence the court could receive in an appeal under s 69; (ii) whether there was a philosophy of non-intervention which should influence the court hearing an appeal under s 69(2)(a); (iii) what degree of deference was to be shown to the arbitrator's decisions on questions of law; and (iv) how the court should identify any questions of law arising out of the award.

Held – (1) The principal document which should be considered in any appeal under s 69 of the 1996 Act was the arbitral award itself. In addition to that the court should also receive any document referred to in the award, which the court needed to read in order to determine a question of law arising out of the award.

a Section 69, so far as material, is set out at [8], below

In the instant case that meant that the court would refer not only to the arbitrator's award but also to the correspondence and documents referred to in the award as comprising the sub-contract in order to consider the true construction of the qualification which formed the basis of the claimant's appeal (see [44]–[46], below); *Foleys Ltd v East London Family and Community Services* [1997] ADRLJ 401 and *HOK Sport Ltd (formerly Lobb Partnership Ltd) v Aintree Racecourse Co Ltd* (2002) 86 Con LR 165 considered.

(2) There was no philosophy or ethos of the 1996 Act which should deter the court from answering any questions of law raised by the appeal correctly in the event that the arbitrator had erred. Amongst other reasons that was because party autonomy was one of the three general principles upon which Pt I of the 1996 Act was founded and, in the instant case, the parties had agreed in the exercise of their autonomy that an appeal should lie to the courts on any question of law (see [48]–[50], below); *Lesotho Highlands Development Authority v Impregilo SpA* [2005] 3 All ER 789 distinguished.

(3) The principles to be applied by the court to an abitrator's award were as follows. First, the court should read an arbitral award as a whole in a fair and reasonable way. It should not engage in minute textual analysis. Second, where the arbitrator's experience assisted him in determining a question of law, such as the interpretation of contractual documents or correspondence passing between members of his own trade or industry, the court would accord some deference to the arbitrator's decision on that question. The court would only reverse that decision if it were satisfied that the arbitrator, despite the benefit of his relevant experience, had come to the wrong answer (see [51]–[57], below); *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis* [1983] 2 All ER 658, *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, *Gill & Duffus SA v Société pour l'Exportation des Sucres SA* [1986] 1 Lloyd's Rep 322 and *Fidelity Management SA v Myriad International Holdings BV* [2005] 2 All ER (Comm) 312 considered.

(4) Questions of law arising out of an award were to be identified in line with existing authority by examining the way in which an arbitrator had stated the law in his reasons and by examining whether the correct application of law to the facts would have led to a different decision. In the instant case only one of the questions raised by the claimant was a question of law and it needed to be modified in order to be relevant to the appeal. The arbitrator had come to the right conclusion on the modified question and accordingly the appeal would be dismissed (see [58]–[63], [69], [91], [92] below); *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis* [1983] 2 All ER 658 and *Geogas SA v Trammo Gas Ltd, The Baleares* [1993] 1 Lloyd's Rep 215 applied.

Notes

For the law relating to appeals from an arbitration award on a question of law see 2(3) *Halsbury's Laws* (4th edn reissue) para 75.

For the Arbitration Act 1996, s 69, see 2 *Halsbury's Statutes* (4th edn) (2003 reissue) 702.

Cases referred to in judgment

André et Cie v Cook Industries Inc [1986] 2 Lloyd's Rep 200; *rvsd* [1987] 2 Lloyd's Rep 463, CA.

Bank Mellat v GAA Development and Construction Co [1988] 2 Lloyd's Rep 44.

Bank of Credit and Commerce International SA (in liq) v Ali [2001] UKHL 8, [2001] 1 All ER 961, [2002] 1 AC 251, [2001] 2 WLR 735.

Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd [2005] EWHC 2912 (Comm), [2005] All ER (D) 245 (Dec).

Fidelity Management SA v Myriad International Holdings BV [2005] EWHC 1193 (Comm), [2005] 2 All ER (Comm) 312.

Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis [1983] 2 All ER 658, [1983] 1 WLR 1469.

Foleys Ltd v East London Family and Community Services [1997] ADRLJ 401.

Geogas SA v Trammo Gas Ltd, The Baleares [1993] 1 Lloyd's Rep 215, CA.

Gill & Duffus SA v Société pour l'Exportation des Sucres SA [1986] 1 Lloyd's Rep 322, CA.

Hallamshire Construction plc v South Holland DC [2003] EWHC 8 (TCC), (2004) 93 Con LR 103.

HOK Sport Ltd (formerly Lobb Partnership Ltd) v Aintree Racecourse Co Ltd [2002] EWHC 3094 (TCC), (2002) 86 Con LR 165.

Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98, [1998] 1 WLR 896, HL.

K/S A/S Bill Biakh v Hyundai Corp [1988] 1 Lloyd's Rep 187.

Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43, [2005] 3 All ER 789, [2005] 3 WLR 129.

Moran v Lloyd's [1983] 2 All ER 200, [1983] QB 542, [1983] 2 WLR 672, CA.

Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema [1981] 2 All ER 1030, [1982] AC 724, [1981] 3 WLR 292, HL.

Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd [2006] EWHC 89 (TCC), [2006] BLR 113.

Vascroft (Contractors) Ltd v Seeboard plc (1996) 78 BLR 132.

Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] 2 EGLR 14.

Appeal

Kershaw Mechanical Services Ltd (Kershaw) brought arbitration proceedings against Kendrick Construction Ltd (Kendrick) in relation to sums due under a building contract. The arbitrator, Mr Don Smith, revised the sums due under the final account. By a claim form issued in the Technology and Construction Court on 21 December 2005 Kershaw appealed against the abitrator's award pursuant to s 69 of the Arbitration Act 1996. The facts are set out in the judgment.

Robert Clay (instructed by *Hannah & Mould*) for Kershaw.

Simon Henderson (instructed by *Bell Lax Litigation*, Sutton Coldfield) for Kendrick.

Cur adv vult

2 March 2006. The following judgment was delivered.

JACKSON J.

[1] This judgment is in seven parts, namely Part 1—Introduction; Part 2—The facts; Part 3—The Present Proceedings; Part 4—What is the correct approach of the court to an appeal under s 69(2)(a) of the 1996 Act? Part 5—Which, if any, of the four questions formulated by Kershaw are questions of law arising out of the award? Part 6—What are the answers to those questions which have survived scrutiny? Part 7—Conclusion.

PART 1—INTRODUCTION

[2] This is an appeal under s 69 of the Arbitration Act 1996 against an arbitrator's partial award determining what sums are due to a sub-contractor on its final account.

[3] Kershaw Mechanical Services Ltd is the sub-contractor. I shall refer to this company as 'Kershaw'. Kershaw was claimant in the arbitration; Kershaw is also claimant in these proceedings.

[4] Kendrick Construction Ltd is the main contractor. I shall refer to this company as 'Kendrick'. Kendrick was respondent in the arbitration and is defendant in these proceedings.

[5] The employer, under the main contract, is Birmingham Heartlands and Solihull National Health Service Trust. I shall refer to this body as 'the trust'. Two firms of engineers will feature in the story. They are White, Young and Green, to whom I shall refer as 'WYG', and RW Gregory, to whom I shall refer as 'RWG'.

[6] The sub-contract in this case incorporated, with modifications, the standard form of sub-contract published by the JCT, known as 'DOM\2', 1981 edition.

[7] In this judgment I shall refer to the Arbitration Act 1996 as 'the 1996 Act'. Section 1 of the 1996 Act provides:

> '*General principles.*—The provisions of this Part are founded on the following principles, and shall be construed accordingly—(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by this Part the court should not intervene except as provided by this Part.'

[8] Section 69 of the 1996 Act provides:

> '(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> (2) An appeal shall not be brought under this section except—(a) with the agreement of all the other parties to the proceedings, or (b) with the leave of the court . . .
>
> (7) On an appeal under this section the court may by order—(a) confirm the award, (b) vary the award, (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or (d) set aside the award in whole or in part.
>
> The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.'

[9] Having dealt with these preliminary matters, I must now turn to the facts.

PART 2—THE FACTS

[10] In the late 1990s the trust decided to extend the Heartlands Hospital in Birmingham by constructing two new blocks of wards. The trust's requirements

for the new buildings were set out in a series of specifications, appendices, drawings and related documents. This amalgam of documents is referred to compendiously as 'the employer's requirements'.

[11] In late 1999 and early 2000, Kendrick was preparing a tender for the design and construction of the new hospital buildings. Kendrick assembled a team of consultants and sub-contractors whom Kendrick intended to engage for the project in the event that the trust accepted Kendrick's tender. Kendrick appointed WYG to design the mechanical and electrical services. Kendrick chose Kershaw as the prospective sub-contractor to supply and install the mechanical services and a different firm as prospective sub-contractor to supply and install the electrical services.

[12] On 8 March 2000 Kershaw submitted its tender for the supply and installation of mechanical services in the sum of £1,838,697. This figure comprised 13 components, one of which was the sum of £59,503 attributed to above ground drainage.

[13] Kershaw's tender letter included the following passage:

> '8. The following items are not included within our tender. A. Full conceptual design responsibility . . . 3. At this stage we have made no allowance for design works. However, we have allowed to work alongside White, Young and Green, to develop the design. 14. We have allowed, within our tender, to develop sketches and schematics produced by White, Young and Green into fully co-ordinated and working drawings.'

[14] Following the receipt of tenders from Kershaw and other prospective sub-contractors, Kendrick submitted its own tender to the trust for the overall design and construction of the two new hospital buildings. Happily Kendrick's tender was accepted and work commenced on the project.

[15] In October 2000 Kendrick sent a letter of intent to Kershaw on the basis of which Kershaw commenced work in relation to mechanical services. In February 2001 Kendrick dispensed with the services of WYG and, instead, appointed RWG to design the mechanical and electrical services.

[16] On 19 April 2001 Kendrick sent a memo to Kershaw listing (a) the documents which comprised the employer's requirements in relation to mechanical services and (b) other documents upon which Kershaw's tender had been based. These other documents included 'all pre-tender correspondence from White, Young and Green'. This somewhat elliptical phrase was understood by all parties to cover not only letters but also drawings, sizing schedules and similar documents provided by WYG. Kendrick's memo of 19 April also recorded certain additions to and omissions from the mechanical services, which had been agreed since the date of Kershaw's tender. The overall agreed effect of these additions and omissions was to reduce Kershaw's tender figure to £1,785,444·39.

[17] On 30 April 2001 Kendrick sent a draft order to Kershaw, requesting Kershaw to carry out the supply and installation of all mechanical works for the sum of £1,785,444·39 in accordance with the documents which were attached. These attachments included Kendrick's memo dated 19 April and the DOM\2 articles of agreement with certain manuscript amendments. Those manuscript amendments included deletion of the design requirement set out in the first recital. In the DOM\2 appendix, under the heading 'Part 15' Kendrick wrote: 'As covered by all items referred to in our facsimile transmission dated 19th April 2001 (four pages).'

[18] On 9 May 2001 Kershaw responded as follows:

'Thank you for your faxed draft of the order and DOM\2 agreement. Comments as follows . . . 8. Part 15. Since your fax is a numbered document I do not see the need to incorporate what you say here. However, I am still unhappy that the document properly reports the basis of our pricing. I understood what you are saying as an objection to us incorporating our schedule of information we received from White, Young Green for tender purposes in that you currently do not have access to their files to check it is comprehensive. Although I can assure you that we are not deliberately concealing anything. Accordingly, for the avoidance of doubt I would like this statement incorporated here. "Certain information was provided on behalf of the contractor to the sub-contractor by White, Young Green as noted in the contractor's facts of 19/04/01. It is agreed that where and to the extent that the final design information, supplied by the contractor or his consultant, differs from that information previously supplied, as noted above, then the sub-contract sum will be adjusted" . . . Regards Jack Kirk.'

[19] The statement comprising two sentences, which Kershaw required to be incorporated, has been referred to by all parties as 'the qualification' and I shall adopt that term.

[20] In July 2001 a formal sub-contract was concluded between Kendrick and Kershaw. The documents comprising the sub-contract included Kershaw's tender dated 8 March 2000, Kendrick's draft order dated 30 April 2001 plus attachments and Kershaw's letter to Kendrick dated 9 May 2001. It can thus be seen that the sub-contract in this case was a modified version of the DOM\2 sub-contract supplemented by correspondence between the parties. This correspondence included the qualification.

[21] Clause 1.3 of the standard conditions of the DOM\2 sub-contract provides:

'Variation: Where clause 15.1 applies the term "Variation" means any of the following changes which are required by a direction of the contractor issued under the Sub-Contract:

1. the alteration or modification of the design, quality or quantity of the Sub-Contract Works including:

1. the addition, omission or substitution of any work,

2. the alteration of the kind or standard of any of the materials or goods to be used in the Sub-Contract work.

3. The removal from the site of any work, materials or goods executed or brought thereon by the Sub-Contractor for the purposes of the Sub-Contract Works other than work, materials or goods which are not in accordance with the Sub-Contract.

2. the imposition in an instruction of the Employer issued under the Main Contract of any obligations or restrictions in regard to the matters set out in **paragraphs 2.1 to 2.4** or the addition to or alteration or omission of any such obligations or restrictions set out or referred to in the **Appendix Part 1 Section E**, insofar as such addition, alteration or omission is contained in such an instruction of the Employer effecting a Change in the Employer's Requirements, in regard to:

1. access to the site or use of any specific parts of the site,

2. limitations of working space,

3. limitations of working hours.

4. the execution or completion of the work in any specific order.

Where **clause 15.2** applies the term "Variation" has the same meaning but in paragraph 1 of this definition **delete** "design, quality or quantity" and **insert** "design or quality".'

[22] Clause 16 of the standard conditions sets out rules for valuing variations. Both art 4 and cl 38B of the standard conditions provide for disputes between the parties to be referred to arbitration. Clause 38B.5 provides:

'The parties hereby agree and consent, pursuant to Sections 45(2)(a) and 69(2)(a) of the Arbitration Act 1996, that either party may (upon notice to the other party and to the Arbitrator):

1. apply to the courts to determine any question of law arising in the course of the reference; and

2. apply to the courts on any question of law arising out of an award made in an arbitration under this Arbitration Agreement.'

[23] After concluding the sub-contract, Kershaw proceeded with the execution of their works. Kershaw achieved practical completion on 2 October 2002. Thereafter Kershaw submitted its final account to Kendrick. Unfortunately, the parties were unable to agree about numerous items in the final account. These disagreements were referred to arbitration in accordance with art 4 and cl 38B of the sub-contract. The parties reached agreement upon the choice of arbitrator, namely Mr Don Smith, who is an experienced quantity surveyor practising in the West Midlands.

[24] The hearing of the arbitration took place at a hotel in Coventry, over a period of three weeks in June and July 2005. The arbitrator sat for ten days during that period. The arbitrator received factual and expert evidence called on behalf of both parties. The hearing bundle comprised extensive correspondence and contemporaneous records relating to the matters in dispute. Mr Robert Clay of counsel represented Kershaw and Mr Simon Henderson of counsel represented Kendrick. Both counsel made detailed oral and written submissions for which the arbitrator expressed his appreciation.

[25] After the end of the hearing the arbitrator considered matters for some four months. On 24 November 2005 the arbitrator delivered his partial award, dealing with all matters in issue, save costs. For convenience, I shall refer to this partial award as 'the award'.

[26] The arbitrator's award is lengthy and thorough. In the early pages the arbitrator sets out the factual background and the parties' rival contentions as to the effect of the qualification. The arbitrator then summarises pertinent parts of the expert and factual evidence. After that the arbitrator turns to the issues of principle. The arbitrator considers the question of priority as between sub-contract documents; he concludes that all the documents listed in Kershaw's memo of 19 April 2001 carried equal weight. The arbitrator notes that under the sub-contract Kershaw did not have design responsibility.

[27] The arbitrator then describes the process whereby Kershaw prepared its tender as follows:

'62.1 The evidence of Kendrick is that there was no partnering agreement but that Kershaw and Kendrick worked hand in hand as a team, to prepare the tender. This is borne out by the evidence of Mr O'Connor, who attended several meetings with the design team, made requests for information and

eventually arrived at a situation where Kershaw had sufficient information to submit a compliant tender. Had the parties not been working as a team Kershaw's only obligation would have been to price the information which was provided, specifically exclude all other information and submit a non-compliant tender, with appropriate exclusions.

62.2 I am therefore of the view that in the preparation of the tender, Kendrick and Kershaw worked as a team, together with WYG, the designer.

63. I set out below my findings in relation to the arrangements between the parties pre-tender.

63.1 The design was done by WYG. In order to prepare a design WYG took the ER's, the specification, the room data sheets, the architect's drawings, the mechanical drawings, extrapolated the necessary information and produced schematic drawings, sketches and component lists to enable the works to be priced by Kershaw. The above facts are not disputed by the parties.

63.2 Kershaw used such information to prepare its tender sum. Prior to submission of the tender, Kershaw attended meetings with the design team at which it requested further information to enable it to provide a compliant tender. At the date of the tender, Kershaw was satisfied that it had been provided with sufficient information to provide a compliant tender. The above facts are supported by the evidence of Mr O'Connor.

63.3 The information provided by WYG did not contain details of every pipe run, valve, union, volume control damper or access door. Indeed, not every floor of the building was designed. Where such information was not shown on a drawing or in a schedule, Kershaw used its initiative as an experienced mechanical installations sub-contractor to include for such ancillary equipment, which was not shown on the schematic drawings, sketches or schedules, but which was an essential part of a complete system, without which the system would not operate. The above facts are substantiated by the factual evidence of Mr Kirk and Mr O'Connor and the expert evidence of Mr Standley. While the evidence of Mr King does not support the above facts, I prefer the factual evidence of Mr Kirk and Mr O'Connor in this regard.

63.4 In addition to the drawn and scheduled information, Kershaw was to have regard to the ER's, the specification and the room data sheets in order to provide a compliant installation. For example the above ground drainage was not drawn but it was described and due allowance was made in Kershaw's tender. Another example was a requirement for the diversion of existing services which was not shown on a WYG drawing, but was shown on a CPW drawing, which formed part of the ER's and due allowance was made for this in Kershaw's tender. The above facts are supported by the factual evidence of Mr Kirk and Mr O'Connor and the expert evidence of Mr Stanley.

63.5 Kershaw submitted a compliant tender.'

[28] It should be noted that Mr Kirk and Mr O'Connor, who are referred to in that passage, are both employees of Kershaw. Mr King, who is also referred to in that passage, is or at least was Kershaw's expert witness.

[29] In paras 66 to 70 of his award, the arbitrator sets out what his approach will be to the disputed variation items. He states:

'66. The above however, must be considered in the context that while not all the detail was shown on the information provided by WYG, Kershaw had an obligation to include the components which were an essential part of the drawn or described installation in order to make it compliant. Therefore in the event that RWG in the final design drew or described a component which was an essential part of the WYG design, but which had not been drawn or described by WYG, this clearly cannot be a variation under the qualification which warrants an adjustment to the sub-contract sum, as allowance should have been made in Kershaw's compliant tender, for such components or equipment.

67. In my view there is no hard and fast rule which can be applied across the board in order to ascertain whether or not a variation is under the terms of the qualification. Each variation must be considered on its merits based upon my paras 65 and 66 of this decision.

68. I will therefore, when deciding Kershaw's entitlement to additional payment under the qualification, carry out an analysis in order to firstly ascertain whether or not the information necessary to include the item in the tender was available from the information provided by WYG at the time of tender. In the event that I find that the claimed item was not contained within the information provided by WYG, I will then ascertain whether the information was available from any other source at the time of tender and whether Kershaw as an experienced mechanical services sub-contractor should have included the claimed item on the grounds that although it was not drawn or described, it was an essential component which was necessary to provide a compliant installation.

69. In the event I find that the claimed item was not shown on the WYG information, or was not shown on other information, or could not reasonably have been implied as necessary to provide a compliant system, or has increased in size or capacity from that shown on or implied from the WYG information, I will find that the claimed item is a variation under the qualification and arrive at a fair and reasonable adjustment to the sub-contract sum.

70. On the other hand in the event I find that the claimed item was not shown on the WYG information but could have been obtained from other available information or was necessary to provide a compliant installation, I will find that the claimed item is not a variation under the qualification and make no adjustment to the sub-contract sum.'

[**30**] Having dealt with these general questions of principle and approach, the arbitrator then turns to the specific and detailed items, which he is required to decide. The arbitrator deals individually with 44 disputed items in Kershaw's final account and five disputed contra-charges put forward by Kendrick. The arbitrator also records the financial effect of 70 further items in Kershaw's final account, which were agreed either before or during the hearing. Finally there is a summary, at the end of the award, which shows (after correction of certain clerical errors) that £1,993,238·17 is due to Kershaw on its final account.

[**31**] Kershaw was aggrieved by the arbitrator's decision. Kershaw took the view that, on a proper application of the qualification to the variation claims, the sum due on the final account was well in excess of £2m. Accordingly, in order to challenge the arbitrator's decision, Kershaw commenced the present proceedings.

PART 3—THE PRESENT PROCEEDINGS

[32] By a claim form issued in the Technology and Construction Court on 21 December 2005, Kershaw appealed against the arbitrator's award, pursuant to s 69 of the 1996 Act. By reason of cl 38B.5 of the standard conditions of sub-contract and s 69(2)(a) of the 1996 Act, this is an appeal which the claimant is entitled to pursue without any need for the leave of the court.

[33] The essential argument advanced in the claim form is that the arbitrator has erred in his interpretation of the qualification. As a result the arbitrator has erroneously rejected the following eight variation items: (1) 1.13 street heating. (2) 1.44\1.44A fire and smoke dampers. (3) 1.51 (also known as VO1.10) plant room extract fans. (4) 1.57 (VO1.09) above ground drainage. (5) MO2 diversion of underground services. (6) MO27 food challenge kitchen extract canopy and ducts. (7) MO46 wiring to plant in medical gas plant room. (8) MO91 provide drains from medical gases plant room.

[34] Further, it is alleged that the arbitrator has erroneously awarded too small a sum in respect of the following eight variation items: (1) 1.09 (also known as VO1-01) heating pipework; (2) 1.10 (VO1.1.02) heating insulation; (3) 1.23 (VO1-04) domestic pipework; (4) 1.26 (VO1-05) domestic insulation; (5) 1.29 steam and condensate pipework; (6) 1.30 steam and condensate insulation; (7) 1.53 (also known as VO1-07) ductwork; (8) 1.55 (also known as VO1-08) ductwork insulation.

[35] The questions of law upon which the appeal is based, as set out in the claim form (after amendment during the course of the present hearing) read as follows:

> '1. On the true construction of the Qualification is the Qualification intended to permit an adjustment where the final design information differs from the information supplied by White Young Green?
>
> 2. Does the Qualification permit adjustments for items which would have been allowed for in the tender if Kershaw had been tendering on a design and build basis?
>
> 3. Does the fact that Kershaw did not expressly qualify its tender or raise areas of uncertainty in March 2000 preclude Kershaw from recovering an adjustment under the Qualification for items omitted by WYG?
>
> 4. Is the Qualification in fact more restrictive than the ordinary variation clause or less restrictive?'

[36] Although a number of remedies are claimed in the claim form, the principal relief sought is that the award be remitted to the arbitrator for reconsideration in the light of the court's decision on the four questions of law posed.

[37] The evidence, which has been lodged in respect of this appeal, comprises the following: (1) the arbitrator's award; (2) a witness statement made by the defendant's solicitor exhibiting the contractual documents and also Kendrick's closing written submissions in the arbitration; (3) a witness statement made by the claimant's solicitor exhibiting certain further pre-contract correspondence and also extracts from Kershaw's opening and closing written submissions in the arbitration.

[38] The hearing of this appeal commenced on Monday of this week (27 February). Mr Robert Clay represents Kershaw, as he did before the arbitrator, and Mr Simon Henderson represents Kendrick, as he did before the arbitrator. Counsel's submissions occupied the whole of Monday and Tuesday.

All issues relevant to the appeal have been explored and counsel have kindly carried out further research, at my request, in order to ensure that all authorities bearing upon the correct approach to an appeal under s 69(2)(a) of the 1996 Act are before the court. I am grateful to both counsel for their industry in this regard.

[39] The issues debated at the hearing may be grouped under the following three headings: (1) What is the correct approach of the court to an appeal under s 69(2)(a) of the 1996 Act? (2) Which, if any, of the four questions formulated by Kershaw are questions of law arising out of the award? (3) What are the answers to those questions which have survived scrutiny? I shall now deal with matters in that order.

PART 4—WHAT IS THE CORRECT APPROACH OF THE COURT TO AN APPEAL UNDER S 69(2)(A) OF THE 1996 ACT?

[40] Four topics have been debated at the hearing under this rubric. They are: (1) What evidence can the court receive in an appeal under s 69(2)? (2) Is there a philosophy of non-intervention, which should influence the court hearing an appeal under s 69(2)(a)? (3) What degree of deference should be shown to the arbitrator's decisions on questions of law? (4) How should the court identify any questions of law arising out of the award?

[41] The first and third of these topics are of general application to appeals under s 69. The second and fourth of these topics are limited to appeals under s 69(2)(a). I shall deal with the four topics in that order.

(1) *What evidence can the court receive in an appeal under s 69?*

[42] Two authorities have been cited on this question. In *Foleys Ltd v East London Family and Community Services* [1997] ADRLJ 401, Colman J refused an application for leave to appeal under s 1 of the Arbitration Act 1979. He viewed with displeasure a bundle of pleadings, evidence and submissions from the arbitration, which had been placed before the court. Colman J said that such evidence may be admissible on an application to remit the award under s 22 of the Arbitration Act 1950 or to set the award aside for misconduct. However, such evidence was inadmissible on an application for leave to appeal on a point of law. On such an application only the arbitrator's award should be put before the court, supplemented possibly by brief evidence in respect of the *Nema* guidelines (see *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1981] 2 All ER 1030, [1982] AC 724).

[43] In *HOK Sport Ltd (formerly Lobb Partnership Ltd) v Aintree Racecourse Co Ltd* [2002] EWHC 3094 (TCC), (2002) 86 Con LR 165, Judge Thornton QC stated that the practice of the Technology and Construction Court was the same as the practice of the Commercial Court in this regard. Judge Thornton said this (at [18]):

> 'Whatever may have been the misconception of practitioners as to the applicable practice in the Official Referees' Court before *Foley*'s case was decided in March 1997, it should now be clear to experienced practitioners in the TCC that extraneous materials are not to be referred to in arbitration appeal leave applications. It is also important to stress that such materials are not admissible in the hearing of appeals on questions of law arising out of awards, particularly since many construction arbitration appeals are brought without the applicant first having had to obtain the leave of the court. This is because many construction contracts contain an arbitration clause that provides the parties' joint consent to an appeal being brought without the need to first obtain the leave of the court.'

Paragraph 10.4.1. of the second edition of the TCC Guide faithfully reflects the guidance given in the *Foleys* case and the *HOK Sport* case.

[44] The present case, however, reveals that this approach may be too restrictive. Kershaw's appeal turns upon the true construction of the qualification. The qualification is set out verbatim by the arbitrator in para 19 of his award. The qualification forms part of a series of correspondence, which became incorporated into the sub-contract. The arbitrator helpfully identifies the relevant correspondence and documents in his award although, for obvious reasons, he does not recite them from beginning to end. Nevertheless, for the purposes of this appeal, the court needs to look at the contractual correspondence and documents, which the arbitrator has identified. The court cannot construe the qualification in isolation; the court must read the qualification in the context of the series of documents of which it forms part. See, for example, *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114–115, [1998] 1 WLR 896 at 912–913 and *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8 at [39], [2001] 1 All ER 961 at [39], [2002] 1 AC 251. See also *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC) at [39], [2006] BLR 113 at [39]. *Sheldebouw* is a case where the principles stated by the House of Lords in the *Investors Compensation Scheme* case and the *BCCI* case were applied to the interpretation of a construction contract.

[45] In my view the guidance given in the *HOK Sport* case should be modified to this extent. The principal document which should be considered in any appeal under s 69 of the 1996 Act is the arbitral award itself. In addition to that, however, the court should also receive any document referred to in the award, which the court needs to read in order to determine a question of law arising out of the award.

[46] It is for these reasons that during the present appeal I have looked not only at the arbitrator's award but also at the correspondence and documents referred to in the award as comprising the sub-contract. I have not found it either necessary or helpful to examine the other documents put in evidence, such as written submissions made to the arbitrator.

[47] The summary of the facts set out in Part 2 of this judgment is drawn exclusively from (a) the arbitrator's award and (b) the correspondence and documents identified by the arbitrator as comprising the sub-contract.

(2) Is there a philosophy of non-intervention which should influence the court hearing an appeal under s 69(2)(a)?

[48] In his skeleton argument Mr Henderson contends that the general philosophy of non-intervention by judges (which pervades the 1996 Act) should discourage the court from allowing an appeal brought under s 69(2)(a). He cites *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2005] 3 All ER 789, [2005] 3 WLR 129. Mr Henderson relies in particular upon that section of Lord Steyn's speech in the *Lesotho Highlands* case which is headed 'The ethos of the 1996 Act'.

[49] Mr Clay, on the other hand, submits that the *Lesotho Highlands* case is irrelevant. That case was concerned with a challenge under s 68 of the 1996 Act, since an appeal under s 69 was barred by the International Chamber of Commerce rules. Mr Clay further points out that in the present case the parties have expressly agreed that there should be an appeal on questions of law to the

court. Therefore the court should simply decide the questions of law, which have been posed. The court should not be deterred by any philosophy or ethos of the 1996 Act.

[50] On this issue, I accept the submissions of Mr Clay. The court must decide any questions of law raised by the appeal, however difficult or finely balanced they may be. There is no philosophy or ethos of the 1996 Act which should deter the court from answering those questions correctly, in the event that the arbitrator has erred. I reach this conclusion for five reasons:

(1) Party autonomy is one of the three general principles upon which Pt I of the 1996 Act is founded (see s 1(b) of the 1996 Act).

(2) The parties in the present case, in the exercise of their autonomy, have agreed that an appeal shall lie to the courts on any questions of law.

(3) The principle of non-intervention stated in s 1(c) of the 1996 Act is qualified by the important words, 'except as provided by this Part'. Section 69(2)(a) of the 1996 Act is a provision falling within that exception. It expressly permits an appeal on questions of law to be brought by agreement between the parties.

(4) The *Lesotho Highlands* case should be distinguished because it concerned proceedings under s 68 of the 1996 Act. In the *Lesotho Highlands* case the general principles set out in s 1(b) and (c) of the 1996 Act pointed strongly in favour of non-intervention. The consequence in the *Lesotho Highlands* case was that the House of Lords refused to set aside or remit an arbitral decision, which was wrong in law. The present case, which is brought under s 69(2)(a), is at the other end of the spectrum.

(5) The above conclusions are consistent with the observations of Judge Humphrey Lloyd QC in *Vascroft (Contractors) Ltd v Seeboard plc* (1996) 78 BLR 132 at 163–164.

(3) What degree of deference should be shown to the arbitrator's decisions on questions of law?

[51] The next issue which arises concerns the degree of deference which this court should show to an arbitrator's decision when determining what are the correct answers to any questions of law arising out of the award. This issue has nothing to do with any philosophy or ethos of the 1996 Act. It involves reviewing a line of authority, which stretches back over 25 years.

[52] In *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis* [1983] 2 All ER 658, [1983] 1 WLR 1469 Mustill J dismissed an appeal against an arbitrator's decision concerning the contractual consequences of a conflict between Iran and Iraq, whereby vessels were trapped at Basrah. The appeal was brought pursuant to s 1(3)(a) of the Arbitration Act 1979, by reason of an agreement between the parties that each should have the right of appeal on any question of law. Mustill J said ([1983] 2 All ER 658 at 670, [1983] 1 WLR 1469 at 1483):

> 'First, it is pointed out by the charterers that the arbitrator is not a commercial man, but is instead a lawyer of long experience. Hence, so it is said, the court should be more ready than in many cases to substitute its own view of the correct solution, than if he had, for example, been a shipbroker. I recognise that in the context of some types of dispute there might be force in such a submission. For example, if the issue concerned a matter of judgment in a field where long practical experience was of the essence, a judge might feel that he was just as well or ill equipped to establish the correct "bracket" as would be a legally trained arbitrator, whereas he would

be much more cautious if the arbitrator himself possessed the necessary experience.' a

[53] *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 was a case concerning an application by a landlord to set aside the award made by an arbitrator in a rent review arbitration. At the start of his judgment Bingham J said this: b

'as a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it.' c

[54] In *Gill & Duffus SA v Société pour l'Exportation des Sucres SA* [1986] 1 Lloyd's Rep 322 both Leggatt J, in the Commercial Court, and the Court of Appeal allowed an appeal against an arbitral decision of the Council of the Refined Sugar Association. Sir John Donaldson MR, giving the judgment of the Court of Appeal, said this (at 325): d

'For my part, like the learned Judge, I am most reluctant to reverse or differ from a trade tribunal. Nevertheless, the issue is one of construction and thus of law. The arbitrators' finding of fact is part of the contractual matrix and a very important part, but it is no more than that. There is no suggestion that the process of shipment under an f.o.b. contract for sugar or indeed contracts for the sale of sugar generally are in any relevant respect different from contracts for the sale of some other soft commodity. All that is said is that those engaged in the sugar trade find strict punctuality difficult, which may well be true of other trades not to mention other individuals, and that in practice they adopt a more relaxed attitude. This seems to me to be quite insufficient to displace the construction which would usually be placed upon a term involving interdependent obligations in relation to the time for loading, reinforced, as it is in the present case, by the use of the imperative words "at latest".' e f g

[55] In *André et Cie v Cook Industries Inc* [1986] 2 Lloyd's Rep 200 Bingham J was dealing with an award of the Board of Appeal of the Grain and Feed Trade Association stated in the form of a special case. One of the issues which arose concerned the interpretation of some exchanges by telex. Bingham J said this (at 204): h

'I should be very slow to differ from a trade tribunal on the meaning reasonably to be given to telex exchanges of the sort in issue here. Ultimately, of course, the construction of any written instrument is a question of law on which the Court is entitled and bound to rule, but the significance of a meaning attributed by the reasonable non-lawyer varies widely from instrument to instrument and according to the circumstances of the case. Here one is dealing with communications by trader to trader, in the context of an unexpected and fast-moving situation. A trade tribunal brings to the task of interpretation certain insights denied (to a greater or lesser extent) to the Court: an informed appreciation of the commercial situation as it unfolded, seen through the eyes of a trader; an understanding of the j

> hopes and fears and pressures which moved traders at the time; an awareness of the extent to which, at the time, the future course of events appeared obscure and unpredictable; a knowledge of the language which one trader habitually uses to another. So, in a case such as this the Court's task is not one of pure construction and I should be reluctant to differ from the board unless it appeared that the board's construction was fairly [and] plainly untenable.'

[56] In *Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 (Comm), [2005] 2 All ER (Comm) 312 Morison J cited and followed the dictum of Bingham J in the *Zermalt Holdings* case, which has been quoted above. The *Fidelity Management* case concerned a challenge under s 68 of the 1996 Act and so the details of Morison J's reasoning are not directly in point for present purposes.

[57] From this line of authority I derive two principles, which I shall apply in this appeal. (1) The court should read an arbitral award as a whole in a fair and reasonable way. The court should not engage in minute textual analysis. (2) Where the arbitrator's experience assists him in determining a question of law, such as the interpretation of contractual documents or correspondence passing between members of his own trade or industry, the court will accord some deference to the arbitrator's decision on that question. The court will only reverse that decision if it is satisfied that the arbitrator, despite the benefit of his relevant experience, has come to the wrong answer.

(4) *How should the court identify any questions of law arising out of the award?*

[58] The final matter to consider is how the court should identify any questions of law arising out of the award. In appeals brought under s 1(3)(a) of the Arbitration Act 1979 or s 69(2)(a) of the 1996 Act, there is no opportunity for the proposed questions of law to be refined or limited at the leave stage. See *Hallamshire Construction plc v South Holland DC* [2003] EWHC 8 (TCC) at [11], (2004) 93 Con LR 103 at [11].

[59] In relation to this matter, Mustill J gave helpful guidance in *The Chrysalis* [1983] 2 All ER 658 at 663, [1983] 1 WLR 1469 at 1475. He said:

> 'Starting therefore with the proposition that the court is concerned to decide, on the hearing of the appeal, whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages. (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.
>
> In some cases the third stage will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, the third stage involves an element of judgment on the part of the arbitrator. There is no uniquely "right" answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.

The second stage of the process is the proper subject matter of an appeal under the 1979 Act. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another; and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct: for the court is then driven to assume that he did not properly understand the principles which he had stated.

Whether the third stage can ever be the proper subject of an appeal, in those cases where the making of the decision does not follow automatically from the ascertainment of the facts and the law, is not a matter on which it is necessary to express a view in the present case.'

[60] These observations were made in relation to an appeal under s (1)(3)(a) of the 1979 Act. They are, however, equally applicable to an appeal under s 69(2)(a) of the 1996 Act. It should be noted that the passage, which I have just quoted, was cited by Langley J in *Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm), [2005] All ER (D) 245 (Dec).

[61] In *Geogas SA v Trammo Gas Ltd, The Baleares* [1993] 1 Lloyd's Rep 215 the Court of Appeal reversed the decision of the Commercial Court and restored the decision of three arbitrators concerning issues arising under a charterparty. Steyn LJ said this (at 227–228):

'This is an appeal under s. 1 of the Arbitration Act, 1979 on "a question of law arising from an arbitration award". For those concerned in this case that is a statement of the obvious. But it matters. It defines the limits of the jurisdiction of the Court hearing an appeal under the 1979 Act. The arbitrators are the masters of the facts. On an appeal the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the Courts. Parties who submit their disputes to arbitration bind themselves by agreement, to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a Court ought never to question the arbitrators' findings of fact.

From time to time attempts are made to circumvent the rule that the arbitrators' findings of fact are conclusive. Such attempts did not cease with the enactment of the Arbitration Act 1979. Subsequently, attempts were made to argue that an obvious mistake of fact by arbitrators may constitute misconduct. It is clear that such a challenge is misconceived. See [*Moran v Lloyd's* [1983] 2 All ER 200, [1983] QB 542, *K/S A/S Bill Biakh v Hyundai Corp* [1988] 1 Lloyd's Rep 187]. Then an attempt was made to argue that an obvious mistake of fact may amount to an excess of jurisdiction which would enable the Court to intervene. Again, the manoeuvre to outflank the cardinal rule that the arbitrators are the masters of the fact failed. See [*Bank Mellat v GAA Development and Construction Co* [1988] 2 Lloyd's Rep 44 at 52, Mustill and Boyd *Commercial Arbitration* (2nd edn, 1989) p 558]. Since 1979 a

number of unsuccessful attempts have been made to invoke the rule that the question whether there is evidence to support the arbitrators' findings of fact is itself a question of law. The historical origin of the rule was the need to control the decisions of illiterate juries in the 19th century. It never made great sense in the field of consensual arbitration. It is now a redundant piece of baggage from an era when the statutory regime governing arbitration, and the judicial philosophy towards arbitration, was far more interventionist [than] it is today. Another transparent tactic is a submission that there is an inconsistency in the arbitrators' findings of fact. That is not a valid ground for an attack on an award. See [*Moran*'s case [1983] 2 All ER 200 at 204, [1983] QB 542 at 549]. Parties sometimes resort to a more oblique way of challenging arbitrators' findings of fact: the Court is asked to draw reasonable inferences from the arbitrators' findings of fact. The purpose is often to put forward a new legal argument which was never advanced before the arbitrators. But it is contrary to well established principle for the Court to draw inferences from findings of fact in an award on the basis that it would be reasonable to do so. The only inferences which a Court might arguably be able to draw from arbitrators' findings of fact are those which are truly beyond rational argument. It is, however, by no means clear that it is permissible even in such a seemingly clear case for a Court to draw inferences of fact from the facts set out in the award. See [*Mustill and Boyd*, p 600]. This catalogue of challenges to arbitrators' findings of fact points to the need for the Court to be constantly vigilant to ensure that attempts to question or qualify the arbitrators' findings of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged.'

[62] In my view, the comments made by Steyn LJ in that passage are now applicable to appeals brought under s 69 of the 1996 Act.

[63] I shall not attempt either to paraphrase or to synthesise the guidance given in *The Chrysalis* and *The Baleares*. I regard that guidance as both relevant and helpful when the court is confronted with an arbitration appeal, which has not passed through the filter of an application for leave. I shall follow that guidance in the present case.

PART 5—WHICH, IF ANY, OF THE FOUR QUESTIONS FORMULATED BY KERSHAW ARE QUESTIONS OF LAW ARISING OUT OF THE AWARD?

[64] I shall address Kershaw's four questions in the order set out in the claim form.

[65] Question 1 concerns the true construction of the qualification. It is undoubtedly a question of law arising out of the award. The problem with question 1 is that it is academic. In his opening speech Mr Clay asserted that the correct answer to question 1 is Yes. He then went on to concede that the arbitrator's answer to that question was Yes.

[66] This court readily pays tribute to the excellent service which arbitrators provide to the construction industry. But there is really no point in the court hearing argument or delivering judgment on matters where everybody agrees that the arbitrator was right.

[67] On the second day of the hearing Mr Clay revised his submissions on question 1. He submitted that the arbitrator's answer to question 1 was 'Generally yes, but no in respect of the seven matters listed in paragraph seven of the Particulars of Claim'. The seven matters listed in para 7 of the particulars of claim are:

'Differences which:

(1) would have been allowed for in the tender if Kershaw had been tendering on a design and build basis, or

(2) would have been allowed for in a tender if Kershaw was responsible for identifying all components necessary to achieve a compliant installation, or

(3) could have been identified as an essential component from other information not supplied by White, Young Green, or

(4) could have been the subject of an express specific qualification of Kershaw's March 2000 tender, or

(5) were the subject of an express specific qualification between March 2000 and the conclusion of the Sub-Contract in July 2001, but not one prior to March 2000, or

(6) were introduced because the final design information implemented a requirement of the Employer's Requirements which WYG had omitted from its drawings, or

(7) would have been included by Kershaw if Kershaw had ignored the WYG drawings and simply carried out its own design appraisal exactly as if Kershaw stood in the shoes of Kendrick and was employing WYG to tender for the main contract.'

[68] With all due respect to counsel I do not agree. Mr Clay's concession on day one was correct. His revised submission on day two involves attributing to the arbitrator an extremely convoluted answer, which cannot be gleaned from the award. Question 1 is a perfectly simple question. It admits of a Yes or No answer. It can be seen from the award that there are many occasions when the arbitrator has adjusted the contract sum pursuant to the qualification and in favour of Kershaw, precisely because the final design information differed from the information supplied by WYG.

[69] Nevertheless, I am loath to jettison question 1, merely because of the way it has been formulated. There is a serious issue of law between the parties, which has been debated during the appeal, but currently is not captured by question 1. The issue is whether the arbitrator's interpretation of the qualification is correct. It seems to me that question 1 could be converted into a question, which is relevant to this appeal if the word 'where' is changed to 'whenever'. Question 1 will then read as follows:

'On the true construction of the Qualification, is the Qualification intended to permit an adjustment whenever the final design information differs from the information supplied by White, Young Green?'

[70] Mr Clay may or may not be content with my revised version of question 1. However, I shall address that revised version in Part 6 of the judgment because it will at least enable me to decide the issues which have been fully argued by counsel on both sides.

[71] I turn now to question 2. The present sub-contract was not a design and build sub-contract. The arbitrator acknowledges this in paras 33, 34 and 61 of his award. At no point in the award does the arbitrator discuss the hypothetical question whether the qualification permits adjustments, which would have been allowed for in the tender, if Kershaw had been tendering on a design and build basis. What the arbitrator discusses, in great detail and on an item by item basis, is what adjustments are permitted or required by the qualification. Whether or not those same adjustments would have been allowed if Kershaw had tendered

on a design and build basis is not addressed in the award and there is no reason why it should be.

[72] Mr Clay submits that the correct answer to question 2 is Yes but the arbitrator's answer is No. This incorrect answer of the arbitrator is to be inferred, says Mr Clay, from paras 65 to 70 of the award, in particular the latter part of para 68. The arbitrator's incorrect answer is also to be inferred from the manner in which he deals with item VO1.09 (above ground drainage), item MO1.13 (street heating) and item MO1.44 (fire and smoke dampers).

[73] I do not agree with this analysis. The arbitrator does not address question 2, either expressly or implicitly in those passages of his award. Mr Clay's criticisms of the arbitrator's reasoning at paras 65 to 70 can all be addressed under the revised version of question 1. The hypothetical question 2 is not necessary for this purpose. Furthermore, question 2 certainly does not arise out of the arbitrator's decisions on the three specific items cited by Mr Clay. The use of question 2 as an attack upon those three individual decisions may be an attempt to present an appeal on the facts as though it were an appeal on the law. Any such attempt must be firmly discouraged (see *The Baleares* [1993] 1 Lloyd's Rep 215 at 228).

[74] For all these reasons, I conclude that question 2 is not a question of law arising out of the award and I decline to consider it.

[75] I turn now to question 3. Mr Clay contends that this question arises from the arbitrator's decision in respect of street heating. I do not agree. On a fair and reasonable reading of the award (which is the correct approach as set out in Part 4 above) the arbitrator's reasoning in respect of street heating is perfectly clear. It may be summarised as follows. (1) Street heating is not shown on the WYG drawings. However, it was included in the employer's requirements and this should have been apparent to Kershaw at tender stage. (2) Kershaw failed either to revise its tender or to qualify its tender in respect of street heating when the omission was noted. (3) The qualification, as interpreted by the arbitrator in paras 65 to 70 of his award, does not permit the contract sum to be adjusted in respect of street heating.

[76] Mr Clay, in his submissions, latches onto paras 102.5.4 and 102.5.5 of the award. These paragraphs read as follows:

> '102.5.4. While the information was not drawn by WYG, there is a clear reference to the heating in the ER's and Kershaw, as an experienced mechanical installation sub-contractor should have realised, even if it did not see the relevant part of the ER's, that heating would be required, and ask the question, prior to submitting its bid.
>
> 102.5.5. Having found that Kershaw had an obligation to have regard to the requirements of the ER's as well as the drawn information, I must find that the relevant information was available at tender stage and therefore, an allowance should have been included.'

[77] It is plainly the case that Kershaw could have qualified its tender, in respect of street heating, at any time between March 2000 and July 2001, although in fact it failed to do so. The arbitrator is not saying otherwise in paras 102.5.4 and 102.5.5. Those paragraphs must be read in a fair and reasonable way in the context of the award as a whole. They must not be taken in isolation and subjected to minute textual analysis. See Part 4 above.

[78] I have come to the conclusion that question 3 is not a question of law, which arises out of the arbitrator's decision on street heating, or out of any other part of the award. Accordingly, I decline to answer question 3.

[79] I come next to question 4. The phrase, 'the ordinary variation clause' is vague and would cover a wide range of contractual provisions. However, Mr Clay has explained that 'the ordinary variation clause' is intended to be a reference to cl 1.3 of the standard conditions in this case. I shall therefore proceed on the basis that question 4 invites a comparison between the qualification on the one hand and cl 1.3 on the other hand. The examinee is required to state which clause is more restrictive.

[80] This question is, I suppose, a question of law in that it requires two contractual provisions to be interpreted. However, it most certainly does not arise out of the award. The arbitrator never posed this question or attempted to answer it. Furthermore, the exercise serves no useful purpose. The sub-contractor in this case had the benefit of both the qualification and cl 1.3. It can be seen from the award that Kershaw recovered substantial sums under both heads. In a number of instances, Kershaw succeeded in a claim under the qualification where it did not and could not succeed under cl 1.3. See, for example, the arbitrator's decision in respect of radiant panels, discussed on pp 94 to 95 of the award.

[81] The real purpose of this appeal is to ascertain the meaning and effect of the qualification, not to carry out an arid comparison between that provision and another contractual term, the meaning of which is not in doubt. I therefore hold that question 4 is not a question of law arising out of the award.

[82] In the result therefore, of the four questions posed by Kershaw, only question 1 has survived scrutiny. Even that question requires amendment if it is to serve any useful purpose. I must now endeavour to answer that question.

PART 6—WHAT ARE THE ANSWERS TO THOSE QUESTIONS WHICH HAVE SURVIVED SCRUTINY?

[83] The correct answer to question 1, as formulated, is Yes. It is clear that the arbitrator's answer is Yes. This can be seen both from paras 65 to 70 of his award, which state general principles, and from the later paragraphs, where he applies those principles and awards substantial sums pursuant to the qualification. Mr Clay, for Kershaw, submits that the correct answer to question 1 is Yes. Mr Henderson, for Kendrick, agrees that the answer is Yes. Whilst I am pleased to record this state of unanimity, it is clearly not a ground for allowing the appeal.

[84] Let me now turn to the modified version of question 1. This reads as follows:

> 'On the true construction of the Qualification, is the Qualification intended to permit an adjustment whenever the final design information differs from the information supplied by White, Young Green?'

The arbitrator's answer to this question is No. In paras 65 to 70 of the award the arbitrator interprets the qualification in a manner which restricts its effect to some situations (but not all situations) where the final design information differs from the information supplied by WYG.

[85] Mr Clay has no serious quarrel with para 66 of the award. His strongest criticisms are focused upon paras 68 to 70. I would summarise Mr Clay's principal arguments as follows. (1) The arbitrator's restrictive interpretation of the qualification (especially the last part of para 68 of the award) places the pricing risk on Kershaw, whereas the design responsibility lies on others. (2) Kershaw is thereby treated as having priced a risk, even though Kershaw could not control either the magnitude or the outcome of that risk. (3) The arbitrator's

interpretation of the qualification places upon Kershaw the financial consequences of WYG's errors and omissions. (4) The risk of design changes after tender was increased by the change of engineering consultants during that period. The qualification, as interpreted by the arbitrator, provides insufficient protection against that increased risk. (5) The arbitrator's interpretation means that where there is an item, which everybody overlooked at tender stage, it is Kershaw, which bears the cost. (6) It is quite wrong that Kershaw should be held to allowances, which it made at tender stage on the basis of inadequate information. (7) The arbitrator was wrong to treat all the documents listed in Kendrick's memo of 19 April 2001 as having equal importance. The drawings and information provided by WYG carried greater weight than the employer's requirements. (8) The arbitrator's interpretation is not in accordance with the words of the qualification. The arbitrator does not analyse the wording of the qualification so as to support his interpretation. (9) If and in so far as the arbitrator's errors are not clear from paras 65 to 70, they are made plain by his reasoning and decisions in respect of item VO1.09 (above ground drainage), item MO1.13 (street heating) and item MO1.44 (fire and smoke dampers).

[86] I should make it plain that Mr Clay's written submissions span many pages and his oral submissions, of which I took a careful note, occupied several hours. I bear in mind the full amplitude of those submissions. The nine propositions set out above represent my attempt to distil, from counsel's written and oral submissions, what appear to be the most important points and to set them out in a convenient order.

[87] In addressing these arguments, I must apply the general principles set out in Part 4 above. In particular, this is a case in which the arbitrator's specialist experience of the construction industry assists him in interpreting a series of exchanges between the main contractor and the sub-contractor between March 2000 and May 2001. Accordingly, I must accord a measure of deference to the arbitrator's interpretation of the qualification. I will only reverse his decision if I am satisfied that the arbitrator, despite the benefit of his relevant experience, has come to the wrong answer.

[88] I am not so satisfied. On the contrary, I consider that the arbitrator came to the right conclusion and I agree with his interpretation of the qualification. I reach this conclusion for five principal reasons:

(1) It is not suggested that Kershaw priced its tender exclusively upon the basis of the WYG drawings and information. On the contrary, Kershaw accepts that when pricing the tender, it had to and did pay regard to the employer's requirements. By way of example, the drawings and information provided by WYG revealed nothing about above ground drainage. Nevertheless, Kershaw could see from the employer's requirements that above ground drainage was required and included an allowance of £59,503 in respect of this item.

(2) When submitting its fixed price tender in March 2000, and when standing by that tender in 2001 (subject to the revisions agreed on 19 April 2001), Kershaw was self-evidently accepting a pricing risk in respect of those matters where the tender was based upon inadequate information. The acceptance of such a risk was a commercial decision made by Kershaw. It was not an unusual decision.

(3) The unusual feature of the present case was Kendrick's decision to change mechanical and electrical consultants at a critical time. This created the risk that whereas WYG had resolved to meet the employer's requirements in one way, the new engineers, RWG, might decide to meet the employer's requirements in a different way. The qualification, as interpreted by the arbitrator, gave Kershaw

proper protection against this area of risk. It enabled Kershaw to recover payment for changes of this nature, even though they did not fall within cl 1.3 of the sub-contract conditions.

(4) The arbitrator's finding that all the documents listed in Kendrick's memo of 19 April 2001 carried equal weight, seems to me to be correct. This finding was not challenged in the notice of appeal, but has been the subject of criticism in oral argument. The principal documents listed in Kendrick's memo are (a) the employer's requirements relating to mechanical services and (b) the drawings and information supplied by WYG. It should be remembered that the WYG drawings and information were by no means fully developed. Kershaw based its tender on all information, both written and oral. This included information gained at meetings. See the arbitrator's findings of fact in paras 62 and 63 of his award.

(5) The arbitrator's conclusions, at paras 68, 69 and 70 seem to me to attribute a fair and reasonable meaning to the actual words of the qualification. This qualification was not clearly expressed. It was a short form of words used by busy men in the course of their commercial dealings. The qualification has to be construed in the light of the circumstances at the time. In particular those words must be given a sensible meaning in a situation where everybody knew that Kershaw's tender was based, not only upon WYG's drawings and information, but also upon extensive further material.

[89] Now let me turn to the three items, which Mr Clay contends reveal more starkly and more clearly the arbitrator's legal error in interpreting the qualification. I have read and re-read the arbitrator's reasoning and decisions in respect of above ground drainage, street heating and the dampers. It seems to me that in those passages, the arbitrator is faithfully applying his interpretation of the qualification (as set out in paras 65 to 70) to the facts, which he finds in respect of those three items. At this point, the analysis of Mustill J in *The Chrysalis* becomes pertinent. The arbitrator has made findings of fact about those three items. These findings of fact constitute stage one in Mustill J's analysis. The arbitrator has reached conclusions about the meaning and effect of the qualification at paras 65 to 70 of his award. This constitutes stage two. Finally, the arbitrator has applied his interpretation of the qualification to the particular facts surrounding above ground drainage, street heating and the dampers. This constitutes stage three in Mustill J's analysis. The process of application does not reveal any further conclusions of law. The specific decisions in respect of above ground drainage, street heating and the dampers cannot be made the subject of an appeal to this court.

[90] Accordingly, it would not be right for me to delve into the arbitrator's detailed decisions on those three items and I decline to do so.

[91] Let me now draw the threads together. Question 1, as formulated in the particulars of claim, has correctly been answered Yes by the arbitrator. Question 1, as reformulated by me, has correctly been answered No by the arbitrator. I am conscious that either party, or possibly both parties, may dislike my reformulation of question 1. I therefore turn from the semantics of the question to the real issue between the parties. The real issue between the parties is whether the arbitrator has construed the qualification correctly or whether he ought to have interpreted it more widely. On this issue, I am satisfied that the arbitrator construed the qualification correctly and that the arbitrator made no error of law.

PART 7—CONCLUSION

[92] I am grateful to the solicitors and counsel on both sides for the considerable assistance, which they have given to the court. For the reasons set out in parts 4, 5 and 6 above, this appeal is dismissed. Pursuant to s 69(7)(a) of the 1996 Act, I make an order confirming the arbitrator's partial award.

Appeal dismissed.

Martyn Gurr Barrister.

Irvine and another v Irvine and another

[2006] EWHC 583 (Ch)

CHANCERY DIVISION

BLACKBURNE J

16, 23 MARCH 2006

Company – Unfair prejudice to members – Relief – Purchase of shares of prejudiced members – Valuation of shares – Company not a quasi-partnership – Whether valuation should be on pro rata basis or at a discount – Companies Act 1985, s 459.

The petitioners held a 49·96% shareholding in the second respondent company. The remaining shares were held by the first respondent. The petitioners applied to the court under s 459[a] of the Companies Act 1985 for an order that the first respondent purchase their shares. The court held that unfair prejudice had been caused to the petitioners as a result of the first respondent's management of the second respondent and made the order. The first respondent considered that the minority shareholding should be valued on a discounted basis. The petitioners considered that their minority shareholding should be valued on a pro rata basis. They contended that fairness required a non-discounted valuation for the minority shares in that, although the second respondent had not been a quasi-partnership since the death of the family member whose disposition of his shares had resulted in the current shareholdings, the company had remained a family company; the difference between the two shareholdings was 50% less one share and 50% plus one share; and it had been the behaviour of the first respondent which had driven the petitioners to seek an exit from the company by means of a buy-out order. The first respondent submitted that the fact that the court had found that the manner in which he had conducted the second respondent's affairs had been unfairly prejudicial to the interests of the petitioners so as to establish their entitlement to a buy out order could not, of itself, determine the basis of valuation of the petitioners' shares.

Held – A minority shareholding was to be valued as such unless some good reason existed to attribute to it a pro rata share of the overall value of the company. Short of a quasi-partnership or some other exceptional circumstance, there was no reason to accord to it a quality which it lacked. In the instant case there were no circumstances which could be described as exceptional. Accordingly, the minority shareholding should be valued on a discounted basis (see [10], [11], below).

Re Bird Precision Bellows Ltd [1984] 3 All ER 444 and *Strahan v Wilcock* [2006] All ER (D) 106 (Jan) applied.

Notes

For orders for protection of members against unfair prejudice; purchase of shares, see 7(1) *Halsbury's Laws* (4th edn) (2004 reissue) para 933.

a Section 459, so far as material provides: '(1) A member of a company may apply to the court by petition for an order . . . on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of . . . some part of its members . . .'

a For the Companies Act 1985, s 459, see 8 *Halsbury's Statutes* (4th edn) (1999 reissue) 508.

Cases referred to in judgment

Bird Precision Bellows Ltd, Re [1984] 3 All ER 444, [1984] Ch 419, [1984] 2 WLR 869; *affd* [1985] 3 All ER 523, [1986] Ch 658, [1986] 2 WLR 158, CA.

b *CVC/Opportunity Equity Partners Ltd v Almeida* [2002] UKPC 16, [2002] 2 BCLC 108.

Strahan v Wilcock [2006] EWCA Civ 13, [2006] 06 LS Gaz R 30, [2006] All ER (D) 106 (Jan).

Syers v Syers (1876) 1 App Cas 174, HL.

c **Petition**

The petitioners, (1) Patricia Mary Irvine and (2) Michael Cleobury Thatcher and Patricia Mary Irvine as trustees of an accumulation and maintenance settlement dated 6 August 1993, acting in their capacities as shareholders in the second respondent Campbell Irvine (Holdings) Ltd brought a petition under s 459 of the

d Companies Act 1985 for an order pursuant to s 461 of the 1985 Act that their shares be purchased by the first respondent, Ian Charles Irvine. Blackburne J made the order sought on 10 March 2006 ([2006] EWHC 406 (Ch), [2006] All ER (D) 153 (Mar)). The petitioners and the respondents made further submissions as to the basis of valuation of the shareholding. The facts are set out in the judgment.

e

Catherine Roberts (instructed by *Stevens & Bolton LLP*, Guildford) for the petitioners.

Nigel Dougherty (instructed by *Charles Russell LLP*) for the respondents.

Cur adv vult

f

23 March 2006. The following judgment was delivered.

BLACKBURNE J.

[1] On 10 March 2006 I handed down judgment on this s 459 petition. I found

g that unfair prejudice had been established and ordered the first respondent (Ian) to buy or procure the purchase of the petitioners' shares in the second respondent (CIHL). I expressed the view that in valuing the shares there should not be any minority discount but stressed that I had not heard argument on the point. The matter has since been argued.

[2] The petitioners' shares together represent 49·96% of the issued shares in

h CIHL. Of that 49·96% just under half are held by the first petitioner (Patricia) and the balance by the second petitioner (the trust). The shares were acquired from the 50% holding in CIHL formerly owned by Malcolm Irvine (Malcolm), Patricia's late husband and Ian's younger brother. Malcolm died on 1 March 1996. In August 1994 Malcolm had given half of his shareholding to the

j trust. By his will, Malcolm had given one share to Ian and the remainder to Patricia. Patricia is one of the two trustees of the trust. The other trustee, Michael Thatcher, has 'delegated' his powers as a trustee to Patricia in relation to the trust. The trust is for the benefit of Patricia's three sons who are all now adults. For all practical purposes Patricia and the trust speak as one voice.

[3] The question which I have to decide is whether in the working out of the buy-out order the 49·96% shareholding (as effectively it is) is to be valued on a pro

rata, non-discounted basis to reflect the fact that it is a minority holding. Miss Catherine Roberts, appearing on behalf of the petitioners, submitted that it should; Mr Nigel Dougherty, appearing on behalf of Ian, submitted that it should be valued on a discounted basis.

[4] Most, if not all, of the authorities in which the question has been raised whether the shares in a company which is the subject of a s 459 petition should be valued on a pro rata or on a discounted basis have been cases where the company is or is alleged to be a quasi-partnership. Certainly, Miss Roberts was unable to draw my attention to any in which a non-discounted basis of valuation has been applied to a minority holding in a company which is not a quasi-partnership.

[5] The legislation does not stipulate how the matter is to be approached. On the other hand, the courts have repeatedly emphasised that the overriding requirement in quasi-partnership cases is that the price to be paid, where a buy-out order is made, should be fair. In *Re Bird Precision Bellows Ltd* [1984] 3 All ER 444 at 450–451, [1984] Ch 419 at 431 (a case under s 75 of the Companies Act 1980, the predecessor to s 459) Nourse J said:

> 'In the case of the shareholder who acquires shares from another at a price which is discounted because they represent a minority it is to my mind self-evident that there cannot be any universal or even a general rule that he should be bought out under s 75 on a more favourable basis, even in a case where his predecessor has been a quasi partner in a quasi partnership. He might himself have acquired the shares purely for investment and played no part in the affairs of the company. In that event it might well be fair, I do not know, that he should be bought out on the same basis as he himself had bought, even though his interests had been unfairly prejudiced in the mean time. A fortiori, there could be no universal or even a general rule in a case where the company had never been a quasi partnership in the first place.
>
> In summary, there is in my judgment no rule of universal application. On the other hand, there is a general rule in a case where the company is at the material time a quasi partnership and the purchase order is made in respect of the shares of a quasi partner ... It seems clear to me that ... that is [namely, a valuation on a non-discounted basis] in general the fair basis of valuation in a quasi partnership case, and that it should be applied in this case unless the respondents have established that the petitioners acted in such a way as to deserve their exclusion from the company.'

[6] In *Strahan v Wilcock* [2006] EWCA Civ 13, [2006] 06 LS Gaz R 30, [2006] All ER (D) 106 (Jan) Arden LJ stated (at [17]) that:

> 'Shares are generally ordered to be purchased on the basis of their valuation on a non-discounted basis where the party against whom the order is made has acted in breach of the obligation of good faith applicable to the parties' relationship by analogy with partnership law, that is to say where a "quasi-partnership" relationship has been found to exist. It is difficult to conceive of circumstances in which a non-discounted basis of valuation would be appropriate where there was unfair prejudice for the purposes of the 1985 Act but such a relationship did not exist. However, on this appeal I need not express a final view on what those circumstances might be.'

[7] The reason for so treating the valuation of shares on a buy-out order in a quasi-partnership case was offered by Lord Millett in *CVC/Opportunity Equity Partners Ltd v Almeida* [2002] UKPC 16 at [41], [42], [2002] 2 BCLC 108 at [41], [42]:

> '[41] The rationale for denying a discount to reflect the fact that the holding in question is a minority holding lies in the analogy between a quasi-partnership company and a true partnership. On the dissolution of a partnership, the ordinary course is for the court to direct a sale of the partnership business as a going concern with liberty for any of the former partners who wish to bid for the business to do so. But the court has power to ascertain the value of a former partner's interests without a sale if it can be done by valuation, and frequently does so where his interest is relatively small: see *Syers v Syers* (1876) 1 App Cas 174. But the valuation is not based on a notional sale of the outgoing partner's share to the continuing partners who, being the only possible purchasers, would offer relatively little. It is based on a notional sale of the business as a whole to an outside purchaser.
>
> [42] In the case of a company possessing the relevant characteristics, the majority can exclude the minority only if they offer to pay them a fair price for their shares. In order to be free to manage the company's business without regard to the relationship of trust and confidence which formerly existed between them, they must buy the whole, part from themselves and part from the minority, thereby achieving the same freedom to manage the business as an outside purchaser would enjoy.'

[8] Is there any reason in the present case for concluding that, although it is a minority holding and although CIHL is not a quasi-partnership, fairness requires the petitioners' shares to be valued on a non-discounted basis? Or, taking up the comment of Arden LJ, are there present in this case circumstances (which she considered difficult to conceive of) that would make it appropriate for the petitioners to receive a non-discounted valuation for their shares?

[9] Miss Roberts advanced the following considerations for submitting that such circumstances do exist. Although, since Malcolm's death, CIHL had not been a quasi-partnership, the company remained nevertheless a 'family company' in that all the shares were held by or for the benefit of members of the Irvine family. The articles contained restrictions on the transfer of shares and there is no open market for their disposal. Treating the shareholdings of Patricia and the trust as a combined holding the difference between that holding and Ian's is only one share (in that the petitioners' holding is 50% less one share and Ian's is 50% plus one share). If only proper dividends had been paid and Ian had been less greedy in the remuneration which he drew for himself the petitioners would have been content to remain shareholders of the company. It is only because over several years Ian has behaved in the way that he has that the petitioners have been driven to seek an exit from the company by means of a buy-out order. If this was not a case where a pro rata basis of valuation should apply, it would be difficult to think that any such case would ever arise, and there would be a risk therefore that the court's discretion in fixing the basis of valuation for a minority holding in a company which was not a quasi-partnership would be atrophied.

[10] Mr Dougherty submitted that the matter was one of principle. CIHL was not a quasi-partnership. As a result of the gift by Malcolm to Ian of the single share, control of CIHL passed to Ian. No conditions were attached to the gift of that share. Ian was not subject to any restrictions, over and above those contained in CIHL's articles, against disposing of his majority holding to an

external purchaser. The petitioners' shareholdings constituted a minority holding even though the difference between them and Ian's is so small. There were no circumstances which could be described as exceptional so as to justify a departure from the ordinary assumption that a minority shareholding is valued as such. The fact that the court has found that the manner in which Ian has conducted CIHL's affairs was unfairly prejudicial to the interests of the petitioners so as to establish their entitlement to a buy-out order cannot, of itself, determine the basis of valuation of the petitioners' shares.

[11] I accept Mr Dougherty's submissions. A minority shareholding, even one where the extent of the minority is as slight as in this case, is to be valued for what it is, a minority shareholding, unless there is some good reason to attribute to it a pro rata share of the overall value of the company. Short of a quasi-partnership or some other exceptional circumstance, there is no reason to accord to it a quality which it lacks. CIHL is not a quasi-partnership. There are no exceptional circumstances. The shareholdings must therefore be valued for what they are: less than 50% of CIHL's issued share capital. The extent of the discount to be applied will be a matter for the valuers.

Order accordingly.

Victoria Ellis Barrister.

Sanderson and another v Exel Management Services Ltd

EMPLOYMENT APPEAL TRIBUNAL

SILBER J, MS K BILGAN AND MR G LEWIS

12 MAY, 15 JUNE 2006

Employment – Remuneration – Holidays with pay – Week's pay – Normal working hours – Employee having normal working hours if entitled to overtime pay when employed for more than fixed number of hours – Whether 'fixed number of hours' including 'hours' calculated by way of genuine pre-estimate – Employment Rights Act 1996, s 234(1).

The employees worked as drivers. They were employed under a standard hours contract with a basic 40-hour week and different rates of pay for overtime, shift work, and other types of work. The hours for which they were paid did not depend on the actual hours worked but were based on 'production' hours, which were a form of notional hours calculated on the basis of set formulae by which certain tasks were deemed to take certain periods of time, irrespective of how long they actually took. The employees challenged the manner in which their holiday pay should have been calculated by their employer. The issue turned on whether they had 'normal working hours' within the meaning of the Employment Rights Act 1996. Section 234(1)[a] of the 1996 Act provided that where an employee was entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there were for the purposes of the 1996 Act normal working hours. The employment tribunal concluded that the employees did have normal working hours and they appealed. It was agreed before the employment appeal tribunal that the issue depended solely upon the construction of s 234(1) of the 1996 Act as there were no relevant contractual provisions and no findings of the tribunal or evidence adduced concerning the actual number of hours worked by the employees. The employer contended that a 'fixed number of hours' in s 234(1) could include a genuine pre-estimate of the actual number of hours worked.

Held – On the true construction of s 234(1) of the 1996 Act 'fixed number of hours' meant the fixed actual number of hours for which the employee was employed not a notional number of hours even where that notional number was a genuine pre-estimate. The dictionary definition of 'fixed' included 'definite'. An employee had to be employed for a definite number of hours if he were to have 'normal working hours'. If the draftsman of s 234(1) had wanted to ensure that the provision only related to actual hours worked and not any form of notional or pre-estimated hours, he was likely to have considered that the words 'fixed hours' would be appropriate bearing in mind the dictionary definition. To include genuine pre-estimated hours it would be necessary to redraft the section to add the words 'or for any other period which is a genuine pre-estimate of the number of hours he actually works'. There was no cogent

a Section 234, so far as material, is set out at [8], below

reason why such new wording should be adopted. Accordingly, the appeal would be allowed (see [21]–[28], below).

Notes

For normal working hours and a week's pay, see 16(1A) *Halsbury's Laws* (4th edn reissue) paras 115–120.

For the Employment Rights Act 1996, s 234, see 16 *Halsbury's Statutes* (4th edn) (2005 reissue) 1011.

Case referred to in judgment

Bamsey v Albon Engineering & Manufacturing plc [2004] EWCA Civ 359, [2004] IRLR 457.

Appeal

Michael Sanderson and Charles Griffin, employees of the respondents Exel Management Services Ltd, appealed from the decision dated 14 December 2005 of an employment tribunal sitting in Sheffield that they had normal working hours within the meaning of ss 221–224 of the Employment Rights Act 1996. The facts are set out in the judgment.

Peter Edwards (instructed by *Rowley Ashworth*, Leeds) for the appellants.
Fergus McCombie (instructed by *Exel plc Legal Dept*) for the respondents.

Cur adv vult

15 June 2006. The following judgment of the appeal tribunal was delivered.

SILBER J.

I INTRODUCTION

[1] This appeal by Michael Sanderson and Charles Griffin (the appellants) relates to the manner in which their holiday pay should have been calculated by their employers Exel Management Services Ltd (the respondents). The particular issue on which the outcome of this appeal depends is whether the appellants had 'normal working hours' within the meaning of ss 221–224 of the Employment Rights Act 1996. By a decision sent to the parties on 14 December 2005, an employment tribunal sitting in Sheffield held that the two appellants did have 'normal working hours'. The appellants appeal on the basis that they did not work 'normal working hours'. This appeal is apparently a test case for some 6,000 workers, who are or were employed under similar provisions by the respondents.

II THE STATUTORY BACKGROUND

[2] Under reg 30(1) of the Working Time Regulations 1998, SI 1998/1833, a worker may present a complaint to an employment tribunal that his employer has failed to pay him the whole or any part of any amount due to him under reg 16(1).

[3] By reg 16(1) of the 1998 regulations, it is provided (with our emphasis added) that: 'A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of *a week's pay* in respect of each week of leave.'

[4] Regulation 16(2) states (with our emphasis added) that: 'Sections 221 to 224 of the [Employment Rights Act 1996] shall apply for the purpose of

determining the amount of *a week's pay* for the purposes of this regulation [subject to modifications which do not apply in this case].'

[5] In order to determine what constitutes 'a week's pay', it is important to ascertain if there were any 'normal working hours' for the particular employee because the formula in the 1996 Act for determining 'a week's pay' depends on the answer to that question. In summary, if an employee has 'normal working hours', then the calculation of 'a week's pay' for him is determined by the application of ss 221–223 of the 1996 Act while if the employee does not have 'normal working hours', the calculation of 'a week's pay' for him is calculated in accordance with s 224 of the 1996 Act.

[6] In *Bamsey v Albon Engineering & Manufacturing plc* [2004] EWCA Civ 359, [2004] IRLR 457, it was held by the Court of Appeal that reg 16(1) of the 1998 regulations which, as I explained at [3], above, is the basis of the appellants' claims, 'clearly incorporates, for the purpose of determining a week's pay . . . also the interpretation of "normal working hours" in [s 234]' (see [32] per Auld LJ with whom May and Jacob LJJ agreed).

[7] It is common ground that the 'normal working hours' of an employee can be ascertained in some cases first from a relevant contractual term or second from the number of hours actually worked by employees or third by applying s 234 of the 1996 Act. Both Mr Peter Edwards, counsel for the appellants, and Mr Fergus McCombie, counsel for the respondents, agree, correctly in our view, that in this case the question of whether there were 'normal working hours' depends solely on the construction of s 234 of the 1996 Act because first there were no relevant contractual provisions in this case and second there were no findings of the employment tribunal or evidence adduced concerning the actual number of hours worked by the appellants. In other words, if s 234 of the 1996 Act does not show that the appellants had 'normal working hours', then it is common ground that he [sic] must be regarded as not having 'normal working hours'. Indeed in *Bamsey v Albon Engineering & Manufacturing plc*, Auld LJ explained (at [9]) that:

> '. . . although s.234 is expressed as if overtime were its focus, its effect is to equate "normal working hours" with those done and which are "fixed" by the contract of employment, whether or not including over-time . . .'

[8] Thus, the issue on this appeal depends on the application of s 234(1) of the 1996 Act, which provides, with our emphasis added that: 'Where an employee is entitled to overtime pay when employed for more than *a fixed number of hours in a week* or other period, there are for the purposes of this Act normal working hours . . .'

[9] So the answer to the question of whether the appellants had 'normal working hours' depends on whether they were employed for 'a fixed number of hours in a week'. In other words the appellants would only have had 'normal working hours' if they were employed for 'a fixed number of hours in a week'. Indeed, it is common ground that the issue on this appeal can be refined to determining whether the appellants were employed for 'a fixed number of hours in a week' because if they did, then the employment tribunal was correct but if they were not, the appellants did not have 'normal working hours' and the employment tribunal's decision was wrong. As we will explain shortly in greater detail, the case for the appellants is that the words 'normal working hours' mean fixed actual hours while the respondents contend that those words can also mean genuine pre-estimates of the actual hours worked. The precise nature of

this dispute will become clearer after we have set out the relevant facts which we will now do.

III THE FACTS

[10] The employment tribunal found in its reasons that:

> '19.2. Both [appellants] were subject to the terms and conditions of employment [which] ... were agreed following negotiations with the employees' trade unions.
>
> 19.3. These terms provide a standard hours contract which gave the [appellants] a basic 40-hour week and which set out rates of pay for overtime, shift pay and for different types of work.
>
> 19.4. Whilst the terms and conditions set out overtime rates there was no obligation on the [appellants'] part to undertake overtime nor was there any obligation on the part of the [respondents] to provide it.
>
> 19.5. The terms and conditions also set out the basis on which drivers would receive enhanced pay after working 40 hours. These hours, it was agreed, were "production hours".
>
> 19.6. Drivers were paid at different rates dependent on the task they were obliged to undertake. Accordingly their remuneration, depending as it did upon the tasks allocated to them and over which the [appellants] had no direct control, varied from week to week.
>
> 19.7. The [appellants] were required under their terms and conditions of employment to make themselves available for early attendance at work. For this they would be paid at the rates specified within those terms and conditions.
>
> 19.8. The terms and conditions of employment set out a fixed rate of payment in respect of holiday pay.'

[11] It is important to stress that the hours for which the appellants were paid did not depend on the actual hours worked but were based on what were described as 'production' hours, which were a form of notional or deemed hours calculated on the basis of set formulae by which certain tasks were deemed to take certain periods of time, irrespective of how long they actually took. There was according to the appellants, one exception, which was that the early shift premium was based on the actual number of hours worked.

[12] According to the evidence of Anne Moorby of the respondents, the pay of the appellant drivers was made up of two elements of which the first was a productivity calculation under which for each 50 kilometres covered by a driver a payment was made equating to one hour's pay irrespective of how long that driving took. Anne Moorby also explained that the second element of the appellant drivers' pay was described as 'terminal loading times' by which each product transported had a pre-determined loading and unloading period allocated to it and that this period had been calculated on the *estimated* length that it would take for that task to be completed irrespective of how long it actually took.

[13] The evidence of Mr Sanderson, which was accepted by the employment tribunal, was that he had estimated that he received pay for between 90 and 110 production or notional hours a week on average whereas of course he actually worked far fewer hours. Mr Sanderson would have received pay at the standard rate for the first eight hours deemed to have been worked and he would then be paid time-and-half for the remaining production hours or notional hours.

The contractual terms of the appellants stated that 'Basic hourly rates per week are 40' but Ms Moorby explained in evidence, as recorded by the employment tribunal (with its underlining) that 'in situations where drivers return to their depot having completed more productivity hours worked than actual hours they are expected to assist with any other work required to be done'. Her evidence was that the work of the drivers, such as the appellants, was assigned on a daily basis by the traffic planner.

[14] All this material shows first that the pay of the appellants was based on 'productivity' or notional hours worked and not on actual hours worked and second that the actual working hours of the employees were not definitely specified because the basic 40 hours were 'productivity' or notional hours but subject to the exceptions specified in the last paragraph. Indeed, the employment tribunal did not make any findings about the precise number of actual hours the appellants were obliged to work or actually did work each week.

[15] On the issue of whether the 'productivity' or the notional hours were still a correct estimate of the time taken for various jobs, Anne Moorby explained in para 11 of her witness statement that:

> 'Since the pay structure was devised by the client, technology had advanced so that the actual time required to complete each task has reduced significantly. Using the examples stated above, Sulphuric Acid is paid at 1·5 hours to load but now only takes a maximum of 30 minutes to complete. Therefore the hours booked are not necessarily a true representation of the hours worked.'

[16] Thus the position is that now some 10 years or so after those productivity or notional hours were calculated, they are no longer a genuine pre-estimate of the tasks for which they are selected. Moreover the position in respect of driving times is that the pay is not linked to the time spent completing the journey but to the length of the journey, as I explained at [12], above. That means that pay for this work is not based on the number of hours worked but on the notional 'productivity' hours calculated in the way Ms Moorby explained.

[17] The employment tribunal's conclusion (at para 34) was that: 'From our findings of fact we have concluded these [appellants] had normal working hours.'

[18] The approach of the employment tribunal supported by the respondents on this appeal is that the appellants were employed for 'a fixed number of hours in a week or other period' as specified in s 234(1) of the 1996 Act.

[19] Mr Edwards for the appellants disagrees and he contends that the words 'fixed number of hours' mean the fixed actual number of hours for which the employee was employed and not the notional hours or to use the terminology adopted in this case of 'production' hours. Thus he says that the appellants were not employed for 'a fixed number of hours'.

[20] In his submissions to us Mr McCombie initially contends that those words 'fixed hours' could include not only 'fixed number of hours', but that they could also cover 'notional hours'. He later accepted correctly in our view that this interpretation could not be right. Instead he submitted that the phrase 'a fixed number of hours' could include a genuine pre-estimate of the actual number of hours worked.

[21] In our view, four factors individually and cumulatively lead us to the conclusion that the words 'fixed number of hours' means actual fixed hours as contended by Mr Edwards and not a notional number of hours even if it was a genuine pre-estimate.

[22] First, the word 'fixed' is defined in the *Shorter Oxford English Dictionary* (1993 edn) vol 1, p 962 as meaning among other things 'definite', which supports the appellants' submission. So the employee has to be employed for a definite number of hours if he is to have 'normal working hours'. The respondents contend for a meaning of 'fixed' which is not 'definite' and which is not in accordance with any definition of the word 'fixed' in the dictionary.

[23] Second, if the draftsman of s 234(1) of the 1996 Act wanted to ensure that the provision only related to actual hours worked and not any form of notional or pre-estimated hours, he is likely to have considered that the words 'fixed hours' would be the appropriate wording bearing in mind the dictionary meaning of the word 'fixed' as including 'definite'.

[24] Third, if Mr McCombie is right it would be necessary to redraft s 234(1) so that it would read with the new words in italics:

> 'Where an employee is entitled to overtime pay and employed for more than a fixed number of hours *or for any other period which is a genuine pre-estimate of the number of hours he actually works* in a week or other period, there are for the purposes of this Act normal working hours in this case.'

[25] Fourth, there is no cogent reason put forward as to why this new wording should be adopted or should reflect the intention of Parliament. For the purpose of completeness, even if the respondents' approach was to be adopted, it would not assist the respondents because as we have explained the number of 'production' hours is no longer a genuine pre-estimate of the length of time a particular task takes. Even on the respondents' case they would not be assisted by this construction.

[26] For the purpose of completeness if the case for the respondents was that the words 'fixed hours' included a genuine pre-estimate of the work which the employee had in the past worked at any particular time, this construction would have to be rejected for the reasons set out at [22]–[25], above.

[27] Thus the appellants' contentions are accepted and the appellants were not employed for 'a fixed number of hours'. We should explain that both counsel agree correctly in our view that we should not attach any importance to the correspondence with the chairman of the employment tribunal, which took place after the decision was given because the views that were expressed in that correspondence were those of the chairman himself rather than the views of the employment tribunal.

[28] Finally, it has been agreed that if this appeal were to be allowed, the only order that we should make would be to allow the appeal on the basis that the two claimants did not work 'normal working hours'. We so order.

Appeal allowed.

James Wilson Barrister (NZ).

Jones v Whalley

[2006] UKHL 41

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD RODGER OF EARLSFERRY, LORD CARSWELL, LORD BROWN OF EATON-UNDER-HEYWOOD AND LORD MANCE

29 JUNE, 26 JULY 2006

Criminal law – Trial – Stay of proceedings – Abuse of process – Caution in lieu of prosecution – Appellant assaulting respondent – Appellant agreeing to police caution on basis that no prosecution would be brought – Respondent subsequently bringing prosecution against appellant – Justices staying proceedings on grounds of abuse of process – Whether justices correct on the facts.

W assaulted and injured J. The matter was reported to the police, and an officer interviewed W concerning an offence of assault occasioning actual bodily harm. W admitted the offence. The officer decided that W should not be prosecuted, but should instead be cautioned. W was notified of the decision in a standard form. The form stated, inter alia: 'This means that you will not have to go before a criminal court in connection with this matter but that a RECORD will be kept of this warning.' It was not in dispute that W had been informed of the effects of the caution and had agreed to be cautioned. Eight months later, J, acting as a private prosecutor, laid an information against W, charging him with assault occasioning actually bodily harm. When the matter came before a magistrates' court, W submitted that a private prosecution was precluded by his acceptance of a police caution on the indication that, if he accepted it, he would not face any further criminal proceedings. The justices were satisfied that to allow the prosecution to proceed would be an abuse of the process of the magistrates' court, and stayed the proceedings. On J's appeal to the Divisional Court by way of case stated, the court held that the administration and acceptance of a caution were not sufficient to render the exercise of the right of private prosecution an abuse of process. W appealed to the House of Lords, contending, inter alia, that the conclusion of the justices had been correct on the facts.

Held – The conclusion of the justices had been correct. The abuse complained of was not abuse impairing the fairness of the trial, since evidence of the admission and caution could be excluded. Rather, it went to the fairness of trying W at all in the circumstances. If J had legal grounds for attacking the police decision to caution W, he could apply for judicial review to quash that decision. If successful, the slate would be clean. There would be no citable caution on W's record, and J would be free to prosecute. But so long as that formal caution stood, induced by a representation that W would not be prosecuted, the private prosecution of W did amount to an abuse, as the justices had held. Accordingly, the appeal would be allowed (see [13], [17], [24], [30], [31], [33], [37], below).

Notes

For abuse of process in relation to bringing a prosecution, see 44(1) *Halsbury's Laws* (4th edn reissue) para 1345.

Cases referred to in opinions

Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138 sub nom *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42, [1993] 3 WLR 90, HL.

Gouriet v Union of Post Office Workers [1977] 3 All ER 70, [1978] AC 435, [1977] 3 WLR 300, HL.

Hayter v L [1998] 1 WLR 854.

R v Croydon Justices, ex p Dean [1993] 3 All ER 129, [1993] QB 769, [1993] 3 WLR 198, DC.

R v West London Justices, ex p Klahn [1979] 2 All ER 221 sub nom *R v West London Metropolitan Stipendiary Magistrate, ex p Klahn* [1979] 1 WLR 933, DC.

R (on the application of R) v Durham Constabulary [2005] UKHL 21, [2005] 2 All ER 369, [2005] 1 WLR 1184.

Cases referred to in list of authorities

A-G's Ref (No 1 of 1990) [1992] 3 All ER 169, [1992] QB 630, [1992] 3 WLR 9, CA.

R v Bow Street Metropolitan Stipendiary Magistrate, ex p South Coast Shipping Co Ltd [1993] 1 All ER 219, [1993] QB 645, [1993] 2 WLR 621, DC.

R v Chief Constable of the Kent County Constabulary, ex p L (a minor), R v DPP, ex p B (a minor) [1993] 1 All ER 756, DC.

R v Clerk to the Bradford Justices, ex p Sykes (1999) 163 JP 224.

R v Latif, R v Shahzad [1996] 1 All ER 353, [1996] 1 WLR 104, HL.

R v Metropolitan Police Comr, ex p P (1995) 160 JP 367.

R v Tower Bridge Metropolitan Stipendiary Magistrate, ex p Chaudhry [1994] 1 All ER 44, [1994] QB 340, [1993] 3 WLR 1154, DC.

R (on the application of Mayor and Burgess of London Borough of Newham) v Stratford Magistrates' Court (2004) 168 JP 658.

Appeal

Stephan Joseph Whalley appealed with leave of the Appeal Committee of the House of Lords given on 15 November 2005 from the order of the Divisional Court (Sedley LJ and Beatson J) on 10 May 2005 ([2005] EWHC 931 (Admin), [2005] All ER (D) 114 (May)) allowing an appeal by way of case stated by the respondent, Lawrence John Jones, from the decision of the Justices for the County of Merseyside, sitting at St Helens on 25 October 2005, that it would be an abuse of the process of the court to allow to proceed a private prosecution brought by Mr Jones against Mr Whalley for assault occasioning actual bodily harm. The facts are set out in the opinion of Lord Bingham of Cornhill.

Timothy King QC and *Stuart Mills* (instructed by *KSB Law* as agents for *Iain MacDonald*, St Helens) for Mr Whalley.

Malcolm Swift QC and *Simon Reevell* (instructed by *Northern Rail Ltd*, Bradford) for Mr Jones.

Their Lordships took time for consideration.

26 July 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, on 17 May 2003 the appellant, Mr Whalley, who is an adult, assaulted and injured the respondent, Mr Jones, at Newton-le-Willows. The

matter was reported to the Greater Manchester Police, and an officer of that force interviewed Mr Whalley concerning an offence of assault occasioning actual bodily harm. Mr Whalley admitted commission of that offence. The officer decided that Mr Whalley should not be prosecuted but should instead be cautioned. He was notified of this decision in a standard form bearing the imprint of the Greater Manchester Police. This form explained the effect of the caution: 'This means that you will not have to go before a criminal court in connection with this matter but that a RECORD will be kept of this warning.' In a section directed to adults, the form stated: 'WHAT A CAUTION MEANS TO YOU—The record of caution is a criminal conviction which is citable in a court should you re-offend. Should you re-offend you will almost certainly be charged and placed before a Criminal court.' The form repeated that if Mr Whalley appeared before a court and was found guilty of another offence then details of this caution might be given to the court. It is not found as a fact, but it seems safe to infer, that the effect of the form was explained orally to Mr Whalley by the officer, and that Mr Whalley agreed to be cautioned on these terms.

[2] On 22 December 2003 Mr Jones, acting as a private prosecutor, laid an information against Mr Whalley, charging him with assault occasioning actually bodily harm contrary to s 47 of the Offences against the Person Act 1861. The matter came before justices sitting at St Helens, and Mr Whalley submitted that his acceptance of a police caution on the indication that, if he accepted it, he would not face any further criminal proceedings, should preclude a private prosecution. The justices heard argument on this issue on 25 October 2004, when authority was cited. The justices were satisfied that to allow the prosecution to proceed would be an abuse of the process of the magistrates' court, and stayed the proceedings. On Mr Jones's appeal to the Queen's Bench Divisional Court by case stated, the court (Sedley LJ and Beatson J) held that the administration and acceptance of a caution were not sufficient to render the exercise of the right of private prosecution an abuse of process (see [2005] EWHC 931 (Admin), [2005] All ER (D) 114 (May)).

[3] Mr Whalley now challenges the conclusion of the Divisional Court, contending that the justices were right, on the facts of this case, to reach the conclusion they did. But he also raises a broader question, not deployed in argument below, whether the right of private prosecution can, or should, survive the implementation of a formal cautioning procedure which has not been quashed and set aside on an application for judicial review.

CAUTIONS

[4] In *R (on the application of R) v Durham Constabulary* [2005] UKHL 21, [2005] 2 All ER 369, [2005] 1 WLR 1184, the House had occasion to consider the practice of formal reprimands and warnings established by the Crime and Disorder Act 1998 to replace the practice of cautioning young offenders committing less serious offences. The practice had become discredited, first, because cautions had in some areas been given so repeatedly and predictably that they lacked the desirable effect of deterring young offenders, and, secondly, because they did nothing constructively to address the roots of offending behaviour. Under the new regime, young offenders were no longer to be cautioned, but the new reprimands and warnings were intended to have teeth, and those warned were to be referred to youth offending teams. By s 65(1) of the 1998 Act, a constable may reprimand or warn a young offender only if he has evidence of the commission of an offence such as to give a realistic prospect of conviction; if the offender

admits the offence; if the offender has not previously been convicted of an offence; and if the constable is satisfied that it would not be in the public interest for the offender to be prosecuted. In the Home Office/Youth Justice Board *Final Warning Scheme: Guidance for the Police and Youth Offending Teams* (November 2002) it is made clear (see p 5 (paras 1.2, 1.3)) that the object of the new scheme is to prevent offending by young people and divert them from their offending behaviour before they enter the court system. Prominence is given to the requirement that prosecution must be judged to be not in the public interest (see pp 8, 10 (paras 4.7(e), 4.26)), and by s 56 of the Criminal Justice and Court Services Act 2000 the Police and Criminal Evidence Act 1984 was amended to grant power to bail a young offender pending possible reprimand or warning, thus enabling the public interest to be more fully considered and the views of victims ascertained (see pp 10, 14, 14–16 (paras 4.28, 6.15, Chs 7, 8)). But the views of victims, although an important factor in determining the seriousness of an offence, are not conclusive, and victims should not be involved in decisions on disposals for young offenders, which are the responsibility of the police alone (see para 8.11).

[5] Sections 22 and 23 of the Criminal Justice Act 2003 introduced a new regime, applicable only to adult offenders. It provided for the giving of cautions subject to conditions. Non-compliance with the conditions exposes the offender to prosecution for the original offence. The conditions imposed (s 22(3)) must be directed to one or both of two objects, facilitating the rehabilitation of the offender and ensuring that he makes reparation for the offence. A conditional caution may only be given by an authorised person and where each of five requirements is satisfied. An authorised person is defined (s 22(4)) to mean a constable, an investigating officer or a person authorised by a relevant prosecutor (defined in s 27) for purposes of s 22. The first requirement is that the authorised person has evidence that the offender has committed the offence. The second is that a relevant prosecutor decides (a) that there is sufficient evidence to charge the offender with the offence, and (b) that a conditional caution should be given to the offender in respect of the offence. The third requirement is that the offender admit guilt to the authorised person. The fourth requirement is that the authorised person explains the effect of the conditional caution, warning him that failure to comply with the conditions may result in prosecution for the offence. The last requirement is that the offender signs a document admitting the detailed offence and consenting to the caution on the specified conditions. By s 24, failure to comply with the conditions without reasonable excuse may lead to the institution of criminal proceedings against the offender for the offence in question. Pursuant to his duty under s 25 of the 2003 Act, the Secretary of State has issued a Code of Practice on 'Conditional Cautioning: Criminal Justice Act 2003, Sections 22–27' (October 2004). This points out (in para 2.2) that 'The simple caution will remain available as a disposal, and may be appropriate in cases where no suitable conditions readily suggest themselves, or where prosecution would not be in the public interest'. Provision is made for involving victims, but 'it is vital not to give the impression that the victim's views (if any) will be conclusive as to the outcome, which (it should be explained) is at the discretion of the [Crown Prosecution Service]' (see para 7.1).

[6] Neither the reprimand and warning regime established by the 1998 Act nor the conditional cautioning regime introduced by the 2003 Act applies to this case. Mr Whalley is an adult. His caution contained no conditions, and the 2003 Act was not in force when he was cautioned. The procedure adopted when

cautioning him was not governed by statute, but was the subject of a series of Home Office circulars, most recently circular 18/1994 (Cautioning of Offenders). This set out revised National Standards for Cautioning Offenders. In these the purposes of a formal caution were defined (in para 1): to deal quickly and simply with less serious offenders; to divert them from unnecessary appearance in the criminal courts; and to reduce the chances of their re-offending. It is made clear (in para 2) that before a caution may be given there must be sufficient evidence, an admission of guilt and informed consent by the offender to the giving of a caution. A note to para 2 provides:

> 'In practice consent to the caution should not be sought until it has been decided that cautioning is the correct course. The significance of the caution must be explained: that is, that a record will be kept of the caution, that the fact of a previous caution may influence the decision whether or not to prosecute if the person should offend again, and that it may be cited if the person should subsequently be found guilty of an offence by a court.' (See Note 2D.)

Paragraph 3 provides that where the requirements are met, consideration should be given to whether a caution is in the public interest. The police should take into account the public interest principles described in the Code for Crown Prosecutors. These provide that a potential defendant should not be prosecuted, despite the existence of evidence providing a realistic prospect of conviction, where it is judged that prosecution would not be in the public interest.

THE NARROWER ISSUE

[7] On behalf of Mr Whalley, Mr Timothy King QC relied on his client's agreement to be cautioned on an express assurance by the police officer that he would not have to go before a criminal court in connection with the matter. He relied by analogy on *R v Croydon Justices, ex p Dean* [1993] 3 All ER 129, [1993] QB 769. In that case the applicant assisted the police in a murder investigation on the understanding, induced by the police, that he would not himself be prosecuted. Some weeks later, at the instance of the Crown Prosecution Service (the CPS), the applicant was charged with a lesser offence connected with the same crime. In committal proceedings before justices it was submitted that the prosecution was an abuse of the process of the court. This contention was rejected by the justices, but accepted by the Divisional Court (Staughton LJ and Buckley J). Mr King pointed out that in that case the police had no authority to bind the CPS just as, in this, the police had no authority to bind Mr Jones. But the court did not regard that point as decisive. Staughton LJ said ([1993] 3 All ER 129 at 135, [1993] QB 769 at 776–777), with the agreement of Buckley J:

> 'It is submitted on behalf of the Crown Prosecution Service that they alone are entitled, and bound, to decide who shall be prosecuted, at any rate in this category of case; and that the police had no authority and no right to tell Dean that he would not be prosecuted for any offence in connection with the murder: see the Prosecution of Offences Act 1985, s 3(2). I can readily accept that. I also accept that the point is one of constitutional importance. But I cannot accept the submission of [counsel for the prosecution] that, in consequence, no such conduct by the police can ever give rise to an abuse of process. The effect on George Dean, or for that matter on his father, of an undertaking or promise or representation by the police was likely to have been the same in this case whether it was or was not authorised by the

> Crown Prosecution Service. It is true that they might have asked their solicitor whether an undertaking, promise or representation by the police was binding; and he might have asked the Crown Prosecution Service whether it was made with their authority. But it seems unreasonable to expect that in this case. If the Crown Prosecution Service find that their powers are being usurped by the police, the remedy must surely be a greater degree of liaison at an early stage.'

He concluded ([1993] 3 All ER 129 at 137, [1993] QB 769 at 778):

> 'In my judgment the prosecution of a person who had received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process. [Prosecuting counsel] was eventually disposed to concede as much, provided (i) that the promisor had power to decide, and (ii) that the case was one of bad faith or something akin to that. I do not accept either of those requirements as essential.'

Here, Mr King argued, it was necessary to consider the effect on Mr Whalley of the categorical statement the officer made. Mr King distinguished *Hayter v L* [1998] 1 WLR 854, where two defendants who had been cautioned were thereafter privately prosecuted, and the prosecution was held by a Divisional Court (Schiemann LJ and Poole J) not to be an abuse. The point of distinction in that case was that the forms signed by the defendants indicated in terms that such cautions did not preclude the bringing of proceedings by an aggrieved party.

[8] To this argument, Mr Malcolm Swift QC (who, like Mr King, did not appear below) advanced a series of answers on behalf of Mr Jones. First, he submitted, the right of private prosecution is expressly preserved by s 6 of the Prosecution of Offences Act 1985. That section provides:

> '(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.
>
> (2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.'

This provision means exactly what it says. Save where the Director of Public Prosecutions is under a duty to take over the conduct of proceedings or, not being under a duty, chooses to do so, Pt I of the 1985 Act, establishing the CPS, does not preclude the bringing of a private prosecution. To that extent the right of private prosecution survives. But Mr Whalley does not rely on any provision of Pt I as defeating the private prosecution brought by Mr Jones.

[9] Secondly, Mr Swift relied on Lord Wilberforce's recognition of the right to bring a private prosecution as 'a valuable constitutional safeguard against inertia or partiality on the part of authority' in *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 79, [1978] AC 435 at 477. In the same case ([1977] 3 All ER 70 at 97, [1978] AC 435 at 498) Lord Diplock described private prosecutions as 'a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law'. Strong statements to the same effect have been made extra-judicially by, among others, Lord Simon of Glaisdale (see the Law Commission's Report on *Consents to Prosecution* (Law Com no 255) (20 October 1998) pp 27–28 (para 4.4)). There are,

however, respected commentators who are of opinion that with the establishment of an independent, professional prosecuting service, with consent required to prosecute in some more serious classes of case, with the prosecution of some cases reserved to the Director, and with power in the Director to take over and discontinue private prosecutions, the surviving right is one of little, or even no, value (see pp 28, 36–37, 37–41 (paras 4.5–4.8, 5.7, 5.10–5.24)). The Law Commission concluded (para 5.24)—

> 'that the harm which might result from an unfettered right of prosecution would be either or both of the following . . . (2) the harm (whether to the individual involved in the criminal process or to the public interest in the strict sense) that results from any prosecution successful or not which is not in the public interest.'

Mr Swift is entitled to insist that the right of private prosecution continues to exist in England and Wales, and may have a continuing role. But it is hard to regard it as an important constitutional safeguard when, as I understand, private prosecutions are all but unknown in Scotland.

[10] Thirdly, Mr Swift distinguished *R v Croydon Justices, ex p Dean* [1993] 3 All ER 129, [1993] QB 769 by pointing out that the two bodies involved in that case, the police and the CPS, were both arms of the executive, whereas, in the present case, one (the police) is an arm of the executive and the other is a private individual. This is certainly a distinction, and I would agree that *Ex p Dean* is a stronger case, and concerned a young person. But what the court relied on in the passage quoted at [7], above, was the effect of the representation on the applicant, and the state has an interest in the integrity of court proceedings. In the present case Mr Whalley was led to believe that if he agreed to be cautioned he would not be prosecuted for this offence. He was probably misled into believing, wrongly, that the caution was a criminal conviction, because that is what the form said, an error into which the justices also were misled, as the Divisional Court pointed out ((2005) 169 JP 466 at [8]) (although the Divisional Court was wrong to suggest that a warning or reprimand given to a young offender under s 65 of the 1998 Act has the status of a conviction: the warning or reprimand may, like a caution, be cited in later proceedings but is not, again like a caution, a conviction). It is not known whether, in the present case, Mr Whalley was alive to the risk of a civil claim against him by Mr Jones, but he doubtless believed that his acceptance of a caution rendered him immune from the risk of prosecution.

[11] Mr Swift submitted, fourthly, that the forms considered in *Hayter v L* [1998] 1 WLR 854 stated the true legal position accurately and the form in the present case did not. But Mr Jones was not to be deprived of his rights by a misstatement in a police form. If the police chose to caution Mr Whalley and not to instigate a prosecution, that was their decision and could not deny to Mr Jones the exercise of a right he enjoyed at law. This is in my opinion correct. But it does not answer the question whether the proceedings brought by Mr Jones were fairly to be regarded by the justices, in the circumstances, as an abuse of the court's process.

[12] Mr Swift relied, fifthly, on the safeguards which exist to prevent or curb misuse of the right of private prosecution. These safeguards, listed in *Hayter v L* (at 858), include the power of justices to refuse to issue a summons and the Director's power to take over private prosecutions and bring them to an end. The House should not, it was argued, invent any further safeguard. I would accept the value of these safeguards in some cases. Authority shows that the issue

of a summons is a judicial act (see *R v West London Justices, ex p Klahn* [1979] 2 All ER 221 sub nom *R v West London Metropolitan Stipendiary Magistrate, ex p Klahn* [1979] 1 WLR 933), but in practice summonses are routinely issued without detailed scrutiny, and there is nothing to suggest that the police caution of Mr Whalley was disclosed when application was made for the summons in the present case. The CPS was, as the justices record, offered the opportunity to take over Mr Jones's prosecution, but declined to do so for reasons which are not in evidence: the CPS may have disagreed with the police action and favoured prosecution, or it may have agreed with the police decision but preferred to leave the matter to the justices. It is not clear that either of these safeguards operated effectively in the present case.

[13] The narrower issue is whether a private prosecution may or should be regarded as an abuse of the process of the magistrates' court where the defendant has agreed to be formally cautioned by the police on the assurance that, if he agrees, he will not have to go before a criminal court. The abuse complained of is not abuse impairing the fairness of the trial, since evidence of the admission and caution could be excluded. The abuse complained of goes, as in *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138 sub nom *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42, to the fairness of trying Mr Whalley at all in the circumstances. The justices recognised, on the authority of that case, that the power to stay must be used sparingly. But they thought it would be an abuse, and not only, as I infer, because they were misled into regarding the caution as a conviction, which, if true, would have given Mr Whalley a complete defence. I agree with the justices' conclusion. If Mr Jones had legal grounds for attacking the police decision to caution Mr Whalley, he could apply for judicial review to quash that decision. If successful, the slate would be clean. There would be no citable caution on Mr Whalley's record and Mr Jones would be free to prosecute. But so long as that formal caution stood, induced by a representation that he would not be prosecuted, the private prosecution of Mr Whalley did in my opinion amount to an abuse, as the justices held.

THE BROADER ISSUE

[14] In his oral submissions to the House Mr King questioned whether, irrespective of what may be said to, or stated in a form given to, a person who is cautioned, conditionally cautioned, reprimanded or warned, it can ever be other than an abuse of process for a court thereafter to entertain a private prosecution against him. To the extent that this contention was inconsistent with *Hayter v L*, counsel challenged the correctness of that decision.

[15] The broad lines of the argument may be summarised in this way. The practice of cautioning, originally developed by the police as a pragmatic response to a certain class of case, has grown into something much more sophisticated and specific, as evidenced by the statutory regimes established by the 1998 and 2003 Acts and a series of Home Office circulars. While there are obvious differences between the young offender, conditional cautioning and simple cautioning regimes, they have shared objectives of seeking to keep people out of the criminal courts and preventing further offending. Underlying a decision to reprimand, warn, caution conditionally or caution simpliciter, and fundamental to each, is a judgment made by a responsible official that prosecution would not be in the public interest, or at least that the public interest would be better served by not prosecuting. Such a judgment, like a decision not to prosecute, is not immune from challenge. If shown to be unlawful on any of the familiar grounds

relied on to seek judicial review, it may be quashed and set aside. But so long as the decision stands the judgment should be respected, and it would be wrong in principle to allow it to be circumvented at the behest of a private prosecutor whose motives may have little or nothing to do with the public interest. The right to prosecute privately is a factor of little weight in the balance, since it is a somewhat anomalous historical survival; it cannot outweigh an extant decision of a responsible official on what will best serve the public interest. On this argument, paradoxically, the statement made in the form given to Mr Whalley, in its reference to going before a criminal court, was accurate, and the statement in the *Hayter v L* forms was inaccurate.

[16] I see very considerable force in this argument. A crime is an offence against the good order of the state. It is for the state by its appropriate agencies to investigate alleged crimes and decide whether offenders should be prosecuted. In times past, with no public prosecution service and ill-organised means of enforcing the law, the prosecution of offenders necessarily depended on the involvement of private individuals, but that is no longer so. The surviving right of private prosecution is of questionable value, and can be exercised in a way damaging to the public interest. I would not, therefore, reject this argument. But nor do I think the House should in this appeal accept it, for reasons which I find, cumulatively, to be compelling. It was not advanced in the Divisional Court, so we lack the benefit of its judgment on it. It was scarcely foreshadowed in Mr Whalley's written case, and there was no hint that the correctness of *Hayter v L* was to be challenged. Thus Mr Swift had little opportunity to prepare an argument in reply. The question is one of some importance, and should not be resolved in the absence of representation of the Crown or any police force, both of whom might be expected to have views on how the issue should be decided. The question is one which might well benefit from legislative attention. It is not necessary to resolve this question to decide the present appeal.

[17] For these reasons and those given by my noble and learned friend Lord Rodger of Earlsferry with which I agree, I would therefore allow the appeal on the narrower ground, set aside the decision of the Divisional Court, uphold the decision of the justices and dismiss the proceedings. I would invite written submissions on costs within 14 days.

LORD RODGER OF EARLSFERRY.

[18] My Lords, in May 2003 the appellant, Mr Whalley, assaulted and injured the respondent, Mr Jones. When interviewed by the Greater Manchester Police, he admitted the offence. The officer concerned decided that Mr Whalley should not be prosecuted, but should be cautioned. In the case of the Greater Manchester Police the effects of a caution are set out on a standard form. It is not in dispute that Mr Whalley was informed of those effects and agreed to be cautioned.

[19] Mr Whalley's standard form told him that a decision had been made that he was to receive a caution for the offence of assault occasioning actual bodily harm for which he had been interviewed. The notice continued: 'This means you will not have to go before a criminal court in connection with this matter but that a RECORD will be kept of this warning.' The form went on to spell out the other consequences of the caution.

[20] Having been told this, Mr Whalley would have been entitled to assume that, since he had accepted the caution with its attendant effects, he would not now be prosecuted for the assault on Mr Jones. The form warned him, however,

that details of his caution would be disclosed to the victim in accordance with the victims' charter. And, presumably, having been made aware that there was to be no public prosecution, the victim, Mr Jones, initiated a private prosecution against him. Some months later, the Chief Crown Prosecutor for Merseyside declined to take over the prosecution. The House knows nothing about the reasons for that decision. In October 2004, the justices held that it would be an abuse of the process of the court to allow the prosecution to proceed and so they stayed the proceedings. Mr Jones appealed and the Divisional Court reversed the justices, holding that in the circumstances the prosecution was not an abuse of process (see [2005] EWHC 931 (Admin), [2005] All ER (D) 114 (May)).

[21] When the police officer cautioned Mr Whalley, he was not acting under a statutory scheme. But nor was he off on a frolic of his own, or on a frolic of the Greater Manchester Police. On the contrary, he was acting in accordance with an officially recognised policy which was intended to be followed by police forces throughout the country in accordance with guidance issued by the Home Office. The current guidance was to be found in Home Office circular 18/1994, to which was annexed a revised version of the National Standards for Cautioning. Paragraph 1 of the standards describes the purposes of a formal caution as being to deal quickly and simply with less serious offenders, 'to divert them from unnecessary appearance in the criminal courts', and to reduce the chances of their re-offending. All worthwhile policy objectives. Before the police can contemplate administering a caution, there must be sufficient evidence of the offender's guilt and he must admit the offence. Provided these requirements are met, 'consideration should be given to whether a caution is in the public interest' (see para 3). The police are told that they should take into account the public interest principles described in the Code for Crown Prosecutors. In their turn, Crown Prosecutors are told in para 8.3 of the current *Code for Crown Prosecutors* (2004) p 15 that a simple caution should only be given if the public interest justifies it and in accordance with Home Office guidelines.

[22] What is clear from the National Standards for Cautioning is that a police officer should not decide to administer a caution, rather than to prosecute, unless he is satisfied that cautioning rather than prosecution is in the public interest. Presumably, the officer in this case was so satisfied. If that view was untenable, his decision to caution rather than to prosecute could be set aside on judicial review. But Mr Jones has not challenged the officer's decision. The assumption must be that the police officer was entitled to decide that it was in the public interest for Mr Whalley to be given a caution and so avoid an 'unnecessary appearance in the criminal courts'. On that basis the officer represented to Mr Whalley that he would not have to go before a criminal court for the offence.

[23] In these circumstances, where such an assurance had been given to Mr Whalley, any subsequent decision by the Crown Prosecutor to prosecute him would have been capable of being regarded as an abuse of process (see *R v Croydon Justices, ex p Dean* [1993] 3 All ER 129 at 137, [1993] QB 769 at 778 per Staughton LJ). What happened in this case, however, was that Mr Jones, a private individual, unconnected with the police or prosecuting authorities, initiated the prosecution, despite the assurance given to Mr Whalley. Whether or not Mr Jones was consulted before the police officer took the decision to caution rather than to prosecute and to give that assurance, he was certainly not a party to it. So there is no question of Mr Jones being estopped from initiating the prosecution. Nor did he do anything to give Mr Whalley any legitimate expectation that he would not be prosecuted. The question is, rather, whether

the magistrates were entitled to stay the proceedings because it offended their sense of justice and propriety to be asked to try the accused in these circumstances (see *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138 at 161 sub nom *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 at 74 per Lord Lowry).

[24] Nowadays public prosecutions are the rule. So, usually, the court will be concerned to prevent its process being misused by a public prosecutor. But, in times gone by, when private prosecutions were the rule, the court must have had the power to guard against the corresponding danger of its process being misused by a private prosecutor. So, in this case the justices had the same power to stay for abuse of process as they would have had in the case of a public prosecution. Having duly considered the matter, the justices came to the view that it would be an abuse of their process to allow Mr Jones to continue with the prosecution of Mr Whalley, after the police had given him an assurance that he would not have to go to court in respect of the offence. Clearly, they considered that it offended their sense of justice and propriety to be asked to try the accused in the face of that assurance, irrespective of the fact that the prosecution was initiated by a private individual rather than by a public official. Not only was that a view which was open to the justices, but it is one which I share.

[25] Looking at the matter from a slightly different angle, it seems to me that allowing private prosecutions to proceed, despite an assurance that the offender would not have to go to court, would tend to undermine not only the non-statutory system of cautions, but also the schemes for cautioning young offenders and adult offenders which Parliament has indorsed in the Crime and Disorder Act 1998 and the Criminal Justice Act 2003. A court is entitled to ensure that its process is not misused in this way.

[26] In the course of the hearing, the House was referred to the decision of the Divisional Court in *Hayter v L* [1998] 1 WLR 854. In that case the defendants had assaulted and injured a young man. The police cautioned them, but the terms of the caution indicated that it did not preclude the bringing of proceedings by an aggrieved party. The victim's father then initiated a prosecution of the defendants. They contended that the proceedings should be stayed as an abuse of process. The justices dismissed the informations, but the Divisional Court allowed the prosecutor's appeal.

[27] The qualification in a caution of that type means that the decision in *Hayter v L* is distinguishable from the present case and, for that reason, the House did not hear full submissions on it. I accordingly agree with my noble and learned friend, Lord Bingham of Cornhill, that it would not be appropriate to express a concluded view about the broader argument relating to it. Accordingly, I make only one tentative observation.

[28] Plainly, the *Hayter v L* type of qualification to the caution would alert the offender to the lingering possibility of a private prosecution. So the reaction of a court to being asked to try the case in such circumstances might well be different from its reaction in a case where the caution was not qualified in that way—although, in *Hayter v L*, the qualification does not actually seem to have weighed with the justices. The point which concerns me, however, is not the effect of such a qualified caution on the court's sense of propriety and justice, but, rather, whether it is proper for a police officer to insert the qualification in the caution and, if so, in what circumstances.

[29] The National Standards for Cautioning indicate that a police officer should not administer a caution unless he concludes that it is in the public interest

to divert the offender from an unnecessary appearance in the criminal courts. Prima facie, this would seem to suggest that the officer should have concluded that it is unnecessary for the offender to appear in the criminal courts, whether at the instance of a public or a private prosecutor. Some support for that view might perhaps be found in para 7 of the Home Office circular 18/1994 which contemplates the police giving the victim details of the offender in order to institute civil, but not criminal, proceedings. On that assumption, however, it would be difficult to see how the officer could administer a caution but simultaneously contemplate—by including the *Hayter v L* qualification—that it could be in the public interest for the offender to be prosecuted by the victim. The inclusion of the qualification suggests, however, that the officer has concluded that, while it would not be in the public interest for a public prosecution to be mounted, it would none the less be legitimate, and not contrary to the public interest, for the victim to prosecute, if so advised. Your Lordships heard no submissions on whether it is appropriate for a police officer to issue a caution, with the various consequences for the offender, on that basis. Nor was counsel in a position to explain whether there is an established practice of issuing such qualified cautions in certain kinds of cases. So I simply draw attention to the point but express no view on it.

[30] For these reasons, as well as for those given by Lord Bingham, I would allow the appeal and make the order which he proposes.

LORD CARSWELL.

[31] My Lords, I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill. I am in agreement with his reasons and conclusions on the narrower ground, and for those reasons I would allow the appeal and make the order which he proposes.

[32] On the broader ground, I would also be reluctant to express a firm opinion. I agree with your Lordships that the right to bring a private prosecution retains a residual value, although in modern circumstances I would not wish to overstate its importance. I am conscious of the possibility that it is capable of being abused, the safeguard against which is the right of the public prosecutor to take over the prosecution, an area in which it behoves public prosecutors to be both vigilant and sensitive. I am rather more concerned about the utility of routinely inserting a caveat into cautions that the administration and acceptance of the caution do not preclude the possibility of private prosecution. I fear that the effect could be to deter offenders from accepting cautions in proper cases. Correctly used, and not over-used, cautions play a useful part in criminal justice and I would not like to see that usefulness impaired. I should therefore wish to have fuller argument on the correctness of *Hayter v L* [1998] 1 WLR 854 and its implications before expressing a final view on the broader issue.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[33] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Bingham of Cornhill and for the reasons he gives I too would allow the appeal and make the order indicated.

[34] Like Lord Bingham—and, I apprehend, in common also with my noble and learned friend Lord Rodger of Earlsferry, whose opinion in draft I have also had the advantage of reading—I too see considerable force in the wider argument advanced by the appellant, namely that once an offender has been formally cautioned (unless that caution is quashed in judicial review proceedings), he

cannot be prosecuted, whether publicly or privately, for the same offence. Plainly, however, such a rule, were it to be established, would substantially diminish what many understand to be the present scope for private prosecutions and, as Lord Bingham observes, the question needs to be subject to altogether fuller argument than was addressed to the House on this occasion.

[35] I too, therefore, would allow this appeal on the narrow ground that it is an abuse of process to prosecute someone who has accepted a formal caution on the express assurance that he 'will not have to go before a criminal court in connection with this matter'. The respondent submits that the victim cannot properly be deprived of his right to bring a private prosecution by a police mis-statement (Mr Swift's fourth argument set out by Lord Bingham at [11], above). (This submission, of course, necessarily supposes that the wider argument is wrong.) I see the force of this but the answer to it lies to my mind in the victim's right to apply to have the caution quashed on the ground that it was induced by misrepresentation. (Any such application in future would inevitably now attract full argument on the wider issue too.)

[36] The difficulty, of course, in deciding the present appeal on the narrow ground is that, until the wider issue is resolved by further litigation or, preferably perhaps, by legislation, it remains unclear whether, when administering a caution, the police should warn the offenders, as in *Hayter v L* [1998] 1 WLR 854 at 855, that the caution 'did not preclude an aggrieved party from bringing criminal proceedings or a civil action' or, as here, should assure them of immunity from criminal process. To say nothing about the consequences would obviously be unhelpful. Perhaps the best and safest course would be to give the *Hayter v L* warning but in modified terms, stating that a caution *may* not preclude a private prosecution and will not preclude a civil action.

LORD MANCE.

[37] My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood. On the narrower issue, and subject to some comments below regarding the right to institute a private prosecution, I agree with Lord Bingham's and Lord Rodger's reasoning and do not wish to add anything. I too would therefore allow the appeal and make the order indicated.

[38] The broader issue is one of some importance. It requires some consideration of the general value of any right of private prosecution in modern conditions. It was not raised below or touched on in the appellant's case, and its implications have not been properly explored. They may be more substantial than might appear. Prosecutions brought without police or Crown Prosecution Service involvement are not uncommon. They may be initiated by private bodies such as high street stores, by charities such as the NSPCC and RSPCA, or by private individuals as in the present case. To treat a police decision to accept a caution as by itself fatal to the maintenance of any private prosecution, even where the terms of the caution expressly reserve that possibility, would be a step which would, at the least, require very careful thought, and might very well, even if it were thought appropriate, require legislation.

[39] The Law Commission's approach in their Report on *Consents to Prosecution* (Law Com no 255) (20 October 1998) is of interest. The Commission addressed the right to bring a private prosecution in paras 5.3 and 5.4 under the heading of 'The Fundamental Principle' (see pp 35–36). It pointed out that it had in its prior consultation paper considered the significance of private prosecutions,

and had (in agreement with the statements of Lord Simon of Glaisdale and Lord Diplock and Lord Wilberforce quoted in Lord Bingham's opinion (at [9], above)) concluded that 'the right to private prosecution was "an important one which should not be lightly set aside"' and 'should be unrestricted unless some very good reason to the contrary exists'. The Commission was (like your Lordships' House in the present case) only concerned with social and legal conditions in England and Wales. In Scotland, private prosecutions are apparently very rare, but without knowing more about the different Scottish environment leading to this being so, I cannot regard it as undermining the traditional English view that the right to institute a private prosecution is an important right and safeguard possessed by any aggrieved citizen.

[40] The Commission went on (pp 36–37, 37–38 (paras 5.7, 5.10–5.12)) to recite criticisms of the right which it had received in the light of its consultation paper, and concluded (in para 5.13):

> 'We see the force of these points but do not believe that it is appropriate to consider abolishing the right of private prosecution without specific consideration which has neither been sought nor given in this project. The issues raised on the question of retention of the right of private prosecution are complex and they are not capable of being resolved within the scope of this report.'

[41] At para 5.19 (p 39) the Commission identified two types of harm as likely to result if private prosecutions were instituted in cases failing the tests applied by the Crown Prosecution Service when deciding whether to prosecute, viz the harm resulting (1) from an unsuccessful prosecution of an innocent defendant and (2) from any prosecution, successful or not, which is not in the public interest. But in para 5.22 (pp 40–41) they recited three factors which, as they concluded in their consultation paper, demonstrated that these potential harms did not undermine the fundamental principle of the right to institute a private prosecution. The factors were:

> '(1) There is always a risk that an individual Crown Prosecutor will either misapply the Code or—more likely, given the width of the Code tests—apply a personal interpretation to the tests which, although not wrong, might differ from that of other prosecutors.
>
> (2) The Code itself may, in the eyes of some, fail to achieve a proper balance between the rights of the defendant and the interests of the community.
>
> (3) It should not be assumed that if it is wrong to bring a public prosecution then it is also wrong to bring a private prosecution. If, for example, a case is turned down by the [Crown Prosecution Service] because it fails the evidential sufficiency test, but only just; if the private prosecutor knows that the defendant is guilty (because, say, he or she was the victim and can identify the offender); and if the case is a serious one, then a private prosecution might be thought desirable.'

[42] In the circumstances, the Commission made no suggestion that the right of private prosecution be abolished, but proposed a reformed regime for requiring consent of the Attorney General or Director of Public Prosecutions in the case of certain offences.

[43] The right of private prosecution operates and has been explained at the highest level as a safeguard against wrongful refusal or failure by public

prosecuting authorities to institute proceedings: see the statements by Lord Simon, Lord Diplock and Lord Wilberforce to which I have already referred and para 5.3 of the Law Commission's report. That justification is relevant not just where police fail to take any action at all, but also where their only response is to obtain a caution. Further, as the Law Commission pointed out in their third factor (cf para 5.22), it cannot always be assumed that, if it is wrong to bring a public prosecution, then it is also wrong to bring a private prosecution. While it is a matter of speculation, it is not impossible that such a thought played its part in the decision of the Chief Crown Prosecutor for Merseyside in the present case, declining to take over the prosecution with a view to bringing it to an end.

[44] As matters stand, I do not consider that police, when cautioning an admitted offender, should give any unqualified assurance that the person being cautioned will not thereafter 'have to go before a criminal court in connection with this matter'. Rather, I agree with Lord Brown that they should give a warning along the lines given in *Hayter v L* [1998] 1 WLR 854, but that it would be preferable to give it in slightly modified terms, stating that the caution may not preclude a private prosecution (and will not preclude a civil action) by an aggrieved party. A court before which any such private prosecution is brought will retain a power to stay the proceedings in the event that it concludes that, despite the warning, it would be abusive for them to continue.

Appeal allowed.

Kate O'Hanlon Barrister.

Lambeth London Borough Council and another v Kay and others

Leeds City Council v Price and others

[2006] UKHL 10

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD HOPE OF CRAIGHEAD, LORD SCOTT OF FOSCOTE, LORD WALKER OF GESTINGTHORPE, BARONESS HALE OF RICHMOND AND LORD BROWN OF EATON-UNDER-HEYWOOD

12–15 DECEMBER 2005, 8 MARCH 2006

Local authority – Land – Housing – Right to respect for private and family life – Tenants of housing trust occupying properties owned by local authority and leased to housing trust – Gipsies occupying local authority land without licence or consent – Local authorities seeking possession orders – Whether breach of right to respect for private and family life – Human Rights Act 1998, s 2, Sch 1, Pt I, art 8.

Precedent – House of Lords – Decision of European Court of Human Rights inconsistent with previous decision of the House – Whether appropriate for House of Lords to depart from previous decision of the House.

The respondent local authority in the first of two conjoined appeals (Lambeth) came to an informal agreement with a housing trust (LQHT) under which Lambeth licensed 'short life' premises, ie premises which were not in a condition suitable for normal housing use or capable of being rendered so suitable within the finances available to Lambeth, to LQHT for LQHT to make the premises available as accommodation for persons who were homeless but to whom Lambeth owed no statutory duty to arrange accommodation. LQHT purported to grant licences to those whom it allowed into occupation, including the appellants. In 1995 Lambeth granted LQHT a ten-year lease of the short life properties. Clause 2 of the lease gave Lambeth the right to determine the ten-year terms on the expiry of six months and one week's notice in writing to LQHT stating that Lambeth required possession of the demised properties. As a result of a decision of the House of Lords, an occupier of one of the properties was held not to be, as had been supposed, a licensee of LQHT, but its tenant. Lambeth thereafter terminated the 1995 lease, notified the appellants that they were trespassers, and took possession proceedings against them. The appellants claimed to have become, on the determination of the 1995 lease, tenants of Lambeth, and that their right under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) to respect for their homes gave them an alternative defence to the possession claim. The judge and the Court of Appeal, following previous House of Lords authority, rejected their reliance on art 8. They also rejected the private law tenancy defence. The appellants appealed. The respondent local authority in the second appeal (Leeds) was freehold owner of a recreation ground which was occupied without its permission by gipsies, amongst whom were the appellants in that appeal. Leeds issued proceedings for possession against the appellants as trespassers two days after they had entered

the site. The appellants' defence was based on art 8. The judge, holding himself bound by the same House of Lords authority as the courts in the first appeal, decided as a preliminary issue that art 8 could not in law provide the appellants with a defence to the claim for possession. The Court of Appeal upheld the judge's decision, but considered that the House of Lords authority was incompatible with a later decision of the European Court of Human Rights (ECHR), and granted permission to appeal.

Held – The appeals would be dismissed for the following reasons.

(1) Where a court would ordinarily be bound by domestic rules of precedent to follow the decision of another court higher in the domestic hierarchy, but that decision appeared to be inconsistent with a subsequent ruling of the ECHR, the court should follow the binding precedent. Certainty was best achieved by adhering, even in the convention context, to domestic rules of precedent. It would of course be the duty of judges to review convention arguments addressed to them, and if they considered a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they might express their views and give leave to appeal, as the Court of Appeal had in the instant case. Leap-frog appeals might be appropriate. In that way the courts would discharge their duty under the 1998 Act. The Strasbourg Court authoritatively expounded the interpretation of the rights embodied in the convention and its protocols, as it had to if the convention was to be uniformly understood by all member states. However, in its decisions on particular cases the Strasbourg Court accorded a margin of appreciation, often generous, to the decisions of national authorities and attached much importance to the peculiar facts of the case. Thus it was for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It was by the decisions of national courts that the domestic standard had initially to be set, and to those decisions the ordinary rules of precedent should apply (see [43], [44], [50], [62], [121], [177], [178], [213], below); *Harrow London BC v Qazi* [2003] 4 All ER 461 explained; *Connors v UK* (2004) 16 BHRC 639 considered.

(2) It was not necessary for a local authority in possession proceedings to plead or prove in every case that domestic law complied with art 8. Courts should proceed on the assumption that domestic law struck a fair balance and was compatible with art 8 (see [39], [54], [55], [72]–[76], [181], below).

(3) (Per Lord Hope, Lord Scott, Baroness Hale and Lord Brown) A defence which did not challenge the law under which the possession order was sought as being incompatible with art 8 but was based only on the occupier's personal circumstances should be struck out. Where domestic law provided for personal circumstances to be taken into account, as in a case where the statutory test was whether it would be reasonable to make a possession order, then a fair opportunity had to be given for the arguments in favour of the occupier to be presented. However, if the requirements of the law had been established and the right to recover possession was unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order were as follows: (a) if a seriously arguable point was raised that the law which enabled the court to make the possession order was incompatible with art 8, the county court in the exercise of its jurisdiction under the 1998 Act should deal with the argument either by giving effect to

the law, so far as it was possible for it do so under s 3, in a way that was compatible with art 8, or by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court; and (b) if the defendant wished to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do that provided again that the point was seriously arguable (see [110], [174], [190]–[192], [212], below).

(4) In the first appeal, LQHT was, when it granted the tenancies to the appellants, merely a licensee of Lambeth. The tenancies were not granted by Lambeth and were not carved by LQHT out of any estate that Lambeth had granted to LQHT. They were not derivative estates. LQHT, prior to the grant of the 1995 lease, had no estate in the land. It merely had a contractual licence. Once the LQHT licence had been terminated the appellants were trespassers as against Lambeth. Accordingly, the appellants had no right under ordinary domestic law to retain possession of their respective properties after the termination of the 1995 lease. They had no right to remain there indefinitely, which would be the effect of denying to Lambeth its unqualified right to possession of the premises on the ground that to give effect to that right would be incompatible with art 8. Their interests would be sufficiently protected by the fulfilment of the formal requirements for the eviction, which demanded proof by the public authority landowner of its entitlement to obtain an order for possession in the exercise of its property rights (see [2], [50], [62], [115], [143], [148], [177], [178], [193], [213], below); *Mellor v Watkins* (1874) LR 9 QB 400 and *Barrett v Morgan* [2000] 1 All ER 481 distinguished; *Bruton v London and Quadrant Housing Trust* [1999] 3 All ER 481 followed.

(5) In the second appeal, it was all but unarguable that the recreation ground on which the appellants had parked their caravans was ever their home within the meaning of art 8(1). If, however, the land was their home, it was plain that their eviction was in accordance with domestic property law, which had the legitimate end of enabling public authorities to evict unlawful squatters from public land and restore it to public use. There was no ground on which such action could be stigmatised as disproportionate and accordingly their appeals also had to fail (see [48], [116], [129], [193], below); *Connors v UK* (2004) 16 BHRC 639 considered.

Decision of the Court of Appeal in *Leeds City Council v Price* [2005] 3 All ER 573 affirmed.

Notes

For the convention rights and their interpretation, see Supp to 8(2) *Halsbury's Laws* (4th edn reissue) para 104A.1, and for the right to respect for private and family life, home and correspondence generally, for respect for home in particular, and for what constitutes respect and interference, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 149, 152, 154, 155.

For the Human Rights Act 1998, s 2, Sch 1, Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 678, 707.

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Appeals

Lambeth London Borough Council and another v Kay and others

The defendants Gavin Kay, William Gorman, Ian Peter Constantine, Cherry Barnett, Christopher Cole, Mieczyslaw Dymny and Thomas Greenhalgh appealed with permission of the Appeal Committee against the decision of the Court of Appeal (Auld, Latham and Arden LJJ) on 20 July 2004 ([2004] EWCA Civ 926, [2005] QB 352, [2004] 3 WLR 1396) dismissing their appeals against rulings by Judge Cooke in the Lambeth County Court on 13 December 2002 and 19 December 2003 on preliminary issues in claims against them by Lambeth London Borough Council for possession of residential properties occupied by them. The First Secretary of State intervened in the appeal and JUSTICE and LIBERTY intervened by written submissions only. The facts are set out in the opinion of Lord Scott of Foscote.

Leeds City Council v Price and others

The defendants Kim Maloney, Patrick Maloney (senior), Ellen Maloney, Patrick Maloney (junior) and Kathleen Maloney appealed against the decision of the Court of Appeal (Lord Phillips of Worth Matravers MR, Brooke and Sedley LJJ) ([2005] EWCA Civ 289, [2005] 3 All ER 573, [2005] 1 WLR 1825) dismissing their appeal against a decision of Judge Bush sitting as a deputy judge of the High Court on 25 October on a preliminary issue in proceedings brought by Leeds City Council against Sean Price, F Smith and persons unknown for possession of land at Spinkwell Lane, Wakefield. The appellants had defended those proceedings and subsequently been joined formally. The proceedings were transferred from the Leeds County Court to the High Court. The First Secretary of State intervened in the appeal and JUSTICE and LIBERTY intervened by written submissions only. The facts are set out in the opinion of Lord Bingham of Cornhill.

Jan Luba QC, David Watkinson, Kelvin Rutledge and *Alex Offer* (instructed by *Davies Gore Lomax*, Leeds) for the Leeds appellants and (instructed by *Nicholas & Co* and *Thomas & Co*) for the Lambeth appellants.
Andrew Arden QC, Terence Gallivan and *John McCafferty* (instructed by *Devonshires*) for Lambeth.
Ashley Underwood QC and *Thomas Tyson* (instructed by *Nicole Jackson*, Leeds) for Leeds.
Philip Sales and *Daniel Stilitz* (instructed by the *Treasury Solicitor*) for the First Secretary of State.

Their Lordships took time for consideration.

8 March 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, these appeals have been joined and heard together because they raise an important common issue on the scope and application of the right to respect for the home protected by art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and the 1998 Act. The House is invited to reconsider and depart from its decision in *Harrow London BC v Qazi* [2003] UKHL 43, [2003] 4 All ER 461, [2004] 1 AC 983.

THE *LAMBETH* APPEAL

[2] The first (*Lambeth*) appeal also raises a discrete issue on the occupation status of the appellants as the result of transactions between the London Borough of Lambeth, the London and Quadrant Housing Trust and them over a period of years. On that issue, I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Scott of Foscote, with which I am in complete agreement and to which I cannot usefully add. I need not repeat the facts summarised in his opinion. I take as the legal and factual premise of this opinion that, on termination by Lambeth of the headleases to Quadrant and notification by Quadrant to these appellants of that termination, the appellants' right to occupy their respective premises came to an end and they continued in occupation with no right to do so under the domestic property law of England and Wales.

[3] In July 2000 Mr Gorman (the second-named *Lambeth* appellant) brought an action against Lambeth seeking a declaration that he was a secure tenant. In August 2000 Lambeth began summary proceedings for possession against all these appellants including Mr Gorman. In his case, the claim was struck out as abusive, and Lambeth sought an order for possession by way of counterclaim. Since the other appellants were also seeking recognition as secure tenants, the issue was in each case the same.

[4] For detailed reasons given in his judgment dated 13 December 2002, Judge Roger Cooke resolved all the domestic property law issues against the appellants. The judge then heard argument on the appellants' alternative defence based on the convention and the 1998 Act and, following the decision of the House in *Qazi*'s case, he struck it out. His decision on that ground (as on the domestic property law ground) was upheld by the Court of Appeal (Auld, Latham and Arden LJJ) ([2004] EWCA Civ 926, [2005] QB 352, [2004] 3 WLR 1396). Certain convention issues argued in the Court of Appeal have not been pursued in the House, and only the appellants' argument on art 8 remains for decision.

THE *LEEDS* APPEAL

[5] In the second (*Leeds*) appeal there is an additional issue, on the extent to which, if at all, our domestic rules of precedent are, or should be, modified to give effect to our obligations under the convention and the duties imposed on domestic courts by the 1998 Act.

[6] The respondent, Leeds City Council, is a local authority and the freehold owner of a recreation ground at Spinkwell Lane in Leeds. On about 24 May 2004 that land was occupied by travellers without the council's permission. By 2 June

2004 the first group of travellers had left but others had arrived. On 13 June these appellants (who are the Maloney family) moved onto the site. On 15 June the council issued proceedings for possession in the Leeds County Court. On 24 June, the return date on the claim form, the appellants attended and were represented. On 22 September the proceedings were transferred to the High Court. They had originally been issued against Mr Price, Mr Smith and persons unknown, but the Maloney family were the only occupiers to appear at court or contest the proceedings and they were formally joined as defendants on 18 October 2004 when the claim was heard.

[7] The council claimed possession as freehold owner against the appellants as trespassers. The appellants did not challenge the council's title, and they claimed no leave or licence to enter or occupy the land. They based their defence on art 8, averring that, although the statutory scheme for the protection of gipsy families, taken with the government guidance, was compatible with the convention, the council could not rely on this when it was itself in clear and substantial breach of its obligations under the scheme and the guidance. They also asserted that their personal circumstances and those of their immediate family were exceptional, and so required the council to justify evicting them.

[8] In making these allegations of breach against the council the appellants contended that the council—

> '(a) had not addressed the needs of the Gypsy population in its homelessness strategy at all, contrary to the Homelessness Act 2002 and the Government Guidance given thereupon. This was also averred to be in breach of its obligations under the Race Relations Act 1976; (b) had failed to deal adequately with the needs of the Gypsy community in its Unitary Development Plan. This was alleged to be contrary to both the Homelessness Act 2002 and the Government Guidance given thereupon and to be a breach of the Respondent's duties under the Race Relations Act 1976; (c) did not have a Race Relations Strategy which made any provision for the needs of the gypsy/traveller population; (d) had not complied with the Guidance given either in the 1998 DETR and Home Office publication, "Managing Unauthorised Camping: A Good Practice Guide" or that given in Circular 18/94.'

The appellants further submitted that these alleged failures had to be seen in context, namely that—

> '(a) the [council] had declined to consider additional site provision for the Gypsy community; despite the fact that this should be a key part of any homelessness strategy, and; (b) there was only one official site in the Leeds metropolitan area. This site was full and had a waiting list. Approximately 20% of the gypsy population of Leeds consequently lived on unauthorised encampments.'

The appellants further relied on a number of matters particular to them and at the date of trial:

> '(a) in the 12 months immediately prior to them moving onto the land at Spinkwell Lane the family had either been evicted or forced to move under the threat of eviction in excess of 50 times; (b) in May 2004 Kim Maloney had been admitted to the Leeds General Infirmary suffering from exhaustion and stress resulting directly from these regular moves. She had been in hospital

for 2 nights; (c) Patrick Maloney (Senior) suffered from Alzheimer's disease. He was also affected by a serious head injury which he had sustained in a road traffic accident. He was unable to copy [sic] on his own and had significant memory loss and care needs; (d) Ellen Maloney suffered from depression and associated psychiatric problems as detailed in the report of Dr K. Rix. She also had mobility problems; (e) Ellen Elizabeth Maloney suffered from fits. She was hospitalised with pneumonia at the beginning of June 2004. She was only one year old. Her mother Kathleen Maloney was a single parent; (f) Patrick Maloney (Junior) had major mental health problems as a result of a serious head injury he sustained following a vicious assault on him on 4th July 1998. He was also blind in one eye following a further attack with broken glass. His mental health condition was variable and unpredictable; (g) there were 3 school age children residing on the site; (h) Patrick Maloney (Senior) had just been treated as an inpatient at the Leeds General Infirmary for a gall bladder problem. He was admitted to the hospital on 9th July 2004. He was awaiting further admission and treatment; (i) Patrick Maloney (Junior) had recently suffered from bowel problems and had been treated as an inpatient at St James' hospital for about 3 weeks. He was awaiting further investigations.'

[9] Before the trial, by a letter dated 8 October 2004, the council had formally notified the appellants that they had been found to be unintentionally homeless and in priority need, and had accepted a duty to help them secure accommodation. The appellants at trial contended that in all the circumstances an order for possession was neither necessary nor proportionate. The council replied that it had an absolute right to possession, that the 1998 Act had no application to the case and that the court had no need to consider questions of necessity, justification or proportionality. It had been agreed that the question whether art 8 of the convention could in law provide the appellants with a defence to the council's claim for possession should be resolved as a preliminary issue and on the trial date Judge Bush, sitting as a judge of the High Court, heard submissions and reserved his decision.

[10] On 25 October 2004 the judge gave judgment resolving the preliminary issue in the council's favour. Holding himself bound by the decision of the House in *Qazi*'s case and that of the Court of Appeal in the *Lambeth* appeal, he held that the council's contractual and proprietary claim to possession could not be defeated or qualified by art 8. He made an order for possession forthwith, and refused a stay of execution, but granted leave to appeal to the Court of Appeal.

[11] After this order the appellants left the site. But they appealed to the Court of Appeal (Lord Phillips of Worth Matravers MR, Brooke and Sedley LJJ), which on 16 March 2005 dismissed the appeal ([2005] EWCA Civ 289, [2005] 3 All ER 573, [2005] 1 WLR 1825). The court held that it was bound by the decision of the House in *Qazi*'s case. But it considered that decision to be incompatible with a later decision of the European Court of Human Rights in *Connors v UK* (2004) 16 BHRC 639 and granted the appellants leave to appeal to the House.

MR QAZI'S CASE

[12] The facts of this case were summarised by four members of the House ([2003] 4 All ER 461 at [2], [3], [40]–[44], [90]–[92], [112]–[114]), and were of the simplest. The local authority were the freehold owners of a house which they let to Mr Qazi and his wife as joint tenants. After some six years she left, with their daughter, and she gave notice to quit, which brought the tenancy to an end.

He applied to the local authority for the grant of a tenancy to him alone, but this was refused. The authority issued proceedings for possession, which he resisted. He had married another wife in an Islamic ceremony before the proceedings began, and was later living at the house with her and her young son. He based his resistance to the claim for possession on the right to respect for his home, protected by art 8 of the convention, to which effect in the domestic law of the United Kingdom was given by the 1998 Act. Article 8 provides:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[13] In the House there were said to be two issues and a third potential issue (at [6]), and there was no difference of opinion on the formulation of the issues (at [28]). They were (1) whether, when proceedings were issued and possession was ordered, the house was Mr Qazi's home within the meaning of that expression in art 8 and, if so, (2) whether what the local authority did or proposed to do infringed his right to respect for his home. If those questions were answered in Mr Qazi's favour, there arose the issue whether the local authority's action or proposed action was justified.

[14] At first instance, the recorder answered the first question in the local authority's favour and adversely to Mr Qazi. He held that because Mr Qazi had no legal or equitable right in the house, it was not his home and art 8 was not engaged. He did not, therefore, address the remaining questions. The correctness of this answer to the first question was the main focus of debate in the Court of Appeal ([2001] EWCA Civ 1834, [2002] HLR 276) and in the House ([2003] 4 All ER 461 at [29] per Lord Steyn). But the Court of Appeal unanimously took a different view, and a clear view was expressed by the House (at [11], [26], [68], [95], [99], [110]) that the premises had at the relevant times been Mr Qazi's home within the autonomous meaning of that expression in art 8.

[15] A majority of members of the House, and perhaps all members, held in answer to the second question that there had on the facts been an interference by a public authority with Mr Qazi's right to respect for his home. That was my conclusion (at [24]) and that of Lord Steyn (at [30]–[33]). Lord Hope of Craighead (at [70]) and Lord Millett (at [103]) were, as I understand them, of the same opinion. Lord Scott (at [149]) would for his part have ruled that art 8 was not in the circumstances applicable, but he also expressed agreement with Lord Hope and Lord Millett.

[16] There was, however, a clear difference of opinion among the members of the House. In a case such as Mr Qazi's where a public authority had an unqualified right to possession under domestic property law, Lord Hope (at [83]) did not consider art 8 to be irrelevant but held (at [78], [83]) that art 8(2) is satisfied where domestic property law gives an unqualified right to possession. He concluded (at [84]) that contractual and proprietary rights to possession cannot be defeated by a defence based on art 8. Lord Millett was of a similar opinion (at [100]): art 8 was engaged, but save in wholly exceptional circumstances there would be no lack of respect and no infringement of art 8,

where an order is made in favour of a person entitled to possession under domestic property law (see [107]). Lord Scott echoed this view in holding that art 8 cannot be raised to defeat contractual and proprietary rights to possession. Lord Steyn and I, dissenting, were of opinion that where, as in that case, there was a proposed interference with a person's right to respect for his home, the question of justification, if raised, did fall to be considered (see [24], [26]), even though considerations of domestic property law were likely to be crucial (see [12]) and the occasions on which a court would be justified in declining to make a possession order would, as the parties agreed, be very highly exceptional (see [25]).

THE COURT OF APPEAL DECISIONS UNDER APPEAL

[17] In its judgment on the *Lambeth* appeal [2005] QB 352, the Court of Appeal first considered at length and in detail the private law issues raised by the appellants, resolving them in favour of the local authority, as the House concludes, rightly. The court then turned to the art 8 issue and (at [93]) the decision of the House in *Qazi*'s case, and stated what it understood to be the ratio of the majority. It said (at [98]):

> 'The majority opinions are based, it seems to us, on the logic that the incidents of the domestic law of landlord and tenant provide the answer to the question whether or not, in any case, the interference with the person's home is justified under article 8(2) . . .'

It added (at [100]):

> '. . . The fact is that Lambeth has an unqualified right to possession. And on the basis of the majority opinions in *Qazi*'s case by which we are bound, that is a sufficient answer to the claim under article 8 . . .'

Thus the appellant's art 8 claim was bound to fail. After reserving judgment, the court received the judgment of the European Court in *Connors v UK* (see [20], [22], below). It heard no oral argument on the significance of that decision, but concluded (at [106]) that it could not affect its assessment of the decision of the House in *Qazi*'s case and that it was of assistance to United Kingdom courts only in relation to cases involving gipsies.

[18] In its judgment on the *Leeds* appeal ([2005] 3 All ER 573), the Court of Appeal (at [13]) again summarised the ratio of the majority in *Qazi*'s case:

> 'Thus all three of the majority held that, under the Strasbourg jurisprudence, the exercise of an absolute proprietary right to possession could not infringe art 8. Implicit in this conclusion was the premise that the English domestic law which conferred the absolute right to possession was, itself, compatible with convention rights . . .'

The court then reviewed the compatibility of the majority reasoning in *Qazi*'s case with the decision of the European Court in *Connors v UK* and concluded (at [26]):

> 'The decision in *Connors v UK* is unquestionably incompatible with the proposition that the exercise by a public authority of an unqualified proprietary right under domestic law to repossess its land will *never* constitute an interference with the occupier's right to respect for his home,

or will *always* be justified under art 8(2). To that extent *Connors v UK* is incompatible with *Qazi*'s case . . .'

The court considered (at [27], [28]) the earlier judgment of the court in the *Lambeth* appeal, but did not consider (at [29]) that the reasoning of the European Court in *Connors v UK* could be confined to the treatment of gipsies and accordingly accepted (at [30]) the appellants' submission that *Connors v UK* was incompatible with *Qazi*'s case.

THE STRASBOURG JURISPRUDENCE

[19] In their opinions in *Qazi*'s case the members of the House analysed what were then the leading Strasbourg authorities pertaining to the right to respect for the home, although the majority and the minority drew different inferences from them: contrast the opinions of Lord Hope (at [78]), Lord Millett (at [103], [104]) and Lord Scott (at [125], [146], [149]) with those of myself (at [20], [23]) and Lord Steyn (at [30]). *S v UK* (1986) 47 DR 274, to which my noble and learned friend Lord Hope attaches much significance, was an early admissibility decision of the European Commission of Human Rights on which the court has never, to my knowledge, relied in any later case. It would, in my opinion, serve no useful purpose to repeat this analysis, since if matters rested where they did when *Qazi*'s case was decided the majority interpretation of the Strasbourg jurisprudence would be bound to prevail, whatever reservations there may have been in the minds of some, at the time, about its correctness. It is, however, argued by the appellants, with strong support by the First Secretary of State as intervener, that matters do not rest where they did when *Qazi*'s case was decided, since two cases have since been decided by the European Court which are inconsistent with the ratio of the majority in *Qazi*'s case and support the approach of the minority. Those decisions are *Connors v UK* (2004) 16 BHRC 639 and *Blecic v Croatia* (2005) 41 EHRR 185.

[20] The facts of these two cases were quite different. Mr Connors and his family had lived as licensees on a local authority gipsy site for most of the preceding 16 years when, in January 2000, they were given notice to quit. This notice was prompted by complaints about the behaviour on the site of some members of the applicant's family or their guests, which was said to be a breach of the licence conditions. The applicant did not leave, and proceedings were brought for possession. He sought to challenge the authority's decision to initiate proceedings by judicial review, but permission was refused. The authority's complaints of misbehaviour were strongly denied by the applicant, and so the authority dropped these complaints and relied instead on its right to terminate the applicant's licence on notice, which had been given. There was no answer to this claim under English domestic property law. A possession order was accordingly made, and some weeks later the applicant and his family and their caravans and possessions were forcibly removed from the site.

[21] In *Blecic v Croatia* the applicant had for nearly 40 years before 1992 been a specially-protected tenant of a publicly-owned flat in Zadar. Under the domestic property law of Croatia a specially-protected tenancy might be terminated if the tenant ceased to occupy the flat for a continuous period of six months, but termination might not be effected on that ground if the tenant's failure to use the flat was attributable to medical treatment, military service or 'other justified reasons'. The applicant left Zadar in July 1991 to visit her daughter in Rome. War then intervened, conditions in Zadar were bad, and the applicant did not return until May 1992, by which time another occupant had, without permission,

moved into the flat. In February 1992 the local authority had already initiated proceedings to terminate the tenancy. The applicant claimed that she had had justified reasons for not using the flat, and this argument was accepted by an intermediate court, but it was rejected at first instance and, finally, by the Supreme Court. Thus, without justified reasons, the applicant had no grounds for resisting the termination of her tenancy.

[22] It was agreed in *Connors v UK* (at 658 (para 68)) and held in *Blecic v Croatia* (at 194 (para 52)) that the premises in question were, for purposes of art 8, the applicant's home. It was agreed in *Connors v UK* (at 658 (para 68)) and held in *Blecic v Croatia* (at 195 (para 54)) that the facts disclosed an interference with the applicant's right to respect for his and her home. Under the domestic property law of the two jurisdictions there was no arguable defence to either claim (in *Blecic v Croatia*, once she had been found to have no justified reasons). But in each case the court went on to consider, at some length, the excepting conditions in art 8. In *Connors v UK* (at 659 (para 69)) it was agreed, and in *Blecic v Croatia* (at 195 (paras 57, 58)) it was held, that the interference had a legitimate aim. In each case the crux was whether the interference was necessary in a democratic society, namely whether the interference answered a pressing social need and was proportionate to the legitimate aim pursued (see *Connors v UK* at 662 (para 81), *Blecic v Croatia* at 195–196 (para 59)). These are matters which would not have fallen for consideration at all if a clear answer given by domestic property law were decisive. As it was, the court devoted 14 paragraphs of its judgment in *Connors v UK* to this aspect and 11 paragraphs of its judgment in *Blecic v Croatia*. It reached differing conclusions in the two cases. In ruling against the United Kingdom in *Connors v UK* the court took account of the nature of the rights involved in the case (at 662 (para 82)), the procedural safeguards available to the individual (at 663 (para 83)), the vulnerable position of gipsies as a minority whose way of life member states are positively obliged to facilitate (at 663 (para 84)) and the disadvantageous position of gipsies on local authority as opposed to privately-owned sites (at 647–648, 664–665 (paras 43–46, 87–90)). It concluded that judicial review was not an adequate safeguard (at 665–666 (para 92)) and that (at 666–667 (para 95))—

> 'the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of art 8 of the convention.'

Reaching a different conclusion in *Blecic v Croatia*, the court respected the margin of appreciation accorded to national authorities (at 196–197 (paras 64–65)) and found (at 198 (paras 68–70)) that the applicant had had a fair opportunity to put forward her views and resist the claim made against her.

[23] The decision of the House in *Qazi*'s case was not cited in *Connors v UK*, perhaps because the majority reasoning was inconsistent with the basis on which the United Kingdom's case was put (and had been put on earlier occasions such as *Howard v UK* (1987) 9 EHRR 116, *P v UK* App No 14751/89 (12 December 1990, unreported) and *Chapman v UK* (2001) 10 BHRC 48 and, domestically, in *St Brice v Southwark London BC* [2001] EWCA Civ 1138, [2002] LGR 117, [2002] 1 WLR 1537). The respondents, however, place considerable reliance on the fact that when Mr Qazi sought to apply to Strasbourg to complain of a violation of his art 8

right his application was declared inadmissible. From the very brief reasons given, the respondents infer approval of the majority's reasoning. The Court of Appeal in the *Leeds* case discounted the significance of this finding ([2005] 3 All ER 573 at [15]), and the House itself has been at pains over the years to make plain that the refusal of leave does not necessarily import approval of the reasoning of the judgment which it is sought to challenge. It may have been thought, as the *Qazi* minority certainly thought, that Mr Qazi was most unlikely to win even if his case were remitted to the county court, and his case may have had more in common with earlier cases held inadmissible because the justification was obvious than cases such as *Connors v UK* and *Blecic v Croatia*. I do not, in any event, think that any reliable inference can be drawn from the finding of inadmissibility made against Mr Qazi's application.

[24] The respondents sought in argument to explain *Connors v UK*, as the Court of Appeal did in its Lambeth judgment, as a case turning on the special position of gipsies. This is, in my opinion, partly right and partly wrong. It is right in as much as the position of Mr Connors and his family as members of a vulnerable minority, to whom the state owed a positive obligation, and who had inadequate means of protecting their rights in domestic law, founded the court's finding in their favour on the issue of necessity in a democratic society (ie pressing social need and proportionality). It is wrong in so far as it is relied on to support the majority reasoning in *Qazi*'s case: for on that reasoning the applicants' lack of any proprietary interest whatever under domestic property law would have effectively concluded the case against them, without any need to explore questions of necessity, pressing social need and proportionality. The Court of Appeal in its *Leeds* judgment (at [29]) was in my opinion correct to hold that the reasoning in *Connors v UK* could not be confined to the treatment of gipsies.

[25] The appellants point out that in *Connors v UK* both the applicability of art 8 and an act of interference by a public authority were conceded by the United Kingdom. This is correct, as noted in [22], above. But the Court of Appeal in its *Leeds* judgment (at [25]) rejected the suggestion that the decision was founded on the concession, and thought it clear that the court considered the concession to have been rightly made. I agree. It is also clear that if either of the two cases now before the House were to reach Strasbourg the same concessions would be made (subject, in the *Leeds* case, to the prior contention that the premises were not the appellants' home: see [48], below).

[26] The Court of Appeal in its *Leeds* judgment (at [26]) was in my view right to hold that the decision in *Connors v UK* is 'unquestionably incompatible' with the majority ratio of *Qazi*'s case. It does not appear that *Blecic v Croatia* was cited to the Court of Appeal: had it been, it could only have fortified the court in the correctness of its conclusion.

THE APPLICATION OF THE STRASBOURG JURISPRUDENCE

[27] The appellants contended, with strong support from the First Secretary of State, that: (1) the majority ratio in *Qazi*'s case should be modified to take account of the later Strasbourg jurisprudence, particularly *Connors v UK* and *Blecic v Croatia*; (2) defendants to possession proceedings brought by public authorities should be permitted in principle to raise an art 8 defence in those proceedings; (3) defendants should be permitted to raise such defences in the county court in the possession proceedings and should not be required to raise such defences in separate proceedings for judicial review, and (4) such a procedure would not in practice impose an excessive or unsustainable burden on the administration of

justice in the county courts. Each of these contentions was challenged by the respondents, and each of them is important.

[28] The mandatory duty imposed on domestic courts by s 2 of the 1998 Act is to take into account any judgment of the Strasbourg Court and any opinion of the Commission. Thus they are not strictly required to follow Strasbourg rulings, as they are bound by s 3(1) of the European Communities Act 1972 and as they are bound by the rulings of superior courts in the domestic curial hierarchy. But by s 6 of the 1998 Act it is unlawful for domestic courts, as public authorities, to act in a way which is incompatible with a convention right such as a right arising under art 8. There are isolated occasions (of which *R v Spear, R v Boyd, R v Saunby* [2002] UKHL 31 at [12], [92], [2002] 3 All ER 1074 at [12], [92], [2003] 1 AC 734, is an example) when a domestic court may challenge the application by the Strasbourg Court of the principles it has expounded to the detailed facts of a particular class of case peculiarly within the knowledge of national authorities. The 1998 Act gives it scope to do so. But it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg Court as governing the convention rights specified in s 1(1) of the 1998 Act. That court is the highest judicial authority on the interpretation of those rights, and the effectiveness of the convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down. In the present instance the governing principle is now clear, and gives fair effect to the right to respect for his home which everyone is entitled to enjoy under art 8(1). That provision does not, as has been repeatedly and rightly held, guarantee a right to a home or the right to have one's housing problems solved by the authorities: see *Chapman v UK* (2001) 10 BHRC 48 at 72 (para 99), *Marzari v Italy* (1999) 28 EHRR CD 175 at 179, *O'Rourke v UK* App No 39022/97 (26 June 2001, unreported). But it does guarantee a right to respect for the place where a person lives if his links with that place are close enough and continuous enough (see *Buckley v UK* (1997) 23 EHRR 101 at 115 (para 63), *Mabey v UK* (1996) 22 EHRR CD 123 at 124, *O'Rourke v UK* above) to make it proper to regard that place as his home. To evict or seek to evict a person from such a place is to interfere with his exercise of his art 8(1) right, as the House held in reliance on Strasbourg and other authority in *Qazi*'s case. Article 8(2) forbids such interference by a public authority unless the excepting conditions are satisfied. Compliance with domestic property law is a necessary excepting condition but not a sufficient one, since the other conditions must also be met, notably that the interference must answer a pressing social need and be proportionate to the legitimate aim which it is sought to achieve. This must now be recognised as the correct principle. In stating it, I enter the same important reservation as in *Qazi*'s case [2003] 4 All ER 461 at [23]: nothing in this opinion should be understood as applying to any landlord or owner which is not a public authority. Competing submissions were made on this point. It does not arise for decision in these appeals. It is best left for resolution in a case where it arises.

[29] It necessarily follows, in my judgment, that where a public authority seeks to evict a person from premises (which may be land where a traveller has pitched his caravan) which he occupies as his home, that person must be given a fair opportunity to contend that the excepting conditions in art 8(2) have not been met on the facts of his case. I do not accept, as the appellants argued, that the public authority must from the outset plead and prove that the possession order sought is justified. That would, in the overwhelming majority of cases,

be burdensome and futile. It is enough for the public authority to assert its claim in accordance with domestic property law. If the occupier wishes to raise an art 8 defence to prevent or defer the making of a possession order it is for him to do so and the public authority must rebut the claim if, and to the extent that, it is called upon to do so. In the overwhelming majority of cases this will be in no way burdensome. In rare and exceptional cases it will not be futile.

[30] The respondents submitted that if, on art 8 grounds, an occupier wishes to resist a claim for possession valid under domestic property law, the proper medium for such a challenge is an application for judicial review and the proper venue the Administrative Court and not the county court. That is the proper forum in which a challenge to an exercise of public power by a public authority should be resolved. If this were a correct submission it would have to be accepted, but it would have very unfortunate procedural consequences. It would lead to the adjournment of the county court proceedings while application was made for permission to apply for judicial review. Even if permission were refused, as would almost always be the case, there would be additional expense and delay, preventing summary disposal of the matter in the county court. The occupier would be restricted to a procedure not well-adapted or routinely used for the resolution of sensitive factual questions and to a court traditionally and rightly reluctant to explore the merits of an apparently lawful decision, as it proved to be in *Connors v UK*. But in my opinion it is not a correct submission. Effect must be given to s 7(1)(b) of the 1998 Act, which provides:

> '(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) [ie in a way which is incompatible with a convention right] may . . . (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.'

This is express authority entitling the occupier to raise his art 8 challenge to the possession order sought against him in those proceedings. It is consistent with authorities such as *Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 461 and *Boddington v British Transport Police* [1998] 2 All ER 203, [1999] 2 AC 143, and respects the principle that if other means of redress are conveniently and effectively available to a party they ought ordinarily to be used before resort to judicial review: see, for example, *R v Huntingdon DC, ex p Cowan* [1984] 1 All ER 58 at 63, [1984] 1 WLR 501 at 507. Where a party seeks relief, on conventional judicial review grounds, which only the Administrative Court can grant, there will, of course, be no alternative to an application for judicial review, but that will very rarely, if ever, be the case where an occupier seeks to resist a possession order in reliance on art 8.

[31] The respondents contended that if the approach indicated above were given practical effect the result would be to dislocate the conduct of housing claims in the county court, distort local authority housing policies and budgets, and upset the important compromises inherent in our property law and housing legislation. The appellants, supported by the First Secretary of State, strongly challenged this prediction, while accepting that the threshold for relying successfully on art 8 in response to an otherwise well-founded possession claim should be very high and that the number of successful defendants would be minimal. This is an important aspect of these appeals, and one that has caused the House much concern.

[32] The respondents insisted on the relevance of three principles which are very familiar but are, indeed, fundamental. The first is that the Strasbourg authorities routinely accord a wide margin of appreciation to the national authorities of member states, not least in the context of both art 8 and art 1 of the First Protocol. While in some situations (such as that in *Connors v UK*) the margin is treated as narrower than in some other situations, and the court reserves to itself the power of final review, this principle is undoubtedly correct. So is the closely-allied second principle, that the Strasbourg authorities generally respect, subject to similar qualifications, decisions made by democratically-elected assemblies following public debate. So too is the third principle, that inherent in the whole of the convention is a search for balance between the rights of the individual and the wider rights of the society to which he belongs, neither enjoying any absolute right to prevail over the other. It is unnecessary to cite authority for propositions so well established and understood.

[33] The third of these principles has obvious relevance in a context such as that giving rise to these appeals. For the general property law of England and Wales has developed over the centuries reconciling the rights and interests, sometimes in harmony, sometimes conflicting, of owners, landlords and licensors on one hand and occupiers, tenants and licensees on the other. Over the last century or so, this general property law has been overlaid by a mass of very detailed, very specific housing legislation. Giving the House the benefit of their great expertise, the respondents' counsel drew attention to, among other examples, secure tenancies, introductory tenancies, demoted tenancies, assured tenancies, assured shorthold tenancies and demoted assured shorthold tenancies, all of them created or to a greater or lesser extent regulated by statute. Most of these statutes (and further examples could readily be given) were no doubt prompted by recognition that housing (in which expression I include pitches on which travellers may lawfully pitch their caravans) is a scarce and in the short term finite commodity. The demand for housing at a reasonable price is greater than the supply. This of course means that security of tenure for A means a denial of accommodation for B, recognition of a right for C to succeed to a tenancy means there is no tenancy for D, an extension of time granted to E defers the date when F can find somewhere to live. Our housing legislation strikes a balance between the competing claims to which scarcity gives rise, taking account, no doubt imperfectly but as well as may be, of the human, social and economic considerations involved. And it is, of course, to housing authorities such as the respondents that Parliament has entrusted the power of managing and allocating the local authority housing stock and the pitches on local authority gipsy sites.

[34] Under some statutory regimes, as where discretionary grounds are relied on to terminate a secure tenancy under the Housing Act 1985, the court may make an order for possession only where, other conditions for making such an order being met, the court thinks it reasonable to do so. This enables the court to take account of all circumstances which it judges to be relevant. If, in any case covered by such a regime, the statutory conditions are satisfied and the court does, on consideration of all the circumstances, think it reasonable to make a possession order, the court will in effect have undertaken the very assessment which art 8(2) requires. In such a situation art 8(2) adds nothing of substance to the protection which the occupier already enjoys.

[35] Under some statutory regimes the court may be required to make an order for possession if certain prescribed conditions are met and there is no overriding requirement that the court considers it reasonable or just to make

such an order. The statutory scheme is none the less likely to satisfy the art 8(2) requirement of proportionality if it is clear that the statutory scheme represents a democratic solution to the problems inherent in housing allocation. Thus in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 at [69], [2001] 4 All ER 604 at [69], [2002] QB 48, the Court of Appeal found no breach of art 8(2) in the use of s 21(4) of the Housing Act 1988, as amended, to gain possession of an assured shorthold tenancy granted to a person who had been intentionally homeless, because Parliament had intended to give preference to the needs of those dependent on social housing as a whole over those who, like the tenant, had been intentionally homeless. Similarly, in *R (on the application of McLellan) v Bracknell Forest BC, Reigate and Banstead BC v Benfield* [2001] EWCA Civ 1510 at [63], [2002] 1 All ER 899 at [63], [2002] QB 1129, the Court of Appeal found no breach of art 8 where a housing authority determined the introductory tenancies of tenants whose rent was in arrears under s 127(2) of the Housing Act 1996, since Parliament had decided that it was necessary in the interest of tenants generally and the local authorities to have a scheme whereby, during the first 12 months, tenants were on probation and could be evicted without long battles in the county court, there being (it was held) adequate procedural safeguards. The Court of Appeal took a similar approach when holding, in *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 04 at [37], [2002] LGR 467 at [37], that Parliament clearly enacted the relevant statutory provisions upon the premise that while a tenant is housed as a homeless person he enjoys no security of tenure. See also *Wandsworth London BC v Michalak* [2002] EWCA Civ 271 at [63], [78], [2002] 4 All ER 1136 at [63], [78], [2003] 1 WLR 617. Where a statutory scheme covers the case of an occupier, and conditions are prescribed for obtaining possession, and those conditions are met, it will only be in highly exceptional circumstances that the occupier will gain additional protection from art 8.

[36] There are of course some cases (of which the present cases are examples) in which the relationship between public authority owner or landlord and individual tenant or occupier is not governed by any statutory scheme. But possession may be sought on expiry of the period for which the right to occupy was granted, or because the notice required by domestic property law to bring that term to an end has been given, or because one or more of the conditions on which the right to occupy was granted has been broken. It cannot be said that the relationship between the parties in such cases is the subject of a balance struck by Parliament, but it is not unrealistic to regard the general law as striking such a balance. The public authority owner or landlord has, broadly speaking, a right to manage and control its property within bounds set by statute. The occupier acquires a right, but only a limited right, to occupy. On due determination of that interest, a claim for possession must ordinarily succeed, since any indulgence to the occupier necessarily derogates from the property right of the public authority, whose rights are also entitled to respect. It is not therefore surprising that in *P v UK* App No 14751/89 (12 December 1990, unreported) and *Ure v UK* App No 28027/95 (27 November 1996, unreported), the occupiers' complaints were held to be inadmissible because the public authority's interference or assumed interference was held to be clearly justified. It would, again, require highly exceptional circumstances before art 8 would avail the occupiers. The peculiar facts and circumstances of *Connors v UK* could fairly be regarded as

crossing that high threshold, given the positive obligation to which reference is made in [24], above.

[37] Rarely, if ever, could this test be satisfied where squatters occupy the land of a public authority which they do not and (unlike *Connors v UK*) never have had any right to occupy, and the public authority acts timeously to evict them. The public look to public authorities to preserve their land for public purposes and to bring unlawful occupation to an end, with the environmental hazards it is likely to entail. CPR 55.5(2) and 55.6 provide for the summary removal of squatters. The rule in *McPhail v persons, names unknown* [1973] 3 All ER 393, [1973] Ch 447 must, in my opinion, be relaxed in order to comply with art 8, but it is very hard to imagine circumstances in which a court could properly give squatters of the kind described above anything more than a very brief respite.

[38] I do not think it possible or desirable to attempt to define what facts or circumstances might rank as highly exceptional. The practical experience of county court judges is likely to prove the surest guide, provided always that the stringency of the test is borne in mind. They are well used to exercising their judgment under existing statutory schemes and will recognise a highly exceptional case when they see it. I do not, however, consider that problems and afflictions of a personal nature should avail the occupier where there are public services available to address and alleviate those problems, and if under the relevant social legislation the occupier is specifically disentitled from eligibility for relief it will be necessary to consider the democratic judgment reflected in that provision. Nor can art 8 avail a tenant, otherwise perhaps than for a very brief period, if he can be appropriately accommodated elsewhere (whether publicly or privately). Where, as notably in the case of gipsies, scarcity of land adversely affects many members of the class, an art 8(2) defence could only, I think, succeed if advanced by a member of the class who had grounds for complaint substantially stronger than members of the class in general.

[39] The practical position, in future, in possession proceedings can be briefly summarised as follows. (1) It is not necessary for a local authority to plead or prove in every case that domestic law complies with art 8. Courts should proceed on the assumption that domestic law strikes a fair balance and is compatible with art 8. (2) If the court, following its usual procedures, is satisfied that the domestic law requirements for making a possession order have been met the court should make a possession order unless the occupier shows that, highly exceptionally, he has a seriously arguable case on one of two grounds. (3) The two grounds are: (a) that the law which requires the court to make a possession order despite the occupier's personal circumstances is convention-incompatible; and (b) that, having regard to the occupier's personal circumstances, the local authority's exercise of its power to seek a possession order is an unlawful act within the meaning of s 6. (4) Deciding whether the defendant has a seriously arguable case on one or both of these grounds will not call for a full-blown trial. This question should be decided summarily, on the basis of an affidavit or of the defendant's defence, suitably particularised, or in whatever other summary way the court considers appropriate. The procedural aim of the court must be to decide this question as expeditiously as is consistent with the defendant having a fair opportunity to present his case on this question. (5) If the court considers the defence sought to be raised on one or both of these grounds is not seriously arguable the court should proceed to make a possession order. (6) Where a seriously arguable issue on one of these grounds is raised, the court should itself decide this issue, subject to this: where an issue arises on the application of s 3 the

judge should consider whether it may be appropriate to refer the proceedings to the High Court.

PRECEDENT

[40] Reference has already been made to the duty imposed on United Kingdom courts to take Strasbourg judgments and opinions into account and to the unlawfulness of courts, as public authorities, acting incompatibly with convention rights. The questions accordingly arise whether our domestic rules of precedent are, or should be modified; whether a court which would ordinarily be bound to follow the decision of another court higher in the domestic curial hierarchy is, or should be, no longer bound to follow that decision if it appears to be inconsistent with a later ruling of the Court in Strasbourg. The Court of Appeal concluded, at [33] of its judgment on the *Leeds* appeal, that the only permissible course was to follow the decision of the House in *Qazi*'s case, despite finding that it was incompatible with *Connors v UK*, but to give permission, if sought and not successfully opposed, to appeal to the House, and in that way to take the decision in *Connors v UK* into account.

[41] The House has had the benefit of carefully considered submissions on this issue. In a written case submitted on behalf of JUSTICE and LIBERTY as interveners it is contended that the lower court is free to follow, and barring some special circumstances should follow, the later Strasbourg ruling where four conditions are met, namely (1) the Strasbourg ruling has been given since the domestic ruling on the point at issue, (2) the Strasbourg ruling has established a clear and authoritative interpretation of convention rights based (where applicable) on an accurate understanding of United Kingdom law, (3) the Strasbourg ruling is necessarily inconsistent with the earlier domestic judicial decision, and (4) the inconsistent domestic decision was or is not dictated by the terms of primary legislation, so as to fall within s 6(2) of the 1998 Act. The appellants' formulation was to very much the same effect, although they did not suggest that the domestic court should follow the Strasbourg ruling, only that it might; they emphasised that the inconsistency between the otherwise binding domestic decision and the later Strasbourg ruling should be very clear; and they elaborated somewhat the conditions pertaining to primary domestic legislation. The First Secretary of State, after a judicious review of the arguments for and against the Court of Appeal's approach, favoured a (strictly circumscribed) relaxation of the doctrine of precedent in the circumstances of the *Leeds* appeal. He proposed that a lower court should be entitled to depart from an otherwise binding domestic decision where there is a clearly inconsistent subsequent decision of the Strasbourg Court on the same point. But the inconsistency must be clear. A mere tension or possible inconsistency would not entitle a lower court to depart from binding domestic precedent. The respondent gave a guarded answer. A lower court may decline to follow binding domestic authority in the limited circumstances where it decides that the higher courts are bound to resile from that authority in the light of subsequent Strasbourg jurisprudence.

[42] While adherence to precedent has been derided by some, at any rate since the time of Bentham, as a recipe for the perpetuation of error, it has been a cornerstone of our legal system. Even when, in 1966, the House modified, in relation to its own practice, the rule laid down in *London Tramways Co v LCC* [1898] AC 375, it described the use of precedent as—

> 'an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty

upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.' (See *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77.)

The House made plain that this modification was not intended to affect the use of precedent elsewhere than in the House, and the infrequency with which the House has exercised its freedom to depart from its own decisions testifies to the importance its attaches to the principle. The strictures of Lord Hailsham of St Marylebone LC in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 at 808–810, [1972] AC 1027 at 1053–1055, are too well known to call for repetition. They remain highly pertinent.

[43] The present appeals illustrate the potential pitfalls of a rule based on a finding of clear inconsistency. The appellants, the First Secretary of State and the Court of Appeal in the *Leeds* case find a clear inconsistency between *Qazi*'s case and *Connors v UK*. The respondents and the Court of Appeal in the *Lambeth* case find no inconsistency. Some members of the House take one view, some the other. The prospect arises of different county court and High Court judges, and even different divisions of the Court of Appeal, taking differing views of the same issue. As Lord Hailsham observed ([1972] 1 All ER 801 at 809, [1972] AC 1027 at 1054), 'in legal matters, some degree of certainty is at least as valuable a part of justice as perfection'. That degree of certainty is best achieved by adhering, even in the convention context, to our rules of precedent. It will of course be the duty of judges to review convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here.

[44] There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the convention depends on constructive collaboration between the Strasbourg Court and the national courts of member states. The Strasbourg Court authoritatively expounds the interpretation of the rights embodied in the convention and its protocols, as it must if the convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg Court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.

[45] To this rule I would make one partial exception. In its judgment on the *Leeds* appeal (at [33]), the Court of Appeal said:

> 'In *D v East Berkshire Community Health NHS Trust, K v Dewsbury Healthcare NHS Trust, K v Oldham NHS Trust* [2003] EWCA Civ 1151, [2003] 4 All ER 796, [2004] QB 558 this court held that the decision of the House of Lords in *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633 could not survive the introduction of the 1998 Act. This was, however, because the effect of the 1998 Act had undermined the policy consideration that had largely

dictated the House of Lords' decision. Departing from the House of Lords decision in those circumstances has attracted some academic criticism. It remains to see whether this will be echoed by the House itself.'

When that case reached the House, no criticism of the Court of Appeal's bold course was expressed, the House agreed that the policy considerations which had founded its decision in *X v Bedfordshire* had been very largely eroded and it was accepted that that decision was no longer good law: [2005] UKHL 23 at [21], [30]–[36], [82], [119], [124]–[125], [2005] 2 All ER 443 at [21], [30]–[36], [82], [119], [124]–[125], [2005] 2 WLR 993. The contrary was not suggested. But there were other considerations which made *X v Bedfordshire* a very exceptional case. Judgment was given in 1995, well before the 1998 Act. No reference was made to the convention in any of the opinions. And, importantly, the very children whose claim in negligence the House had rejected as unarguable succeeded at Strasbourg in establishing a breach of art 3 of the convention and recovering what was, by Strasbourg standards, very substantial reparation: see *Z v UK* (2001) 10 BHRC 384. On these extreme facts the Court of Appeal was entitled to hold, as it did in *D v East Berkshire* (at [83]), that the decision of the House in *X v Bedfordshire*, in relation to children, could not survive the 1998 Act. But such a course is not permissible save where the facts are of that extreme character.

DISPOSAL

The Lambeth appeal

[46] It follows from the foregoing paragraphs of this opinion that the courts below should have held the premises in question to be the homes of the respective appellants and should have held their eviction or proposed eviction to be an interference with their exercise of their right to respect for their homes within the meaning of art 8(2). Their defences should not have been struck out save on the basis that nothing sufficient was pleaded to support them.

[47] The question then arises whether these cases should, even after this lapse of time, be remitted to the county court for consideration whether eviction is necessary in a democratic society, as that expression has been defined in the Strasbourg jurisprudence. I would favour that course if there appeared any reasonable prospect of the court deciding that it was not necessary. But it is clear that under domestic property law the appellants have no right to occupy their respective premises, of which the local authority has an unqualified right to possession. The appellants fall outside the categories to which Parliament has extended a measure of protection. The local authority has no duty to accommodate the appellants, but has a power and duty to manage its housing stock. The appellants have not pleaded or alleged facts which give them a special claim to remain. I am satisfied that if these cases were remitted, possession orders would necessarily be made. I would accordingly, although for reasons differing from those of the Court of Appeal, dismiss these appeals.

The Leeds appeal

[48] It seems to me all but unarguable that the recreation ground at Spinkwell Lane on which the appellants parked their caravans was ever their home within the meaning of art 8(1). On the agreed facts, they had been on the site for two days, without any authority whatever, when the council issued proceedings for possession. There is nothing to suggest that they could show such continuous links with the land as would be necessary if it were to be regarded as their home.

If, however, the land was their home, it is plain that their eviction was in accordance with domestic property law, which had the legitimate end of enabling public authorities to evict unlawful squatters from public land and restore it to public (in this case recreational) use. I can see no ground on which such action could be stigmatised as disproportionate, despite the personal afflictions to which these appellants were unfortunately subject. The facts are far removed from those of *Connors v UK* where the family had been lawful occupiers of the authority's gipsy site, with one relatively brief intermission, for many years. I am satisfied that these appellants could not succeed if the case were remitted to the county court. In any event, they left the site over a year ago. I would accordingly, dismiss this appeal also.

[49] I would, in each case, invite written submissions on costs within 14 days.

LORD NICHOLLS OF BIRKENHEAD.

[50] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. For the reasons he gives, with which I fully agree, I too would dismiss both appeals. I also agree with his observations on the judicial precedent point. On the '*Bruton* tenancy' issue in the *Lambeth* appeal (see *Bruton v London and Quadrant Housing Trust* [1999] 3 All ER 481, [2000] 1 AC 406), I agree with the conclusions and reasoning of my noble and learned friend Lord Scott of Foscote whose speech I have had the advantage of reading in draft. I add some short observations only on the procedural aspects of the main issue. I must first set them in their context.

[51] These appeals concern a subject matter of great importance to many people: the right of a local authority to repossess a property occupied by a defendant as his home. The two sets of proceedings exemplify two typical circumstances where repossession claims are made by a local authority. One is where the defendant was lawfully in possession of property, his rights of occupation were duly terminated, and a possession order was then sought. The other is where the defendant entered upon the local authority's property unlawfully and the local authority then took steps to obtain a possession order.

[52] The problems before the House arise from the impact of the Human Rights Act 1998 in these cases. In both sets of proceedings the defendants contend that eviction would violate their convention right to respect for their home. The House is concerned to give guidance on what should be the general approach to such contentions and, where seriously arguable issues arise, in which court the issues should be decided.

[53] The starting point is clear enough. A possession order made by a court in respect of a defendant's home will be, at least ordinarily, an interference with the defendant's right to respect for his home within the meaning of art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). Equally clearly, in almost all cases of the two types mentioned above that interference will be justified as 'necessary in a democratic society' on one or more of the grounds set out in art 8(2). The interference will be justified because in one case the defendants never had any right to be on the property at all. In the other case the defendants had only the limited rights afforded by the housing legislation. This complex, ever-changing law is testimony to the elaborate steps taken by Parliament to strike an appropriate balance between the competing interests of all those who are in need of homes. The country's housing stock is finite, and for many years the legislature has striven repeatedly to achieve the best and fairest

use of the available housing. Parliament's decisions on this extremely difficult and intricate social problem are to be respected.

[54] I said 'in almost all cases' because inevitably there may be the exceedingly rare case where the legislative code or, indeed, the common law is impeachable on human rights grounds. *Connors v UK* (2004) 16 BHRC 639, regarding the lack of protection for gipsies, is an example. It is this possibility, rare and exceptional though it may be, which gives rise to a hugely important practical problem. Day in, day out, possession orders are routinely made in county courts all over the country after comparatively brief hearings. The hearings are mostly brief because the time needed to dispose fairly of the formalities and also of questions of reasonableness, where they arise, is usually short. This will no longer be the position if, as has been contended, local authorities must now plead and prove in every case that domestic law meets the requirements of art 8.

[55] I am unable to accept this remarkable contention. The course proposed would be a recipe for a colossal waste of time and money, in case after case, on futile challenges to the convention-compatibility of domestic law. On the contrary, despite the possibility of a successful challenge under art 8, I see no reason for the present practice to change. Courts should proceed on the assumption that domestic law strikes a fair balance and that it is compatible with the requirements of art 8 and also art 1 of the First Protocol.

[56] This assumption is of course rebuttable. It is for a defendant to place before the court material necessary to displace this assumption, and he must have a fair opportunity to do so. Like Lord Bingham, I am in no doubt that judges will quickly be able to recognise the highly exceptional case where there is a seriously arguable issue based on the requirements of art 8 or art 1 of the First Protocol.

[57] So far I have referred in quite general terms to the compatibility of domestic law with the requirements of the convention. I must now delve just a little more deeply into the particular types of challenge which may be made, because that has a bearing on which court should decide the issue. At this point it is necessary to recall the two routes by which the 1998 Act has incorporated convention rights into this country's law. These are set out in ss 3 and 6 of the Act. These sections provide the protection afforded to convention rights in United Kingdom law.

[58] Against this background take first a case where the defendant's challenge is to the convention-compatibility of primary or secondary legislation. In such cases a judge in the county court, like every judge in every court, is bound to give effect, should occasion arise, to the interpretive obligation set out in s 3. That is within his jurisdiction. But in the scheme of the Act the s 3 interpretive obligation may lead on to a declaration of incompatibility under s 4, which is a matter not within the jurisdiction of a county court. So, in the rare case where seriously arguable questions of this nature arise in the county court, it will be for the judge to consider whether the more appropriate course is for these questions to be resolved in the High Court.

[59] The human rights challenge may take a different form. A local authority is obliged by s 6 to act compatibly with convention rights. The defendant's contention may be that the local authority's exercise of its power to seek a possession order is, in the circumstances, an unlawful act within the meaning of s 6. As with a challenge to the convention-compatibility of housing legislation, so here it will be a rare case indeed where this allegation can be made good. This is because in the ordinary course a public authority in seeking possession will be doing no more than relying on its ownership of land coupled with the limits on

the defendant's rights of occupation as determined by Parliament or, where the defendant has never had any rights of occupation, coupled with his absence of any rights to be present on the land at all. However, if a convention-compatibility issue under s 6 is raised in county court possession proceedings, that court is the appropriate forum for deciding the issue. It is the appropriate forum because in such a case the defendant is entitled to rely upon this allegation as a defence in the possession proceedings: see s 7(1)(b) of the 1998 Act. If the allegation is made good, the court may grant relief as provided in s 8 of the Act. The relief would include dismissing the possession proceedings or staying a possession order for such a period and on such terms as the court considers just and appropriate. I agree therefore with the summary of the practical position set out in the speech of Lord Bingham (at [39]).

[60] For completeness I mention a third possibility which has nothing to do with the 1998 Act. A defendant may seek to challenge the lawfulness of the local authority's decision to pursue possession proceedings as an improper exercise of its powers quite apart from its obligations under s 6. Here again, this issue can be treated as a defence in the proceedings, in accordance with the principle enunciated in the well-known decision of *Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 461.

[61] These brief observations on s 6 are directed solely at local authorities and other landlords which are public authorities within the meaning of s 6. I say nothing about private landlords. They are not public authorities and they are outside the scope of s 6. The court of course is itself a public authority. Courts are bound to conduct their affairs in a way which is compatible with convention rights. The court's own practice and procedures must be convention-compliant. Whether, and in what circumstances, the court's s 6 obligation extends more widely than this, and affects the substantive law to be applied by the court when adjudicating upon disputes between private parties, still awaits authoritative decision. This point does not call for a decision in the present appeals, nor was the point argued.

LORD HOPE OF CRAIGHEAD.

[62] My Lords, I have had the advantage of reading in draft the speeches of all my noble and learned friends. I agree with Lord Scott of Foscote, for all the reasons he gives, that the appellants in the *Lambeth* appeal had no right under ordinary domestic law to retain possession of their respective properties after the termination of the 1995 lease and had become trespassers with no right to remain. I agree with everything that Lord Bingham of Cornhill has said on the issue of precedent. I also agree, for substantially the same reasons as those given by all my noble and learned friends, that both appeals should be dismissed.

[63] Although the essential point on the main issue has been put much more simply and much more attractively by Lord Nicholls of Birkenhead and Lord Brown of Eaton-under-Heywood, I must deal more fully with the detail of the appellants' argument. It was directed to two main questions. The first was how the right to respect for a person's home under art 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) is to be given effect to by the court where a public authority landowner seeks an order for possession of the premises to which it is undoubtedly entitled under domestic property law. The second was whether the decision of the European Court of Human Rights in *Connors v UK* (2004) 16 BHRC 639 is, as the Court of Appeal put it in its *Leeds*

judgment [2005] EWCA Civ 289 at [26], [2005] 3 All ER 573 at [26], [2005] 1 WLR 1825, 'unquestionably incompatible' with the ratio of the majority in *Harrow London BC v Qazi* [2003] UKHL 43, [2003] 4 All ER 461, [2004] 1 AC 983.

[64] These are important questions, as the answers to them will affect all cases in which the owner of land seeks to recover possession from someone who has no right under domestic law to remain there. I agree with Lord Bingham and Lord Nicholls that the position as it affects private landlords does not call for decision in this case, as the respondents to these appeals are both public authorities. But I do not think that it can be left out of account as we explore the wider implications of the argument. As Mr Sales for the First Secretary of State explained, the art 8(1) right to respect for the home does not distinguish between public authorities and private landlords and landowners. Private landlords and landowners too must obtain an order from the court, and the court itself is a public authority (see [104], below). For the purposes of s 6(1) of the 1998 Act the words 'public authority' embrace a wide and indeterminate variety of bodies, in addition to those that are 'core' public authorities, which perform functions of a public nature: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37 at [6]–[12], [41], [163], [2003] 3 All ER 1213 at [6]–[12], [41], [163], [2004] 1 AC 546. But in my opinion a correct understanding of the basis of the majority decision in *Qazi*'s case and of the Strasbourg jurisprudence both before and after *Qazi*'s case should lead to the conclusion that it is not unquestionably incompatible with *Connors v UK*, although I accept that in one respect the reasoning in *Qazi*'s case needs to be modified. I agree with Lord Scott that such differences as there may be between *Qazi*'s case and the Strasbourg Court as to art 8 defences in possession cases are of no relevance to the issue which the House had to decide in *Qazi*'s case.

[65] The appellants' argument, following the approach favoured by the minority in *Qazi*'s case, gives rise to the following conundrum. They say that every person against whom a public authority seeks a possession order with respect to premises which he occupies as his home must be given a fair opportunity to raise as a defence to the proceedings that the excepting conditions in art 8(2) have not been met on the facts of his case and that, if such a defence is raised, it must be rebutted by the public authority. But what if there is a statutory scheme which covers the case of an occupier, and the scheme itself is not challenged as being incompatible with his convention rights? What if that scheme prescribes conditions that must be met for the obtaining of a possession order by the public authority and the court finds that the requirements of the scheme have all been satisfied? And what if there is no statutory scheme but all the requirements for the making of a possession order by the court under domestic property law, which is not challenged as being incompatible with the occupier's convention rights, have been satisfied? Lord Bingham says of these cases, that it would require highly exceptional circumstances before a defence under art 8(2) would avail the occupiers (see [35], [36], above). But what are these circumstances? What is there in the jurisprudence of the Strasbourg Court that tells us that, in those situations, there is anything left for the court to consider under that article? Does that jurisprudence not teach us that the only question that can be raised under that article is whether the law itself is compatible with the occupier's convention rights and that, so long as the law itself is compatible, it is open to the court to apply it to the facts of each case once the requirements of the law have been satisfied? This is the point that the majority in *Qazi*'s case were seeking to grapple with when they said that, because the domestic property

law gave an unqualified right to immediate possession to the housing authority once service of the notice to quit had terminated the joint tenancy, there was nothing left for the court to consider under art 8 in that case and the judge had been right to strike out the defence and make the possession order.

[66] The jurisprudence of the Strasbourg Court indicates that three requirements must be met under art 8(2) in cases where a possession order is sought before it can be held that the interference with the exercise of the right to respect for the home that will result from the making of the possession order is justified. Article 8(2) provides:

> 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The first question is whether the interference is 'in accordance with the law'. As art 12 of the Universal Declaration of Human Rights which was adopted by the General Assembly of the United Nations in 1948 (Paris, 10 December 1948; UN 2 (1949); Cmnd 7662) puts it, no one shall be subjected to arbitrary interference with his home. The requirement that any interference must be in accordance with the law meets the point that it must not be arbitrary. The next question is whether it has an aim that is identified by that paragraph as a legitimate one. Satisfaction of the housing needs of others is regarded as a legitimate aim for this purpose, because it was intended to promote 'the economic well-being of the country' and 'the protection of the rights of . . . others': see *Blecic v Croatia* (2005) 41 EHRR 185 at 195 (para 58). In *Connors v UK* (2004) 16 BHRC 639 at 658 (para 69) the legitimate aim pursued by the interference was 'the protection of the rights of . . . other[s]'—other occupiers of the site and the public authority as its owner and manager. It is hard to conceive of a case where this requirement would not be met where a landowner seeks to vindicate his right to obtain an order for possession of his property on the grounds that all the requirements that the law lays down for recovery of possession from its occupier by means of a court order have been satisfied. The final question is whether interference in pursuit of that aim is 'necessary in a democratic society'. The notion of necessity implies a pressing social need, and the measure employed must be proportionate to the legitimate aim pursued: see *Blecic v Croatia* (at 195–196 (para 59)). In this context a margin of appreciation is allowed to the government of the contracting state. The scope of this margin of appreciation will depend not only on the aim of the interference but also, where the right to respect for the home is involved, the importance of that right to the individual: see *Gillow v UK* (1989) 11 EHRR 335 at 349 (para 48), *Blecic v Croatia* (at 195–196 (paras 59, 60)). This is the only area for legitimate debate in cases where the other requirements have been satisfied.

[67] But, as I shall seek to show in the following paragraphs, *Connors v UK* is the only case where the Strasbourg Court has held that the making of a possession order against an occupier in favour of a public authority in accordance with the requirements of domestic property law has failed to meet the third requirement in art 8(2). It failed to do so in that case because the making of the order was not attended by the procedural safeguards that were required to establish that there was a proper justification for the interference with the applicant's right to respect for his private and family life and his home. So it could

not be regarded as justified by a pressing social need or as proportionate to the aim being pursued (see 666–667 (para 95)). The point of that case, however, was that the law enabled the public authority to evict the applicant from the site which he had been given a licence to occupy without giving reasons which could be examined on their merits by an independent tribunal. There were exceptional circumstances, but it was the law itself that was defective. The margin of appreciation within which in spheres such as housing the judgment of the legislature will be respected did not save it from this criticism (see 662 (para 82)). It leaves untouched cases, of which *Qazi*'s case is an example, where the judgment of the legislature on issues of property law meets the third requirement of the article.

THE CORRECT STARTING POINT

[68] The key to a proper understanding of the decision in *Qazi*'s case is to be found in an appreciation of the fact that the question whether an interference with the respondent's right to respect for his home is permitted by art 8(2) of the convention raises a question of procedure as well as one of substance. The question of substance is whether, on the facts of that case, the interference with the respondent's convention right is permitted by art 8(2). The question of procedure is whether it is necessary, as the appellants submit, for the question whether the excepting conditions in art 8(2) are met to be considered by the county court in every case where the court is asked to make a possession order. In the view of the majority in *Qazi*'s case the question does not require to be considered by the county court if the case is of a type where an application of the law shows that the outcome is a foregone conclusion, as it was in that case because the tenancy which gave the right to occupy had come to an end on the expiry of a notice to quit. In that situation the exercise would have been a pointless one (see [83], [84], [103], [152]).

[69] The jurisprudence of the European Court to which we must look for guidance as to how the question of substance should be answered does not provide much guidance as to how we should deal with the question of procedure. It is a domestic problem. It is not one which troubles the European Court when it is asked to decide the issues remitted to it by art 41 of the convention. That is why the questions arising under art 8(1) and (2) are so often run together at the admissibility stage, with the result that the Commission or the court, as the case may be, is content to address art 8(2) on the assumption that, or after only a cursory examination of the question whether, the right to respect for the home has been interfered with and has to be justified: see *S v UK* (1986) 47 DR 274 at 278 (para 4), *O'Rourke v UK* App No 39022/97 (26 June 2001, unreported), *Connors v UK* (2004) 16 BHRC 639 at 658 (para 68) (the parties were agreed that the applicant's eviction disclosed an interference with his right to respect for his private life, family life and home), *Blecic v Croatia* (2004) 41 EHRR 185 at 195 (para 54) (the court found, in the light of its finding (at 194 (para 52)) that the flat in question could reasonably be regarded as the applicant's home, that the termination of her specially protected tenancy of it by the domestic courts constituted an interference with her right to respect for her home).

[70] The European Court leaves questions of procedure to the contracting states. Its only concern is that procedures are in place which enable individuals to assert their convention rights where there is a live question as to whether or not they have been violated. How this is to be done is a matter for the domestic system. There is therefore no objection in principle, on convention grounds, to a

system which treats cases where a violation of art 8 of the convention is likely to be a live issue differently from those where it is not. Provided means are in place which enable those cases where this is a live question to be dealt with appropriately, a system which provides for all other cases where possession is sought to be dealt with simply and summarily will not be objectionable. That, no doubt, is why, notwithstanding Lord Steyn's strong condemnation of it in [27] of his dissenting opinion, the decision in *Qazi*'s case which on its own facts did not disclose a breach of the convention right has survived European scrutiny: see [88], below.

[71] In the domestic legal order actions for possession are brought in the county court. In Scotland they are brought under the summary cause procedure in the sheriff court. This has important implications for the way issues as to whether an interference with the art 8 right is justified can be dealt with domestically. These courts do not have unlimited jurisdiction. They cannot make a declaration of incompatibility: see s 4(5) of the 1998 Act. The question whether, and if so to what extent, they have a discretion to make or withhold an order for possession depends, and depends only, on the law which has to be applied to the facts of each case.

[72] The effect of the decision in *Qazi*'s case is that where an order for possession is made by the court in accordance with domestic property law the essence of the art 8(1) right to respect for the home will not be violated. So the question whether the interference is permitted by art 8(2) is not a matter that need be considered by the county court. The law itself provides the answer to that question. The only matter which the court needs to consider is whether the requirements of the law and the procedural safeguards which it lays down for the protection of the occupier have been satisfied. There may perhaps be cases where the party seeking to recover possession is a public authority and there is a live issue as to whether the requirements of the law and the procedural safeguards which it lays down fall short of what is required to satisfy the convention right. The law in this area is guided by the decisions of the European Court in Strasbourg, and it must be acknowledged that it is capable of being adapted to new and as yet unexplored circumstances. But cases of this kind are likely to occur only very rarely in practice. As a general rule all the court need concern itself with are the requirements of the law and the relevant safeguards.

[73] Almost every working day judges sitting in the county and sheriff courts throughout the United Kingdom are presented with a long list of claims by public authorities seeking orders for possession of houses and other property forming part of their social housing stock against their occupiers. Almost all of these cases are brought by local authorities, housing association trusts or registered social landlords with respect to property let to tenants on a secure tenancy under s 79 of the Housing Act 1985 and the equivalent legislation that operates in Scotland under the Housing (Scotland) Act 2001. For the most part they are cases where, assuming that one or other of the various grounds for possession which are laid down in Sch 2 to the 1985 Act or its Scottish equivalent is established (and there is usually little or no dispute about this), the court cannot make an order for possession unless it considers it reasonable to make the order, or it is satisfied that suitable alternative accommodation will be available and it is also reasonable to make the order: see s 84(2) of the 1985 Act and s 16 of the 2001 Act.

[74] The hearings on this issue are, for the most part, brief and to the point. They are often unopposed, although an order cannot be made in accordance with the statute unless the party seeking possession can show that the statutory

requirements are satisfied. Where there is opposition the hearings are frequently adjourned for a short period for the parties to reach agreement. Where agreement cannot be reached a full hearing is necessary. But this rarely happens. On the whole, despite the high volume of cases, the system appears to work well. It is widely seen as fair, quick and reliable. The legislation relating to housing in the public sector has been in place for over 20 years. It was recently reviewed and the Scottish equivalent of the 1985 Act was re-enacted in 2001 with only minor modifications by the Scottish Parliament. Nowhere has it been suggested in the Strasbourg case law that a public authority landlord's claim to possession which has been upheld on these grounds in accordance with the statute was a violation of the occupier's right to respect for his home under art 8 of the convention.

[75] At the other extreme, and much less frequent, are actions brought by the owners of land in the public or private sector for the recovery of possession of property over which the occupiers had no security of tenure at all. These include licensees, other than those such as persons employed in agriculture whose licence to occupy is protected by statute, tenants such as those in property with a high rateable value who are excluded from the security of tenure which most tenants in the private sector have under the Housing Act 1988 and other statutes whose contractual right to occupation of the property has been terminated, occupiers under student or holiday lets and trespassers. The absence of any statutory protection in these cases is the result of a deliberate decision by Parliament that the owner's right to recover possession should in these cases be unqualified, other than by the requirement that an order for possession must be sought from the court which ensures that procedures are in place to safeguard the rights of the occupier. That was the position in *Connors v UK* under the legislation that was then in force. The significance of the decision in that case is that it has shown that cases falling within this end of the spectrum may raise issues as to whether the law itself satisfies the requirements of art 8(2). This is not something that can be dealt with in the county court.

[76] In between these extremes there are a wide variety of lettings of one kind or another controlled by statute or by the common law which it is impossible accurately to summarise in a few sentences. The position is complex because it has been appreciated for many years that the law in this area has a strong social content. By the end of the war of 1914–18 many countries had enacted provisions controlling rent: see John W Willis 'A Short History of Rent Control Laws' (1950) 36 Cornell LQ 54, pp 67–71. By 1950 some 150 countries had adopted such laws: see Megarry *The Rent Acts* (10th edn, 1967) vol 1, p 7. Hand in hand with rent control goes security of tenure. In *Feyereisel v Parry* [1952] 1 All ER 728 at 733, [1952] 2 QB 29 at 37, Denning LJ said that the guiding light through the darkness of the Rent Acts was to remember that they confer personal security of tenure on a tenant in respect of his home. The same approach is taken almost every day in the county and sheriff courts as the judges apply the legislation by which Parliament controls the provision of housing in the public sector. As Lord Porter observed in *Baker v Turner* [1950] 1 All ER 834 at 842, [1950] AC 401 at 417, the rules of formal logic must not be applied with too great strictness to legislation of this kind.

[77] The issues addressed by this legislation involve questions of social and economic policy where the choices that are to be made can easily be seen as falling within the discretionary area of judgment best left to the considered opinion of the legislature. They include decisions as to the circumstances in which protection of tenure is not to be given to those who have no contractual

right to occupy as well as those in which there is to be security of tenure, and if so, on what terms. Cases falling into this category are typical of those where the Strasbourg Court will respect the judgment of the contracting state. They are most unlikely to raise an issue as to whether the right to possession which is afforded by domestic law violates the art 8 convention right. If they do, the county court in the exercise of its ordinary jurisdiction should, so far as it is possible for it to do so, deal with it: see [109], below. But no example has been referred to in the Strasbourg jurisprudence where a claim to possession in such a case has failed on art 8(2) grounds.

[78] This is the background to the claim by the appellants in these two appeals that the orders for possession which were made against them in the county court violated their rights under art 8(1) of the convention.

THE APPEALS

[79] In the *Lambeth* appeal the properties in question are owned by Lambeth. The appellants were let into possession of them by the London and Quadrant Housing Trust (LQHT) at various times from about 1981, initially under an informal arrangement with Lambeth and from 1986 under the authority of a licence which was replaced in 1995 by ten-year leases granted by Lambeth to LQHT which were subject to a break clause providing for early termination by either party. In 1999 Lambeth gave notice to terminate these leases. The county court judge, Judge Roger Cooke, held that the effect of the notices was that Lambeth had an unqualified right to possession and that, as the appellants were not tenants of Lambeth, they had no security of tenure under the 1985 Act. The defence under art 8 was struck out. The Court of Appeal, applying *Qazi*'s case, dismissed the appeal: *Kay v Lambeth London BC* [2004] EWCA Civ 926, [2005] QB 352, [2004] 3 WLR 1396.

[80] In the *Leeds* appeal the respondent local authority is the freehold owner of a recreation ground onto which the appellants, who are gipsies, moved without the respondents' consent on 13 June 2004. The respondents issued possession proceedings against them two days later on 15 June 2004 on the ground that they were trespassers. It was not disputed that the appellants had entered onto and remained in occupation of the land without any licence from or consent of the respondents. The case having been transferred to the High Court, Judge Bush held that the appellants had no defence to the claim for possession under art 8. The Court of Appeal held that the decision in *Qazi*'s case was incompatible with *Connors v UK*. But, regarding itself as bound to follow the decision in *Qazi*'s case, it dismissed the appeal: [2005] 3 All ER 573.

[81] The following points are common to both cases. First, the claim by the owners of the properties is that the appellants have no right to remain in occupation of them. They seek to vindicate their right, as owners of the land, to exclusive occupation of the properties. Secondly, the owners in each case are a public authority. They are under a statutory duty to use the property which they own for public purposes—in Leeds' case as land held for use as a public recreation ground, in Lambeth's case as part of the land held for use as part of its social housing stock. Thirdly, as they are public authorities, they are under a duty not to act in a manner that is incompatible with the appellants' convention rights: see s 6(1) of the 1998 Act. Fourthly, the factual circumstances are different from those which were before the House in *Qazi*'s case. In neither of these cases was there a right to possession of the property granted by the owner of the land which under domestic law was no longer enforceable against it by the occupier.

THE ARTICLE 8(2) ISSUE

[82] In *Connors v UK* (2004) 16 BHRC 639 the European Court of Human Rights held that the eviction of the applicant and his family, who were gipsies, from a local authority gipsy site which they were licensed to occupy so long as they did not cause a nuisance was a violation of art 8 because it had not been attended by the requisite procedural safeguards. The appellants submit that this case shows the decision of the majority in *Harrow London BC v Qazi* [2003] 4 All ER 461 was wrong, and that the decision in *Qazi*'s case should be departed from because it is incompatible with what the European Court said in *Connors v UK*.

[83] The facts in these two cases were different, as indeed are the facts in these two appeals. But the scope of the argument is such as to raise again the question of procedure to which the majority drew attention in *Qazi*'s case. In para 5.74 of the Law Commission's Consultation Paper *Renting Homes I: Status and Security* (Consultation Paper No 162, March 2002), Part V, 'The Impact of Human Rights Law', it is said that a procedure which gives a discretion to the county court by requiring it to consider whether having regard to art 8(2) the making of an order would be proportionate is inimical to the purpose of providing a quick and reliable way of evicting tenants whose leases have by the operation of law been terminated. This conclusion has all the more force if the case is one where the person in possession never had a right to occupy the land in the first place.

[84] Mr Luba QC for the appellants submitted that it was a norm of convention law that every case of a person's dispossession from his home had to be justified under art 8(2). He said that a merits review was required in every case, and that there was no room for a short cut. It was not sufficient for the public authority to show that it had an absolute right to possession. Its claim for possession must be accompanied in every case by a pleaded case that the claim for possession was justified under art 8(2). Mr Sales for the First Secretary of State submitted that in principle it was open to any defendant to proceedings for possession to advance an art 8(2) defence in the county court. He differed from Mr Luba in that he accepted that in the vast majority of cases it would be sufficient for the public authority simply to assert its absolute right to possession. But he maintained that in every case—even in those cases where the statutory reasonableness test had to be satisfied by a housing authority—there was a balance that had to be struck under art 8(2) of the convention. This was a matter about which the county court had to be satisfied in every case, notwithstanding the fact that in the overwhelming majority of cases this would, as Lord Bingham points out, be both burdensome and futile: see [29], above.

[85] Despite Mr Luba's assurances to the contrary, there are substantial grounds for thinking that, if it were to be open to a defendant to raise this issue in the county court in every case where the premises are occupied as his home, this would have serious consequences for the system which Parliament has chosen for dealing with possession cases—as the Law Commission has pointed out. He would have to be given a fair opportunity to advance this defence, as the art 8 right carries with it the right to respect for the interest safeguarded in the decision-making process. So he would have to be permitted to plead the defence if he wished to do so. This would have consequences both for the public authority, which would have to rebut it, and for the court which would have to consider and dispose of the issue in every case where it was raised. This is the procedural problem under the domestic system which confronts us, as it did in *Qazi*'s case.

[86] Any procedure that requires consideration of the art 8(2) issue on its merits would be bound to delay the proceedings in one way or another. It is preferable, wherever possible, that the matter should be dealt with in the county court, rather than by adjourning the proceedings to enable the defendant to apply in the High Court for permission for judicial review of the decision to apply for the possession order. A defendant has the right to contend in his defence that the decision of a public authority to recover possession was one which no reasonable person could consider justifiable, as Lord Fraser of Tullybelton explained in *Wandsworth London BC v Winder* [1984] 3 All ER 976 at 978, 981, [1985] AC 461 at 506, 509. But it has to be borne in mind that it would not have been open to the county court to hold that the claim by the public authority in *Connors v UK* to seek to recover possession was unlawful as it was invoking a right to possession that was provided by statute: see s 6(2)(b) of the 1998 Act, which provides that s 6(1) does not apply to an act if the authority was acting so as to give effect to or enforce provisions under primary legislation which cannot be read or given effect to in a way which is compatible with the convention rights. If the ground of challenge is that the legislation is incompatible with art 8 and the statute cannot be read or given effect in a way that is compatible with that article, the county court judge must make the order required by the legislation notwithstanding the incompatibility. The defendant can, if he wishes, apply to the High Court for a declaration of incompatibility. But it would serve no good purpose for the proceedings in the county court to be adjourned to allow him to do so.

[87] In *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26 at [20], [2004] 3 All ER 785 at [20], [2004] 2 AC 323 Lord Bingham acknowledged that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg Court:

> 'This reflects the fact that the European Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the ECtHR. From this it follows that a national court subject to a duty such as that imposed by s 2 [of the 1998 Act] should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under s 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the convention, but such provision should not be the product of interpretation of the convention by national courts, since the meaning of the convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'

[88] The question is whether the jurisprudence of the Strasbourg Court now requires us to say that county courts trying a claim for possession must in every case conduct a review of the defendant's personal circumstances before they can be satisfied that the requirements of art 8(2) are met before they make a possession order or, if the proposition for which Mr Luba contends is too wide, how far if at all the decision in *Qazi*'s case needs to be modified in the light of the decision in *Connors v UK*. The question is not made easier by the fact that when *Qazi*'s case reached the Strasbourg Court it was dismissed as inadmissible without any reasons having been given, and by the absence of any mention of the House's

decision in *Qazi*'s case in the court's judgment in *Connors v UK*. Lord Steyn's declaration in *Qazi*'s case (at [27]), that it would be surprising if the views of the majority on the interpretation and application of art 8 withstood European scrutiny, cannot have escaped attention in Strasbourg. But two opportunities to meet his challenge have now been passed over. This is not a ground for complacency. But it does make it all the more important for us to be careful lest taking account of the decision in *Connors v UK* leads us to breach Lord Bingham's rule that national courts should not outpace the Strasbourg Court. The 'no more' part of this rule is just as important as the 'no less' part.

[89] I propose therefore to examine this issue in three stages: (1) to look again at the Strasbourg cases before *Qazi*'s case, (2) to look at the Strasbourg cases after *Qazi*'s case and (3) then to re-examine *Qazi*'s case itself to see whether that decision should be departed from and, if so, to what extent.

THE STRASBOURG CASES BEFORE *QAZI*'S CASE

[90] I do not think that any advantage is to be gained by conducting a fresh review of all the decisions of the Strasbourg institutions that were considered in *Qazi*'s case. There was a good deal of common ground between the majority and the minority as to the cases that were relevant and their effect. It was agreed that art 8 does not in terms give a right to be provided with a home and does not guarantee the right to have one's housing problem solved by the authorities: see [6] and [50], [53], [55] per Lord Bingham and myself. It was agreed that sufficient and continuous links are required for a house to be considered a 'home' for the purposes of art 8: see [9] and [64], [68] per Lord Bingham and myself. It was accepted by both parties that the Strasbourg jurisprudence did not provide a conclusive answer to the case in the respondent's favour: see [13] per Lord Bingham. Lord Bingham's analysis of the relevant Strasbourg authority was matched step by step in the analysis of it by the majority. There was only one case about the effect of which there was any real disagreement. This was *S v UK* (1986) 47 DR 274. In that case the Commission, when considering whether a house could be regarded as the applicant's home and whether her right to respect for her home could be regarded as interfered with, attached importance to the fact that she was not entitled in domestic law to succeed to the tenancy of the dwelling house and remain in possession of it on the death of her partner who had been the tenant of it (see 278 (para 4)).

[91] For reasons which he explained (at [10]) and were concurred in by Lord Steyn, Lord Bingham concluded that the ruling in *S v UK* no longer offered guidance on the issue of justification as it was made before the formulation of the sufficient and continuing links test in *Gillow v UK* (1989) 11 EHRR 335 at 348–349 (para 46). The majority however took a different view on this point: myself, at [62], [67]; Lord Millett, at [97], [98], [103]; Lord Scott of Foscote, at [126]–[129], [134]. I recognised that the decisions in *S v UK* and in *Gillow v UK* were not entirely consistent with each other. But I drew support from the Commission's approach in *S v UK* (at 278 (para 4)), to the contractual relations established between the local authority and the deceased partner for the proposition that the purpose of art 8 must be kept firmly in mind when one is considering the question whether the right to respect for the home is being interfered with, and for my conclusion (at [83]) that such interference with that right as flowed from the claim for possession by the public authority landlord did not violate the essence of it. Lord Millett and Lord Scott were of the opinion that, although it was clumsily expressed, the Commission's decision in *S v UK*, properly understood, remained

authority for the proposition that the applicant's house could no longer be regarded as attracting the protection of art 8 so as to afford a defence to the local authority's claim to possession as she no longer had any right vis-à-vis the landlord to remain there: see per Lord Millett at [97]; Lord Scott at [134].

[92] I acknowledge Lord Bingham's point that *S v UK* has not been relied on in any later case (see [19], above). This is, of course, not untypical of decisions on admissibility that turn on their own facts. It must be approached with caution too because its reasoning is not entirely in tune with the view developed in later cases that the real issue in these cases is not whether there is an interference but whether that interference is justified. Having reflected again on what was said in *S v UK* in the light of the other pre-*Qazi* authorities, I remain of the opinion that the Commission's decision in that case provides authority for the proposition that the right to respect for the home does not provide the occupier with a defence to the local authority's claim where it was entitled under domestic law to enforce its contractual right to have the property back at the end of the tenancy. This was, of course, a crucial step in the reasoning of the majority that the Strasbourg jurisprudence shows that contractual and proprietary rights of a person entitled to possession cannot be defeated by a defence based on art 8. In none of the Strasbourg cases before *Qazi*'s case was anything said which diminished or detracted from such a person's contractual and proprietary rights, as Lord Scott was careful to emphasise (at [139]).

[93] In *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996 at 999, [1977] 1 WLR 1345 at 1349 Lord Wilberforce said that the best way to resolve a question as to which there are two eminently possible views is by the considered majority opinion of the ultimate tribunal, and that much more than mere doubts as to the correctness of that opinion are needed to justify departing from it. Assuming, which I would respectfully question, that there were two eminently possible views as to whether the Commission's decision in *S v UK* provides the guidance which was found in it by the majority, the fact is that it was the considered opinion of the majority that it did provide that guidance. In these circumstances it would only be if the Strasbourg cases after *Qazi*'s case showed that the majority were wrong that your Lordships would be justified now in departing from what that case decided. This, of course, leaves open the question whether the present cases are distinguishable on their facts from *Qazi*'s case, which I shall reserve until later.

THE STRASBOURG CASES AFTER *QAZI*'S CASE

[94] Three cases must be considered under this heading. The first is *Connors v UK* (2004) 16 BHRC 639, which was a decision issued on 27 May 2004. The second is *Blecic v Croatia* (2005) 41 EHRR 185. The third is the decision of the Strasbourg Court, issued in March 2004 shortly after the oral hearing in *Connors v UK* which took place on 22 January 2004, that the application in *Qazi*'s case was inadmissible. The judgment of your Lordships' House in *Qazi*'s case [2003] 4 All ER 461 was delivered on 31 July 2003.

[95] The significance of *Connors v UK* is best judged by examining the court's assessment of the general principles that fell to be applied to the question whether there had been a violation of art 8 (see 662–663 (paras 81–84)). The parties were agreed that art 8 applied to the circumstances of that case and that the eviction of the applicant disclosed an interference with his right to respect for, among other things, his home (see 658 (para 68)). They were also agreed that the interference was in accordance with the law and that it pursued a legitimate aim (see 658

(para 69)). This left for examination by the court the question whether the interference was 'necessary in a democratic society' (see 658 (para 70)).

[96] In its discussion of the general principles bearing on this issue the court dealt with the matter in three stages. First, there was the scope of the margin of appreciation in cases which give rise to general social and economic considerations. The scope of this margin depends on the context of the case. Particular significance is to be attached to the extent of the intrusion into the personal sphere of the individual. Then there was the question of procedural safeguards which the state has provided when fixing the regulatory framework. The decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by art 8. Finally there was the vulnerable position of gipsies as a minority. This meant that some special consideration should be given to their needs and their different lifestyle both in the regulatory framework and in reaching decisions in particular cases. As the court put it in the last sentence of para 84 (at 663), there is to this extent a positive obligation on the contracting states by virtue of art 8 to facilitate the gipsy way of life.

[97] The conclusion which the court reached, after examining the facts from this standpoint, was that the eviction of the applicant and his family was not attended by the requisite safeguards (see 666–667 (para 95)). The particular defect that was identified was the failure to provide a proper justification for the serious interference with the applicant's rights that resulted from his eviction. The court had noted (at 663 (para 85)) that the respective merits of the arguments as to whether there had been a breach of the licence conditions were not examined in the county court proceedings. They were only concerned with the fulfilment of the formal requirements of the eviction, as the council had relied simply on the power to give 28 days' notice to obtain summary possession without proving any breach of licence. The court held that, in the absence of that justification, the applicant's eviction from the local authority site could not be regarded as justified by a pressing social need or as proportionate to the legitimate aim that was being pursued.

[98] I agree with the Court of Appeal's conclusion in the *Leeds* appeal that the decision in *Connors v UK* is incompatible with the proposition that the exercise by a public authority of an unqualified right to possession will *never* constitute an interference with the occupier's right to respect for his home, and that it will *always* be justified under art 8(2): see [2005] 3 All ER 573 at [26]. Nowhere in my speech in *Qazi*'s case did I subscribe to a proposition in such extreme terms. On the other hand, as I read the Strasbourg Court's judgment, it did not go so far as to say that the recovery of possession will constitute an interference with that right in every case where the premises are occupied by the person as his home. *Connors v UK* was decided, as is usual in that court, on a relatively narrow ground which was related to its own facts.

[99] As the court said in *Connors v UK* at the end of para 85 (at 663), the central issue was whether, in the circumstances, the legal framework applicable to the occupation of pitches on local authority gipsy sites provided the applicant with sufficient procedural protection of his rights. There is an echo here of the point made in para 84 (at 663) about the vulnerable position of gipsies as a minority and the need for some special consideration to be given to their needs and different lifestyles. No mention is made of the general principles or their application to the situation that was discussed in *Qazi*'s case, where the issue was whether the procedure by which a public authority landlord recovers possession of

residential accommodation from a former tenant whose tenancy has come to an end by operation of law by asserting its unqualified right to possession was incompatible with the rights guaranteed by art 8. It is, of course, possible to envisage special cases other than that of gipsies. But the fact that special consideration must be given to their needs does not justify the proposition that this must be done in every case. As the Court of Appeal acknowledged ([2005] 3 All ER 573 at [29]), a statutory regime may itself achieve the balance required by art 8(2) so that, if the judge complies with it, the requirements of art 8(2) will be satisfied.

[100] There was also criticism in *Connors v UK* of the procedure that was adopted in the county court, on the ground that it was concerned only with the fulfilment of the formal requirements for the eviction. The case for the local authority was that it had an absolute and unqualified right to possession, as the applicant's licence had been validly terminated. But this criticism was made in the context of a case where there was a need to give special consideration to the needs of gipsies and their different lifestyles, which was absent from the local authority's decision that the licence should be terminated and for which the statutory regime then in force did not provide. There was no request that the possession proceedings should be stayed for judicial review of the question whether the decision to seek possession was arbitrary, unreasonable and disproportionate.

[101] The facts in *Blecic v Croatia* were also unusual. The applicant was the holder of a specially protected tenancy of a publicly-owned flat in a town in Croatia. Among the conditions that were applied to a specially protected tenancy by the relevant statutes was the holder's entitlement to purchase it under favourable conditions. But it was open to the public authority to terminate it if the holder ceased to occupy the flat for an uninterrupted period of six months. The applicant left the flat in July 1991 to stay with her daughter in Rome for the summer. As this was intended to be for a short period only she left her furniture and belongings in the flat. She locked it and asked a neighbour to take care of it during her absence. But soon after she left it there was an escalation in the armed conflict which made living in the city dangerous and uncomfortable. Her pension was stopped, she lost the right to medical insurance and her flat was broken into in her absence and occupied by another family. She decided to stay in Rome and did not return until May 1992, by which date a civil action had been brought against her for the tenancy to be terminated. After protracted legal proceedings the Supreme Court held in February 1996 that the applicant's non-use of the flat was unjustified as all residents in the town were exposed to the same living conditions as she would have been, had she made the considerable mental and physical effort that would have been required to provide for her basic living needs there.

[102] The court dealt first with the question whether the flat was the applicant's home within the meaning of art 8 of the convention. It held (at 194 (para 52)) that it was, as it was satisfied that she did not intend to abandon it and had made appropriate arrangements for its maintenance with a view to its return. Having found that the termination of the tenancy was an interference with her right to respect for her home, the court then concentrated on the question whether the interference was justified. It was not disputed that the interference was in accordance with the law, and the court held that a legitimate aim was being pursued by the statutory provision which enabled the public authority to terminate specially protected tenancies held by individuals who no longer lived

in the publicly-owned flats that had been allocated to them. The only point at issue was whether, in applying that provision to the applicant's case, the Croatian courts infringed her right to respect for her home in a manner that was disproportionate (see 195 (para 58)).

[103] In its introduction to its judgment on this issue (at 195–196 (para 59)) the court made the familiar points that the crucial questions were whether there was a pressing social need, whether the measure employed was proportionate to the legitimate aim pursued and that the scope of the margin of appreciation enjoyed by the national authorities depended not only on the nature of the aim of the restriction but also on the nature of the right involved. Having examined these issues and decided (at 197 (para 66)) that the decisions of the Croatian courts were based on reasons that were not only relevant but also sufficient for the purposes of art 8(2), the court (at 198 (para 68)) dealt with the question whether the applicant had been involved in the decision-making process, looked at as a whole, to a degree that was sufficient to provide her with the requisite protection of her interests. As it was satisfied on this point too, it held (at 198 (paras 70, 71)) that there had been no violation of art 8.

[104] The important point which emerges from the court's decision for present purposes is the need for the applicant to be sufficiently involved in the decision-making process leading to her eviction so that she had the opportunity to present the arguments which in her view were decisive for the outcome of the proceedings. Article 8 contains no explicit procedural requirements, as the court acknowledged at the outset of para 68 (at 198). But it said that the decision-making process must be fair and such as to ensure due respect of the interests safeguarded by art 8. The task which the court set for itself therefore, basing itself on its existing case law, was to determine whether, having regard to the circumstances of the case and the importance of the decision to be taken, the applicant was involved to a sufficient degree in the decision-making process, seen as a whole, to provide her with the requisite protection. It is also worth noting that the institutions whose actions in the domestic system were under scrutiny in that case were the courts in the contracting state. This suggests that no relevant distinction can be drawn between cases where the party seeking possession is a public authority and those where it is not. The court itself has a function to fulfil in all cases where there is an interest under art 8 that needs to be safeguarded, as it too is a public authority.

[105] That however was a case where, as in *Connors v UK*, the question whether the interference with the applicant's home was justified under art 8(2) was a live issue. As I said earlier in this opinion (see [70], above), the court's only concern as to the question of procedure is that procedures are in place which enable individuals to assert their convention rights where there is a live question as to whether or not they have been violated. The circumstances which led to the court's decision that there was an interference with the right to respect for the home that had to be justified were quite different from those in *Qazi*'s case. There was a real and substantial issue as to whether the Supreme Court's decision to terminate the specially protected tenancy in the unusual circumstances of that case was proportionate to the legitimate aim which was being pursued by the public authority. It does not follow that a procedure which enables this issue to be addressed to the extent that was found to be necessary in *Blecic v Croatia* must be available in every case.

[106] This provides the context for an assessment of the significance of the court's decision that the application in *Qazi*'s case was inadmissible. This is after

all a decision of the Strasbourg Court. The court was provided with the entirety of your Lordships' judgment in that case, as it was submitted as an annexe to the application. So it had before it in full the two dissenting opinions, including Lord Steyn's observation that it would be surprising if the views of the majority on the interpretation and application of art 8 withstood European scrutiny. The fact that there was a sharp division of opinion on these issues could not have been put more clearly. The application was held nevertheless, without detailed discussion, to be inadmissible. What are we to make of this?

CONCLUSIONS

[107] I would draw the following conclusions. I think that it is reasonable to think that the court accepted that the applicant had established that the house was his home for the purposes of art 8 and that the enjoyment of his right to respect for his home was interfered with at least to some extent by the order for possession sought by the local authority. To that extent therefore there was an issue to be considered under art 8(2). But I think that it is reasonable also to think that the court was satisfied that the requirements of art 8(2) were so obviously met by the law which was applied in that case that there was, as Lord Millett put it at [103], simply no balance left for the court to strike between the interference with the applicant's right and the legitimate aim that was being pursued by the local authority. As Lord Scott says, the obvious inference is that the Strasbourg Court were satisfied that there was nothing more to be said in Mr Qazi's case. The tenancy had come to an end, and he no longer had any right to remain in occupation of the premises. His personal circumstances were irrelevant.

[108] These conclusions can be fitted into the lessons to be drawn from *Connors v UK* and from *Blecic v Croatia* in this way. There will be some cases of a special and unusual kind, of which *Connors v UK* is an example, where the interference with the right to respect for the home which results from the making of a possession order will require to be justified by a decision-making process that ensures that 'some special consideration' (the words used in *Connors v UK* at 663 (para 84)) is given to the interests safeguarded by art 8. If there is such a defect the law will need to be amended to provide the necessary safeguards. But there will be many other cases where there are no such special circumstances—where the person's right to occupy the premises as his home has simply been brought to an end by the operation of law and his eviction is necessary to protect the rights under the law of the landowner. In these cases it is enough that the eviction is in accordance with what the law itself requires as the case of *Blecic v Croatia*, in which it was held that the requirements of the law had been satisfied, demonstrates. Further consideration of the interests safeguarded by art 8 will be unnecessary. Cases where the home was occupied under a tenancy, or some other interest falling short of a tenancy, which has been brought to an end in accordance with the relevant law, as in *Qazi*'s case, will fall into this category. The interests safeguarded by art 8 will be sufficiently protected by the fulfilment of the formal requirements for the eviction laid down by the relevant statute or by the common law.

[109] The contrary conclusion, for which the appellants contend, is that procedures must exist in the domestic system for a consideration of the interests safeguarded by art 8 in every case where a person is evicted from his home by the making of a possession order. A requirement that the art 8 issue must be considered by the court in every case by taking into account the defendant's personal circumstances would go further than a reading of these three cases,

taken together and in the light of the prior Strasbourg jurisprudence, will justify. It would breach Lord Bingham's 'no more and no less' rule. The extent and consequences of this breach should not be underestimated. It would drive a deep wedge into the domestic system for the handling of possession cases and would be a colossal waste of time and money, as Lord Nicholls indicates. So I agree with him that judges in the county courts, when faced with such a defence, should proceed on the assumption that domestic law strikes a fair balance and is compatible with the occupier's convention rights.

[110] But, in agreement with Lord Scott, Baroness Hale and Lord Brown, I would go further. Subject to what I say below, I would hold that a defence which does not challenge the law under which the possession order is sought as being incompatible with art 8 but is based only on the occupier's personal circumstances should be struck out. I do not think that *McPhail v persons, names unknown* [1973] 3 All ER 393, [1973] Ch 447 needs to be reconsidered in the light of Strasbourg case law. Where domestic law provides for personal circumstances to be taken into account, as in a case where the statutory test is whether it would be reasonable to make a possession order, then a fair opportunity must be given for the arguments in favour of the occupier to be presented. But if the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these: (a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with art 8, the county court in the exercise of its jurisdiction under the 1998 Act should deal with the argument in one or other of two ways: (i) by giving effect to the law, so far as it is possible for it do so under s 3, in a way that is compatible with art 8, or (ii) by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court; (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable: see *Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 461. The common law as explained in that case is, of course, compatible with art 8. It provides an additional safeguard.

THE DECISION IN *QAZI'S* CASE ITSELF

[111] How then does the decision of this House in *Qazi's* case stand up to examination when it is looked at in the light of the subsequent decisions of the Strasbourg Court? I would hold that there are no grounds for concluding that the decision itself, on its own facts, was unsound. I would draw support for this conclusion from [the] fact that the respondent's subsequent application to Strasbourg was held to be inadmissible. On the other hand I would acknowledge that Lord Scott's observation in *Qazi's* case (at [139]), that in no case has art 8 been applied to detract from the contractual and proprietary rights of the person entitled to possession is no longer true. *Connors v UK* was such a case. The local authority in that case was relying on its contractual and proprietary rights when it applied for the eviction order. As I have already said (see [98], above), I agree with the Court of Appeal's conclusion in the *Leeds* appeal that the decision in *Connors v UK* is incompatible with the extreme propositions that the exercise by a public authority of an unqualified right to possession will never constitute an

interference with the occupier's right to respect for his home, and that it will always be justified under art 8(2): [2005] 3 All ER 573 at [26]. a

[112] But it needs to be stressed that the facts in *Connors v UK* were entirely different from those in *Qazi*'s case. There was no need in *Qazi*'s case to give special consideration to the needs of gipsies and their different lifestyles, and the background to the local authority's decision to seek a possession order was that a valid notice to quit had been served on the local authority by one of the tenants b of the tenancy. *Connors v UK* does not resolve the problem as to how the need to give special consideration to cases of that kind where the law itself is defective—and I do not confine this category to gipsies—can be fitted in to the domestic system which requires that orders for possession must be sought in the county court. So I do not think that the decision in *Connors v UK* is incompatible with the view of the majority in *Qazi*'s case that there is no need for c a review of the issues raised by art 8(2) to be conducted in the county court if the case is of a type where the law itself provides the answer, as in that situation a merits review would be a pointless exercise. In such a case the art 8 defence, if raised, should simply be struck out.

[113] For these reasons I do not think that the reasoning of the majority in d *Qazi*'s case should be departed from. But I accept that the reasoning needs to be clarified. In the light of the subsequent Strasbourg cases I would now place greater emphasis on the need for the court to provide a remedy in those special cases of a kind not considered in *Qazi*'s case where it is seriously arguable that the right to possession which is afforded by domestic law violates the convention e right. Lord Millett suggested in [109] of his speech in *Qazi*'s case that judicial review would provide the appropriate remedy. On balance I think that it would be better for the issue to be dealt with by way of defence to the proceedings in the county court, to the extent that the limits on the jurisdiction of that court permit it to do so (see [86], [110], above).

[114] There may, however, be cases like *Connors v UK* where the f incompatibility with the art 8 convention right lies in primary legislation which the county court is being asked to apply to the case by the public authority: see [86], above. In such a case it would be open to the High Court to make a declaration of incompatibility, if it was not possible to read or give effect to the legislation under s 3 of the 1998 Act in a way which was compatible with g the convention right. But the legislation would nevertheless still have to be enforced, unless the decision of the public authority to seek to enforce it when faced with that incompatibility could be said, when judicially reviewed, to be arbitrary, unreasonable or disproportionate. The decision could not be held in the county court to be an unlawful act within the meaning of s 6 of the 1998 Act: see s 6(2)(b). The fact that the question of incompatibility that was raised in h *Connors v UK* was not capable, under the domestic system, of being dealt with effectively in the county court because of the limits on its jurisdiction reinforces, rather than detracts from, the proposition that a defence which is raised in that court under art 8 should be struck out unless the legislation can be read and given effect in a way that is compatible or it raises an issue as to its incompatibility that j ought to be considered in the High Court.

CONCLUSION IN THE *LAMBETH* APPEAL

[115] For the reasons given by my noble and learned friend Lord Scott of Foscote I would reject the arguments which Mr Luba advanced on the private law issue. The appellants' right to continue in occupation of premises over which

they never had any rights granted to them by the landowner was brought to an end by the operation of law when Lambeth gave notice terminating the leases to LQHT. They have no right to remain there indefinitely, which would be the effect of denying to Lambeth its unqualified right to possession of the premises on the ground that to give effect to this right would be incompatible with art 8. Their interests will be sufficiently protected by the fulfilment of the formal requirements for the eviction, which demand proof by the public authority landowner of its entitlement to obtain an order for possession in the exercise of its property rights. I would dismiss this appeal.

CONCLUSION IN THE *LEEDS* APPEAL

[116] These appellants had been present on the recreation ground for only two days when proceedings were taken against them for the making of the possession order. Unlike the applicant and his family in *Connors v UK*, they never had any right of any kind to make their home there. They were trespassers. They are, of course, gipsies who are in a vulnerable position as a minority. But they had not established the links with the place which they were occupying that were needed for it to be considered as their home within the meaning of art 8(1). Even if it was, such consideration as ought to be given to their needs and their different lifestyle under art 8(2) is met, on the facts of their case, by requiring proof by the public authority of its entitlement as the owner of the land to obtain an order for possession in the exercise of its property rights. I would dismiss this appeal also.

LORD SCOTT OF FOSCOTE.

INTRODUCTION

[117] My Lords, an appellate committee of seven has heard two appeals together in each of which the main issue for decision is the scope that should be given to art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[118] Article 8, entitled 'Right to respect for private and family life', provides: '1. Everyone has the right to respect for his private and family life, his home and his correspondence.' And, in art 8(2), imposes a bar on interference by a public authority with that right:

> 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[119] The art 8(1) 'right to respect' covers, potentially, a very wide spectrum of personal interests (see Lester and Pannick *Human Rights Law and Practice* (2nd edn, 2004) pp 261–262 (para 4.8.2)), but these appeals are concerned only with the art 8 right of a person to respect for his home. It is contended by the appellants, against whom possession orders have been made, that whenever an owner of land takes legal proceedings to recover possession of the land from an occupier who has his home on the land, the action taken by the owner constitutes, prima facie, an interference with the occupier's right to respect for his home, and, consequently, that an order for possession cannot properly be made

unless the art 8(2) conditions are satisfied. It may be, of course, that the occupier has some ground under ordinary domestic law for resisting the possession application. In that case reliance by the occupier on art 8 rights will be unnecessary. But in a case in which the occupier is a trespasser with no right under ordinary domestic law to resist the landowner's possession application, art 8(2), it is said, provides a further ground for resistance and obliges the judge who hears the application to be satisfied, before making an order for possession, that the order is necessary and proportionate in furthering one or other of the legitimate aims referred to in art 8(2).

[120] In *Harrow London BC v Qazi* [2003] UKHL 43, [2003] 4 All ER 461, [2004] 1 AC 983 this House by a majority rejected that contention and held (at [84] per Lord Hope of Craighead) that 'contractual and proprietary rights to possession cannot be defeated by a defence based on art 8'. If that is right, both these appeals must fail. But the issue has come back before the House, this time with an appellate committee of seven, because in *Connors v UK* (2004) 16 BHRC 639 the European Court of Human Rights in Strasbourg held that the eviction of a gipsy family and their caravan from a local authority gipsy site on which the family had no contractual or proprietary right to remain constituted a violation of their art 8 right to respect for their home. It is submitted that the decisions in *Qazi*'s case and *Connors v UK* are irreconcilable and your Lordships are asked to follow the latter case, reverse the former case, and hold that the possession orders made against the appellants violated their art 8 rights. The main issue for your Lordships is whether or not to accede to that submission.

[121] In both the cases now before the House the lower courts held themselves bound to follow *Qazi*'s case notwithstanding the later decision of the Strasbourg Court. The question has been raised whether the requirement imposed by s 2(1) of the 1998 Act, that a domestic court determining a question which has arisen in connection with a convention right must take into account 'any judgment, decision, declaration or advisory opinion' of the Strasbourg Court, relieved the domestic courts of their obligation to follow the prior ruling of your Lordships in *Qazi*'s case. This, too, is an important issue regardless of whether on these appeals your Lordships conclude that the *Connors v UK* decision requires the conclusion that the *Qazi* ruling was wrong. On both these two important issues the First Secretary of State has intervened and, through Mr Philip Sales, has assisted your Lordships with written and oral submissions. As to the issue of precedent, I am in complete agreement with what my noble and learned friend Lord Bingham of Cornhill has said in [40]–[45], above and to which there is nothing that I can usefully add.

[122] In addition, however, there is a domestic private law issue which arises in the *Lambeth* appeal. The appellants contend that they were entitled to be treated by Lambeth Borough Council (Lambeth) as tenants, not as trespassers. If that is right, it is common ground that the tenancies under which they say they are entitled to occupy the properties in question were never terminated and the possession orders made against them must be set aside. It is convenient to deal with this private law issue before grappling with the art 8 issue. First, however, I should refer to the essential facts of the two cases.

THE FACTS IN THE *LEEDS* CASE

[123] The appellants are the Maloney family. There are five of them. They are travellers, whose home is in one or more caravans, often on the move from one place to another.

[124] The respondent is Leeds City Council (Leeds). Leeds is the owner of a recreation ground at Spinkwell Lane in Leeds. On or about 24 May 2004 a number of travellers with their caravans entered the recreation ground and parked their caravans there. This was without Leeds' permission. After a few days the first group of travellers moved on, but others took their place. On 13 June 2004 the Maloneys moved on to the recreation ground. Two days later, on 15 June, Leeds commenced proceedings in the Leeds County Court for possession of the recreation ground. The particulars of claim said that the travellers were trespassers and refused to vacate the recreation ground. 24 June 2004 was the return date specified on the claim form. The Maloney family were the only occupiers of the recreation ground to attend court on that date and contest the possession application. They were formally joined as defendants. The case was adjourned to be heard on 18 October.

[125] Leeds' claim to possession was based on its ownership of the recreation ground which was not in dispute. Nor was it in dispute that the Maloneys were trespassers who had entered onto and remained on the land without any licence or consent from Leeds. They sought to defend by relying on art 8 and by contending that Leeds was in breach of its statutory obligations to provide suitable sites where gipsies could park their caravans. They said, also, that their personal circumstances were 'exceptional' in that several members of the family suffered from medical and psychiatric problems, three members of the family were school age children and in the 12 months preceding their entry onto the recreation ground the family had been evicted or forced to move under threat of eviction more than 50 times. Leeds responded by notifying the family that their status as unintentionally homeless and in priority need was accepted and by accepting a duty to help them obtain accommodation.

[126] On 22 September the case was transferred to the High Court. The art 8 issue was dealt with as a preliminary issue and, on 25 October, Judge Bush, sitting as a deputy judge of the High Court, following *Qazi*'s case, held that contractual and proprietary rights to possession could not be defeated or qualified by reliance on art 8. So he made an order for possession forthwith. He refused a stay of execution but gave leave to appeal to the Court of Appeal.

[127] Following the order for possession and the refusal of the stay of execution the Maloneys and their caravans left the recreation ground. But, none the less, they gave notice of appeal to the Court of Appeal. The appeal seems to have been prosecuted simply for the purpose of ventilating the art 8 issue. Important though this issue undoubtedly is, it seems to me a misuse both of public money and of court time to have prosecuted on appeal a point that had become moot. No one has suggested that an appellate court would have had power to order Leeds to permit the Maloneys and their caravans to re-enter the recreation ground, trespassers again as they had been before. No one has suggested that any monetary award should be made in favour of the Maloneys and against Leeds.

[128] There is a further point to be made on the facts of the Maloney case. Whether the approach to art 8 taken in *Qazi*'s case be right or wrong, it is common ground that the article does not give any protection to the occupation of land or a building unless the land or building is the occupier's 'home'. If a traveller with his caravan enters as a trespasser upon a piece of land, by what process does the small area of land on which he happens to station his caravan and, presumably, a few square yards surrounding that small area of land, become identified as his 'home'? If a homeless person enters an unoccupied building,

places his few possessions in one of the rooms and spends the next night or two there, does the room become his 'home' in relation to which he is entitled to an art 8 'right of respect'? The answer must, I think, be no. It is clearly possible for a trespasser to establish a 'home' in property that belongs to someone else but whether and when he has done so must be matters of degree. In *Buckley v UK* (1997) 23 EHRR 101 at 115 (para 63) the Strasbourg Commission said that—

> '[w]hether or not a particular habitation constitutes a "home" which attracts the protection of Article 8(1) will depend on the factual circumstances, namely, the existence of sufficient and continuous links.'

[129] It could not, in my opinion, credibly be suggested that in the two days between the entry by the Maloneys on the recreation ground and the commencement by Leeds of possession proceedings the Maloneys had established 'sufficient and continuous links' with the piece of land on which their caravan stood so as to constitute that singular piece of land their art 8(1) 'home'.

[130] In my opinion, the *Leeds* case was a very bad one to choose for the purpose of revisiting the correctness of *Qazi*'s case since, whether the appellants' arguments be right or wrong, it is grotesque to suppose that the Maloneys could claim that the commencement by Leeds of possession proceedings to recover its recreation ground was an interference with their right to respect for a 'home' that they had established on Leeds' land. Be that as it may, the *Lambeth* case, by contrast, seems to me a very good test case.

[131] Both Judge Bush and the Court of Appeal, following *Qazi*'s case, rejected the Maloneys' reliance on art 8.

THE FACTS IN THE *LAMBETH* CASE

[132] This case involves residential premises as opposed to open spaces on which caravans may be parked. The properties in question are owned by Lambeth and are mostly in the area of Rushcroft Road London SW2. They are, and have been for several years, occupied by the appellants and it is common ground that they constitute the appellants' homes for art 8 purposes. The properties are part of Lambeth's 'short life' housing stock, that is to say, they 'are not in a condition suitable for normal housing use or capable of being rendered so suitable within finances available to Lambeth' (per Auld LJ at [7] of his Court of Appeal judgment).

[133] London and Quadrant Housing Trust (LQHT) is a charitable housing trust. In 1979 Lambeth and LQHT came to an informal arrangement under which Lambeth licensed 'short life' premises to LQHT for LQHT to make the premises available as accommodation for persons who were homeless but to whom Lambeth owed no statutory duty to arrange accommodation. LQHT purported to grant licences to those whom it allowed into occupation. Each of the appellants is a person who was allowed by LQHT into occupation of a Lambeth owned short life property under a purported licence granted by LQHT.

[134] In 1986 the informal arrangement between Lambeth and LQHT was replaced by a formal licence agreement which reflected the previous informal arrangements. On 4 December 1995, however, Lambeth granted LQHT a ten-year lease of the short life properties. Clause 2 of the lease gave Lambeth the right to determine the ten-year terms on the expiry of six months and one week's notice in writing to LQHT stating that Lambeth required possession of the demised properties.

[135] On 24 June 1999 this House announced its decision in *Bruton v London and Quadrant Housing Trust*, now reported in [1999] 3 All ER 481, [2000] 1 AC 406. The House held that the 'licence' arrangement between LQHT and Mr Bruton, who had been allowed by LQHT into occupation of one of the properties that had been subject to the 1986 licence arrangements and, since 4 December 1995, subject to the 1995 lease, had created as between LQHT and Mr Bruton a relationship of landlord and tenant and not, as LQHT had supposed, a relationship of licensor and licensee. It followed from the *Bruton* decision that each of the occupiers who had been allowed by LQHT to occupy properties on similar terms to those under which Mr Bruton occupied was a tenant of LQHT, not a licensee. So each of the appellants in the *Lambeth* case was a tenant of LQHT.

[136] Lambeth's response to the *Bruton* decision was to give notice to LQHT to terminate the 1995 lease. The notice was given on 23 November 1999. Lambeth then notified the occupiers that they were, or would soon become, trespassers vis-à-vis Lambeth and would have to leave their respective residences. Six actions were commenced over the period between July 2000 and the end of that year. In each action Lambeth claimed possession of a property of which LQHT had been the lessee under the 1995 lease. The possession claim was made against the occupier of the property. Each occupier, who had, as a result of *Bruton*'s case, been a tenant of LQHT, responded by claiming to have become, on the determination of the 1995 lease, a tenant of Lambeth. And, in addition, each occupier claimed that his art 8 right to respect for his home gave him an alternative defence to Lambeth's possession claim.

[137] Judge Roger Cooke, in the county court, and the Court of Appeal followed *Qazi*'s case and rejected the occupiers' reliance on art 8. As to the private law tenancy defence, that too was rejected both at first instance and on appeal. A number of grounds in support of the tenancy defence that were relied on in the courts below were not relied on here. Two grounds only have been relied on here and to those I now turn.

ARE THE APPELLANTS TENANTS OF LAMBETH?

[138] The first of the two grounds relied on starts with the proposition that the grant of the 1995 lease by Lambeth to LQHT involved, by necessary implication, a surrender by LQHT of the licence it had been granted by Lambeth in 1986. But, it is said, it was not open to LQHT to surrender the tenancies that, as *Bruton*'s case had held, LQHT had granted to the appellants. So, the argument proceeds, the appellants' *Bruton* tenancies must have survived the surrender by LQHT of its 1986 licence and have become, in the scintilla temporis between the surrender of the licence and the grant of the 1995 lease, tenancies held directly of Lambeth. Lambeth thereby became, and has remained, bound by the tenancies. The grant of the 1995 lease to LQHT interposed LQHT once more between Lambeth and the appellants but could not detract from the rights that the occupiers had already, in the scintilla temporis, acquired against Lambeth.

[139] Alternatively, it is said that when Lambeth served notice on LQHT to determine the 1995 lease, the only effect of the notice, as between Lambeth and the appellants, was to clear away LQHT's intermediate estate. The notice could not affect the appellants' rights under their tenancies which predated the grant of the 1995 lease.

[140] For the purpose of both these arguments the appellants rely on the principle established by *Mellor v Watkins* (1874) LR 9 QB 400, namely, that where

A has granted a tenancy to B and B has granted a sub-tenancy to C, a surrender by B to A of B's tenancy does not determine C's sub-tenancy but has the effect that A becomes C's landlord ie C holds his tenancy directly from A. The principle was explained by Blackburn J (at 405):

> '[B] had no power to derogate from his landlord's [A's] rights. Subject to those rights, he had a right to sub-let; and by doing that he could not prevent the landlord from giving a notice to quit in invitum, which would have determined both [B's] and the defendant's [C's] interest. But no voluntary act on the part of [B], by which his own interest might be determined, could put an end to the interest which he had created in the defendant. [B's] tenancy was put an end to as far as he was concerned, as between him and [A], by the voluntary surrender of his lease; but the defendant's [C's] tenancy . . . still remained, until determined by a proper notice to quit.'

[141] The reason why this principle is applicable where an intermediate tenant who has granted a sub-tenancy surrenders his tenancy to his landlord is that the sub-tenancy is a derivative interest created by the intermediate landlord out of the interest created by the head landlord. The sub-tenancy belongs to the sub-tenant, not to the intermediate landlord. It is an item of property that cannot be given away by someone to whom it does not belong. It follows that it cannot be surrendered by the intermediate landlord. A surrender is a consensual transaction between landlord and tenant. It derives its effect from the terms of that transaction, not from the terms of the lease or tenancy that is surrendered. The rights of a sub-tenant cannot be reduced or terminated by a transaction to which the sub-tenant is not a party (see *Barrett v Morgan* [2000] 1 All ER 481 at 485, [2000] 2 AC 264 at 271 per Lord Millett).

[142] If, on the other hand, the termination of the lease is provided for in the terms of the lease itself, eg a provision in the lease enabling the landlord or the tenant to give a week's notice terminating the lease, a sub-tenancy cannot, absent statutory intervention, survive the termination of the tenancy by such a notice. The interest of the sub-tenant was created out of the term created by the lease and was, therefore, always subject to termination in accordance with the terms of the lease. *Pennell v Payne* [1995] 2 All ER 592, [1995] QB 192 is a recent reaffirmation by a strong Court of Appeal of this principle and was approved by this House in *Barrett v Morgan* [2000] 1 All ER 481 at 488, [2000] 2 AC 264 at 274.

[143] But the *Mellor v Watkins* principle and the *Pennell v Payne* principle can have no relevance to a case in which a tenancy has been granted by someone without any estate in the land in question. The *Bruton* tenancies are all of that character. LQHT was, when it granted the *Bruton* tenancies, merely a licensee of Lambeth. The tenancies were not granted by Lambeth and were not carved by LQHT out of any estate that Lambeth had granted to LQHT. They were not derivative estates. LQHT, prior to the grant of the 1995 lease, had no estate in the land. It merely had a contractual licence. In these circumstances the *Mellor v Watkins* point that the intermediate landlord cannot by a consensual surrender give away an interest that belongs to a sub-tenant has no substance. True it is that LQHT could not by a surrender of its licence give away or prejudice the rights of the *Bruton* tenants against itself, LQHT. But these rights never were enforceable against Lambeth. Once the LQHT licence had been terminated the appellants were trespassers as against Lambeth.

[144] An analogous situation would arise if a person not the owner of land but in adverse possession of it were to grant a tenancy of the land to another.

As between the grantor and grantee there would be a valid 'non-estate' tenancy. But unless and until the adverse possession had continued for the requisite 12 years the tenancy would not bind the true owner of the land. An agreement by the adverse possessor to deliver up the land to the true owner would not affect the rights of his tenant against him, the landlord, but equally could not turn the tenant into the true owner's tenant or give the tenant any rights against the true owner.

[145] So, too, the consensual termination of LQHT's contractual licence from Lambeth could not, in my opinion, turn the *Bruton* 'non-estate' tenants into estate tenants of Lambeth. I agree with Mr Luba, counsel for the appellants, that the *Bruton* tenants were not bound by a transaction between Lambeth and LQHT to which they were not parties. But the contended for conclusion that they therefore became tenants of Lambeth is a non-sequitor. They never were *sub*-tenants holding, via a grant from LQHT, an interest created by Lambeth. They were tenants of LQHT holding an interest created by LQHT. The *Mellor v Watkins* principle has, in my opinion, no application to such a case.

[146] As to the effect on the *Bruton* tenancies of the grant of the 1995 lease to LQHT and the termination of that lease in 2000, there are two points to be made. First, I agree with the appellants that when in 1995 LQHT were granted a term of years by Lambeth the *Bruton* tenancies became, vis-à-vis Lambeth, no longer 'non-estate' tenancies but estate tenancies. The *Bruton* tenancies were, so to speak, fed by the estate that their landlord, LQHT, had acquired.

[147] But that estate was from the outset subject to the terms of the 1995 lease. The termination of that lease in 2000 in accordance with the termination provisions contained in it terminated the entitlement of the *Bruton* tenants to claim an estate derived from and binding on Lambeth: see *Barrett v Morgan* [2000] 1 All ER 481 at 486, [2000] 2 AC 264 at 272 where Lord Millett referred to a sub-tenant's derivative title as precarious 'for it cannot survive the natural termination of the head tenancy in accordance with its terms agreed before his subtenancy was created'. The 'estate' tenancies held by the appellants were derived from and could not survive the termination of the 1995 lease. The 'non-estate' *Bruton* tenancies could survive as against the grantor of them, LQHT, but they were not binding as against Lambeth.

[148] In my opinion, therefore, in agreement with Judge Cooke and the Court of Appeal, the appellants had no right under ordinary domestic law to retain possession of their respective properties after the termination of the 1995 lease. They had become, vis-à-vis Lambeth, the owner of their properties, trespassers with no right to remain.

THE ARTICLE 8 ISSUE

[149] These appeals have proceeded on the footing that at the heart is the issue whether there is an inconsistency between the Strasbourg Court's judgment in *Connors v UK* and the judgment of this House in *Qazi*'s case and, if so, to what extent. The Court of Appeal in Leeds thought that the two were inconsistent. A differently constituted Court of Appeal in the *Lambeth* case (at [106]) distinguished *Connors v UK* as being applicable only to cases involving gipsies but Mr Luba QC's art 8 submissions to the House on both these appeals were based on the proposition that there were substantial inconsistencies between *Qazi*'s case and *Connors v UK*. My Lords I believe this focus to be misdirected. There are, I would accept, inconsistencies between *Qazi*'s case and *Connors v UK* but they are minor. Much more important is an analysis of the Strasbourg art 8 jurisprudence, ending

with *Connors v UK* and *Blecic v Croatia*. If that is done then I think it becomes apparent that such differences as there are between the approach of the majority in *Qazi*'s case to art 8 defences in possession cases and the approach of the Strasbourg Court to art 8 defences in possession cases is of no relevance to cases like those now before the House or, indeed, to a case such as *Qazi*'s case.

[150] Let me start with the state of Strasbourg art 8 jurisprudence as it stood when the House heard the appeal in *Qazi*'s case. The Strasbourg case law as it then stood was examined and analysed by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead. In the opinion I gave, I expressed the view that in a case where the person occupying the property as his home had no legal or contractual right to remain there, as against the legal owner of the property, a claim by the owner to recover possession would not engage art 8 at all. But Lord Bingham, Lord Hope, Lord Steyn and Lord Millett thought differently and I would accept that it is now settled that such a claim does engage art 8. The contrary view is not, and has not been since *Qazi*'s case, in issue. It follows that art 8(2) comes into play in all such possession cases. But the Strasbourg jurisprudence showed, also, that where an ordinary housing possession claim is being made, whether by a local authority landlord eg *S v UK* (1986) 47 DR 274, a private landlord eg *Di Palma v UK* (1986) 10 EHRR 149, a mortgagee eg *Wood v UK* (1997) 24 EHRR CD 69, an art 8 defence cannot assist the occupier to resist a possession order sought by the legal owner. A fortiori art 8 could not assist an occupier who had entered and remained on the property as a trespasser. In each of the cases to which I have referred the ex-occupier's art 8 complaint was dismissed. In *S v UK* the Commission said (at 278 (para 4)) that the possession order—

> 'was clearly in accordance with the law and was also necessary for the protection of the contractual rights of the landlord to have the property back at the end of the tenancy.'

In *Di Palma v UK*, the Commission said (at 155–156) that the interference with the applicant's art 8 rights brought about by the forfeiture of her lease on account of her failure to pay a service charge—

> 'was in conformity with Art. 8(2) as a measure which was in accordance with the law and necessary in a democratic society for the protection of the rights of others.'

For 'the rights of others', read 'the rights of the landlord'. In *Wood v UK* the Commission said (at 70–71) that the repossession of the applicant's home on account of her failure to keep up repayments of the mortgage loan—

> 'was in accordance with the terms of the loan and the domestic law and was necessary for the protection of the rights and freedoms of others, namely the lender.'

In none of these cases did the Commission undertake a balancing exercise which put into the scale the personal difficulties and problems of the occupier whose home had been the subject of the possession order.

[151] Contrast, on the other hand, the Strasbourg approach to the art 8 cases where the interference with the 'right to respect' for the home did not consist of an application for possession by the owner. (1) In *Gillow v UK* (1989) 11 EHRR 335, a Guernsey case, the issue concerned a provision of the housing legislation under which a person not resident in Guernsey required a licence to take up residence there. This provision was applied to Mr and Mrs Gillow. They were refused a

licence and their occupation of the residence they had acquired for themselves some years earlier was declared unlawful by the domestic courts. On their complaint to Strasbourg the court examined all the facts, held that the housing law provisions were not per se inconsistent with art 8 but that the decision to refuse Mr and Mr Gillow the requisite licence did constitute an art 8 breach (see 353 (para 58)). (2) *Buckley v UK* (1997) 23 EHRR 101 is an important case. This was a gipsy case. The art 8 issue arose because the applicant, who with her family lived in caravans on land that she had acquired for that purpose, had been refused planning permission for that use of the land. An enforcement notice had been served. The Commission had held that the enforcement notice was 'excessive and disproportionate' (at 120 (para 84)) but the case then went to the full court. The court looked carefully at the justification for the application of the statutory planning controls to the applicant, noted (at 129 (para 74)) that it was for the national authorities to make the initial assessment of the necessity for the enforcement measures and said (at 130 (para 76)) that—

> '[w]henever discretion capable of interfering with the enjoyment of a Convention right such as the one at issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled law that ... the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.'

The court then (at 132 (para 84)) held that the planning authorities, in deciding to apply enforcement measures, had paid proper regard to the applicants' interests. The court emphasised that 'it is not the court's task to sit in appeal on the merits of [the planning authorities'] decision'. So no violation of the applicant's art 8 rights was found. I would, however, draw particular attention to the court's emphasis on the need for 'procedural safeguards'. This emphasis is found also in *Connors v UK*.

[152] I have mentioned *Gillow v UK* and *Buckley v UK*, neither of which was a possession order case, for the purpose of the contrast they present when compared with the ordinary housing possession cases. There are several other non-possession order cases but none adds anything to assist in the clarification of the Strasbourg jurisprudence relating to the possession cases. I should mention, however, *Larkos v Cyprus* (1999) 7 BHRC 244. This was a possession case which, on analysis, seems to me to have had a good deal in common with, and therefore to be of assistance in understanding, *Connors v UK*. The applicant, Larkos, was a tenant of the house in which he lived. His landlord was the government. His tenancy was terminated by the government and an eviction order was made against him. This, as I would now accept, was an interference with his art 8 right to respect for his home. Statutory provisions applicable in Cyprus gave a degree of security of tenure to domestic tenants that did not extend to domestic tenants of government-owned property. The applicant complained that this statutory discrimination constituted a violation of his rights under art 14 of the convention in conjunction with art 8. He said there was no good reason why he should enjoy less protection than tenants of private landlords. Both the Commission and the court agreed. The court (at 252 (para 31)) said that—

> 'the legislation was intended as a measure of social protection for tenants ... A decision not to extend that protection to government tenants living

side by side with tenants in privately-owned dwellings requires specific justification . . .' a

—and that the government had failed to provide 'any convincing explanation' for that decision.

[153] In *Qazi*'s case the majority, of whom I was one, held that 'contractual and proprietary rights to possession cannot be defeated by a defence based on article 8' (at [84] per Lord Hope of Craighead). Mr Qazi and his wife had been tenants of a local authority house. They had parted company and Mrs Qazi had served a notice to quit on the landlords. This had the effect in law of terminating the tenancy. Mr Qazi wanted to remain in the house and applied for a new tenancy in his sole name; but his application was refused. The council said they wanted to let the house to someone else on their housing list. They instituted possession proceedings in the county court. Mr Qazi had no right under ordinary domestic law to remain in the house but he resisted the possession application on the ground that his art 8 right to respect for his home was being unlawfully interfered with. The trial judge held that once his legal and equitable right to occupy the house had come to an end the house could not constitute his 'home' for art 8 purposes. So the judge made a possession order. The Court of Appeal ([2001] EWCA Civ 1834, [2002] HLR 276) did not agree that the house no longer constituted Mr Qazi's home and remitted the case to the county court in order for the issue as to whether the interference with his art 8 right could be justified under art 8(2) to be decided. On the council's appeal to this House we all agreed that the Court of Appeal's conclusion on the 'home' issue was correct but the majority took the view that it would be pointless to remit the case to the county court since it was plain that the art 8(2) point would have to be decided in the council's favour.

[154] The conformity of the majority's opinion on the art 8(2) point with Strasbourg jurisprudence was confirmed when Mr Qazi took his art 8 complaint to Strasbourg where it was peremptorily dismissed. The court dismissed his complaint as being manifestly ill-founded and inadmissible. This decision by the court was entirely consistent with their 1995 decision in *Ure v UK* App No 28027/95 (27 November 1996, unreported). My noble and learned friend Lord Bingham (at [23], above) has expressed doubt whether any reliable inference can be drawn from the finding of inadmissibility made in respect of Mr Qazi's application. The inference I would draw is the obvious one, namely, that the court thought his art 8 complaint could not succeed because his eviction could clearly be justified under art 8(2). His tenancy had come to an end and there was nothing more to be said. I would draw comparable inferences from the decisions in *S v UK*, in *Di Palma v UK* and in *Wood v UK*.

[155] It is true that the Strasbourg jurisprudence is not entirely consistent. In *Ure v UK*, for instance, the Commission appear to have reviewed the manner in which the council had 'balanced the various interests involved, such as the interest of the leaving co-tenant, of those in need of accommodation, and of the applicant' before concluding that the council's decision to evict the applicant was neither arbitrary nor unreasonable. And in *Marzari v Italy* (1999) 28 EHRR CD 175, where the applicant had been evicted for failure to pay his rent and had prayed in aid, in support of his art 8 complaint, his serious medical condition, the court (at 180) said that—

'[t]o the extent that the [Trentino Institute for Housing] aimed at recovering possession of the apartment on the ground that the applicant had ceased to pay the rent, the Court considers that the impugned decision had a legitimate

purpose under paragraph 2 of Article 8, namely the protection of the rights of others . . .'

but then went on to consider the applicant's medical condition in connection with the question whether the eviction was necessary in a democratic society. The court found that it was, mainly, I think, because the applicant had been 'never co-operative' and had not 'use[d] the [a]venues which were available to him and which were even pointed out to him in order to avoid the eviction'. Very similar comments could have been made about the applicant in *Di Palma v UK*.

[156] None the less, despite some inconsistencies, the state of Strasbourg jurisprudence, at the time *Connors v UK* was decided, exhibited, in relation to art 8 defences to possession applications made by the owners of properties that constituted the homes of the occupiers from whom possession was sought, the following features: (1) There had been no case in which the grant of a possession order to enable the owner to evict from possession a person who was, or had become, a trespasser had been held to constitute a breach of the latter's art 8 right to respect for his home. (2) In the majority of cases the right of the owner to a possession order had been treated as axiomatic once it had become clear that the occupier had no contractual or proprietary right as against the owner to remain in possession. (3) But if the domestic law rules applicable to the relationship between the owner and the occupier included some unusual feature that placed the occupier in a position of particular disadvantage, that feature of the law, if insufficiently or unconvincingly justified, might lead to a finding of an art 8 infringement. It may be that *Larkos v Cyprus* should be regarded as an example of this. It so happens that the complaint made was an art 14 complaint. But the grounds on which the complaint was held to be well founded seem to me to show that if the complaint had been couched as an art 8 complaint it would, for the same reasons, have been held to be well founded.

[157] Both *Connors v UK* and *Blecic v Croatia* are, in my opinion, consistent with this analysis of the pre-*Connors v UK* jurisprudence. There are three features of *Connors v UK* that contributed to the court's conclusion that the eviction of the family from the local authority caravan site constituted a breach of their art 8 right to respect for their home.

[158] First, the security of tenure given by the Mobile Homes Act 1983 to travellers licensed to station their caravans on privately owned caravan sites was not extended to travellers licensed to station their caravans on local authority owned sites. The court was not persuaded by the government's attempt to justify this discrimination which raised an issue of the same nature as that which in *Larkos v Cyprus* had been successfully raised as an art 14 issue. In *Larkos v Cyprus* the result would have been the same if the complaint had been an art 8 complaint. In *Connors v UK* the result on this point would have been the same if the complaint had been dealt with as an art 14 complaint.

[159] Second, Strasbourg jurisprudence in relation to art 8 and gipsies has established that contracting states have a positive obligation 'to facilitate the gipsy way of life' (see the *Connors v UK* judgment at 663 (para 84)). The court said that—

> 'some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases . . .'

It was this requirement for 'special consideration' to be given to gipsies that led the Court of Appeal in the *Lambeth* case to conclude that the principles expressed by

the Strasbourg Court in *Connors v UK* were not applicable to Kay and the other *Bruton* tenants. a

[160] The third notable feature of *Connors v UK* is the importance placed by the court on 'procedural safeguards'. The applicant had sought permission to apply for judicial review of the local authority's decision to terminate his licence to remain on the caravan site. But the High Court had refused permission. In consequence, the reasons why the local authority had wanted him off the site were never b challenged in court proceedings. Under the applicable domestic law the local authority did not have to justify their decision to terminate his licence but in fact their reason had been that they thought Mr Connors and his family had been making a nuisance of themselves on the site. Mr Connors denied that that was so but, his attempt to seek judicial review of the decision having foundered, the issue c was never judicially tested.

[161] The three features to which I have referred provide the context for the Strasbourg Court's *Connors v UK* judgment, a context that has no counterpart in the facts of either of the appeals now before the House (nor in the facts of *Qazi*'s case). There is no unusual or discriminatory feature of the legal framework under which Lambeth in the *Bruton* tenancy appeals and Leeds in the Maloney appeal d became entitled to possession orders in respect of their respective properties. In the Maloney case, whatever positive obligation there may be for Leeds to provide sites for gipsies and their caravans, the Maloney family cannot claim that two days of trespassing with their caravans on a local authority recreation ground enabled them to claim an art 8 right of respect for the patch of recreation ground on which they e happen to have parked the caravans.

[162] As to 'procedural safeguards', each of the *Bruton* tenants filed a pleading setting out the basis on which his art 8 defence, as well as his domestic law defence, was based. The art 8 defences were given due judicial consideration but were struck out as being incapable of constituting a defence to Lambeth's possession f claim. Whatever 'procedural safeguards' are requisite, they cannot bar a court from ruling in a particular case that the pleaded facts and matters relied on are not capable of outweighing in the balance the contractual and/or proprietary right to possession of the owner of the property in question. If the home occupier thinks the judge's ruling to be in error, the ruling can, as happened in the *Bruton* tenancy cases, be reviewed on appeal, or on an application for permission to appeal. g

[163] *Blecic v Croatia* (2005) 41 EHRR 185 is an interesting example of the Strasbourg Court's approach to a case where the interference with the home has involved an unusual statutory provision. *Blecic v Croatia* was not a case of an owner of property seeking possession from a home occupier. Mrs Blecic had left her flat in Zadar, Croatia, which she occupied under a 'specially protected' tenancy granted h by the local authority, in order to visit her daughter in Rome. While she was away armed conflict erupted in the area, her pension ceased to be paid and she lost the right to medical insurance. So she stayed in Rome for some nine months. During her absence another family moved into her flat and the local authority commenced proceedings to terminate her tenancy. The proceedings were taken in reliance on j a provision of the applicable housing legislation which said that a specially protected tenancy could be terminated if the tenant ceased to occupy the flat for a period exceeding six months without justified reasons. So the issue was whether Mrs Blecic had justified reasons for staying away for nine months. The course of the proceedings was somewhat convoluted but, despite some successes in the lower courts, Mrs Blecic lost both in the Croatian Supreme Court and in the

Constitutional Court. She then took her complaint to Strasbourg and lost there as well.

[164] The Strasbourg Court explained its approach (at 197 (para 65)). They said that in socio-economic matters such as housing the domestic authorities should be accorded a wide margin of appreciation and that the judgment of the domestic authorities as to what was necessary to achieve its objectives should be respected unless that judgment was manifestly without reasonable foundation. They said that the court—

> 'will accept the judgment of the domestic authorities as to what is necessary in a democratic society unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued.'

The court held, further (at 198 (para 70)) that they were satisfied—

> 'that the procedural requirements implicit in Art. 8 of the Convention were complied with and that [Mrs Blecic] was involved in the decision-making process to a degree sufficient to provide her with the requisite protection of her interests.'

So Mrs Blecic lost.

[165] It is informative, I think, to compare what was said in *Blecic v Croatia* with what had been said nine months earlier in *Connors v UK*. Where interference with gipsies' art 8 rights had happened, the court said that 'particularly weighty reasons of public interest by way of justification' were required and that the margin of appreciation to be afforded to the national authorities 'must be regarded as correspondingly narrowed' (see *Connors v UK* at 663 (para 86)). Accordingly, the court was not persuaded that 'the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family [had] been sufficiently demonstrated' (see *Connors v UK* at 666 (para 94)). But in *Blecic v Croatia*, a housing case, the margin of appreciation was held to be wide and the judgment of the domestic authorities was to be accepted unless manifestly ill-founded.

[166] In both *Connors v UK* and *Blecic v Croatia* the Strasbourg Court reviewed with art 8 spectacles, first, the legal framework under which the home occupier had been deprived of his home. In *Blecic v Croatia* that framework passed muster. In *Connors v UK* it did not. Second, the court reviewed the manner in which the legal framework had been applied. In *Blecic v Croatia* that, too, passed muster. In *Connors v UK*, the review was of the local authority's decision to seek a court order to evict the Connors family. The only domestic law review of that decision consisted of the adverse ruling on the application for permission to seek judicial review of the decision. That review was held to be inadequate.

[167] So what are the implications of these two Strasbourg judgments, first, for the House's decision in *Qazi*'s case and, more important, for the appeals now before the House? As to *Qazi*'s case, the domestic law which left Mr Qazi, one of the joint tenants, without a tenancy once his wife, the other joint tenant, had served a notice to quit terminating the tenancy, had no special or discriminatory feature which might have attracted the attention of the Strasbourg Court on an art 8 review—as, indeed, the result when *Qazi*'s case did reach Strasbourg demonstrated. As to the decision of the local authority to seek possession of the property from Mr Qazi and not to grant him a new tenancy, that decision, on the approach exemplified in *Blecic v Croatia*, was within the wide margin of appreciation available to local housing authorities faced with conflicting demands for a scarce commodity. This, too,

is demonstrated by Strasbourg's rejection of Mr Qazi's art 8 complaint. The conclusion that the decision in *Qazi*'s case is consistent with Strasbourg jurisprudence is further supported by the absence of any mention of *Qazi*'s case either by counsel in the course of the *Connors v UK* hearing or by the Strasbourg Court in its *Connors v UK* judgment.

[168] It is right to notice, however, that *Connors v UK* and *Blecic v Croatia* do show that in two types of case where an owner is seeking to recover possession of his property the absence of any contractual or proprietary right of the home occupier to remain in possession may not be conclusive. The first type of case is where an arguable art 8 objection can be taken to some aspect of the statutory and common law rules that entitle the owner to possession. *Connors v UK* was such a case. So was *Larkos v Cyprus*. So, too, was *Blecic v Croatia* although the argument in the end failed. The second type of case is where the procedural means available to the home occupier for challenging the decision by the owner of the property to evict him are inadequate. *Connors v UK* was thought by the Strasbourg Court to be such a case. Subject to that qualification, the conclusion of the Court of Appeal in *Leeds* that *Connors v UK* and *Qazi*'s case could not stand together and that a decision had to be taken as to which to follow is a conclusion with which I respectfully disagree.

[169] As for these appeals, may I consider first the *Lambeth* appeals. The possession orders sought by Lambeth engage the art 8 right to respect for the home of the respective occupiers from whom possession was sought. But an order for possession was in accordance with domestic law. As against Lambeth the occupiers had become trespassers with no right to remain in occupation. There was nothing discriminatory or unusual about the statutory and common law framework that produced that result nor about the absence of any statutory protection given to the occupiers by the housing legislation. I respectfully agree with my noble and learned friend Lord Bingham of Cornhill's remarks at [36], above that the balance required by art 8(2) to be struck was struck by the general law, that the public authority owner had a right to manage and control its property within the bounds set by statute, that the occupier acquired only a limited right to occupy and that on due determination of that right, a claim by the owner must ordinarily succeed. The appellants, the *Bruton* tenants of LQHT, could not resist Lambeth's possession applications on art 8 grounds unless either they mounted an art 8 attack on the legal framework that entitled Lambeth to possession or they attacked on art 8 grounds Lambeth's decision to seek possession. The first attack was not attempted, and, if it had been, would in my opinion have been bound to fail. There is nothing the matter, from an art 8 standpoint, with a common law rule which gives the owner of property, which is occupied as a home by a person who has no right as against the owner to remain there, the right to recover possession of the property. Parliament's omission to provide any statutory security of tenure for home occupiers in the position in which the *Bruton* tenants found themselves is well within the wide margin of appreciation referred to in *Blecic v Croatia*.

[170] As to the decision of Lambeth to seek possession of the properties occupied by the *Bruton* tenants, I agree with and adopt the conclusion expressed by Lord Bingham at [47], above. No facts have been pleaded or alleged by the appellants which outweigh the right and the duty of Lambeth to manage its housing stock. The wide margin of appreciation referred to in *Blecic v Croatia* must be accorded to Lambeth.

[171] The art 8 defences were struck out by Judge Roger Cooke. They were in my opinion rightly struck out. If a defendant does not plead or allege sufficient facts which, if made good, could constitute a defence, the defence can be struck out.

On the facts pleaded and alleged in the art 8 defences the defences could not have succeeded.

[172] Nor, in my opinion, where a home occupier has no contractual or proprietary right to remain in possession as against the owner of the property, could an art 8 defence based on no more than the personal circumstances of the occupier and his family ever succeed. *Connors v UK* is no authority to the contrary. The successful art 8 defence in *Connors v UK* was founded on a combination of Mr Connors's inability to enjoy the security of tenure advantages afforded by statute to occupiers of privately owned caravan sites and on the Strasbourg Court's perception (which I think was an unjustified perception) of a lack of sufficient procedural safeguards enabling him to dispute the grounds which had led the council to terminate his site licence.

[173] As to the *Leeds* appeal, first, it is inconceivable, I repeat, that the part of the recreation ground occupied by the caravans could in two days have become the Maloney home for art 8 purposes. But, second, even if that were not so, Leeds had an unimpeachable right to evict them and restore the site to use as a recreation ground for the benefit of the public generally. No court, domestic or in Strasbourg, has ever suggested that a person who enters and remains on land as a trespasser can assert an art 8 right to respect for the home he has unlawfully established on the land as a defence to the owner's eviction proceedings. In *Connors v UK* the defendant did not enter as a trespasser. He had for some 14 years held a licence entitling him to park his caravans on the caravan site. When the art 8(2) balance is struck in a case with facts like those in the *Leeds* case the balance must at once come down with a resounding clank in favour of the local authority. An art 8 defence in such a case could not ever succeed.

[174] For these reasons, and in agreement with the reasons given by my noble and learned friends Lord Hope of Craighead, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood, these appeals should in my opinion be dismissed. And, for the avoidance of any doubt I wish to express my agreement, in particular, with the whole of Lord Hope's [110].

LORD WALKER OF GESTINGTHORPE.

[175] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Nicholls of Birkenhead. I agree that these appeals should be dismissed for the reasons which they give.

[176] In an earlier draft of this speech I tried to envisage the sort of highly exceptional circumstances in which (as in *Connors v UK* (2004) 16 BHRC 639) domestic law might fail to show the respect for the home required by art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). On reflection, however, I think that such an exercise would be speculative and unhelpful. As Lord Bingham says, the practical experience of county court judges is likely to prove the surest guide, so long as they bear in mind the stringency of the test.

[177] I am in full agreement with Lord Bingham on the issue of judicial precedent. I am also in full agreement with my noble and learned friend Lord Scott of Foscote on the private law issue which arises in the *Lambeth* appeal.

BARONESS HALE OF RICHMOND.

[178] My Lords, I have had the advantage of reading, indeed of re-reading several times, the draft opinions circulated by your Lordships. I agree with,

and have nothing to add to, the opinions of my noble and learned friend Lord Bingham of Cornhill, on the question of precedent, and of my noble and learned friend, Lord Scott of Foscote, on the issue of domestic law arising in the *Lambeth* cases. On the main issues, however, while there are many points upon which we are all agreed, there is one matter upon which we remain divided.

[179] First, there is no reason to suppose that the actual outcome of the decision of this House in *Harrow London BC v Qazi* [2003] UKHL 43, [2003] 4 All ER 461, [2004] 1 AC 983 was incompatible with Mr Qazi's right to respect for his home guaranteed by art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The European Court of Human Rights would not otherwise have found his complaint inadmissible. However, if the ratio decidendi of the majority's decision was that the enforcement of a right to possession in accordance with the domestic law of property can *never* be incompatible with that right, then it must now be modified in the light of the decision of the European Court of Human Rights in *Connors v UK* (2004) 16 BHRC 639. There both the local authority and the court had acted entirely in accordance with the domestic law but the United Kingdom was nevertheless held to have acted in breach of art 8.

[180] Secondly, however, we are all agreed that in the vast majority of cases, the right of a public landowner to enforce a claim to possession of his own land in accordance with the relevant domestic law would automatically supply the justification required by art 8(2) for an interference with the occupier's right to respect for his home. By definition, it would be 'in accordance with the law'; it would serve the legitimate aim of protecting the property rights of the landowner and in some cases the rights of neighbouring occupiers; and it would be proportionate to that aim, the proper balance between the competing rights having been struck by Parliament: see Lord Bingham at [35], [36], above. If that is so, in most cases, granting a possession order in accordance with the domestic law would be the only means available of protecting the right which the landowner wished to assert, and thus could not be disproportionate in the individual case.

[181] Thirdly, we are all agreed that there can be no question of requiring the public landowner to plead and prove individual justification for that interference in every case: see Lord Bingham at [29], above. This was Mr Luba QC's bold submission to us on behalf of the occupiers in these cases. He was right to make that submission, as he recognised that it was the logical consequence of the case which he was putting forward: that the analysis adopted by the Strasbourg Court in the cases found admissible should also be adopted in county and sheriff courts up and down the land when considering any claim for the possession of premises where a person lives. Is it the defendant's home? Will the order interfere with his right to respect for that home? Is that interference in accordance with the law? Does it serve a legitimate aim? Is the interference 'necessary in a democratic society', ie proportionate to the legitimate aim pursued?

[182] As I understand it, none of your Lordships accepts that the sequential approach adopted in Strasbourg to the cases which it declares admissible should be adopted in the general run of possession actions. This is because the court is entitled to make two assumptions. The first is that the domestic law has struck the right balance between the competing interests involved: those of a person occupying premises as his home and those of the landowner seeking to regain possession of those premises in accordance with the law. The second is that the

landowner, if a public authority, has acted compatibly with the convention rights of the individual occupier in deciding to enforce its proprietary rights.

[183] Hence it is only if the occupier advances grounds for challenging either or both of those assumptions that there need be any modification to present practice. Under CPR 24.2, the court may give summary judgment against a defendant if it considers that the defendant has no real prospect of successfully defending the claim. This is similar to but wider than the power to strike out all or part of the written statement of case in CPR 3.4.

[184] So far, so good. Let us next suppose a *Connors v UK* type of case. There an argument could readily be raised that United Kingdom property law did not strike the right balance. Someone who had lived, perfectly lawfully, on a designated gipsy caravan site for many years could be evicted without any good cause being shown, whereas someone who lived on a site governed by the Mobile Homes Act 1983 could only be evicted for cause. The gipsies had no means of challenging the reasons why the local authority wanted to evict them. This discrimination could not be justified.

[185] My Lords, we are all agreed that it must be possible for the defendant in a possession action to claim that the balance between respect for his home and the property rights of the owner, struck by the general law in the type of case of which his is an example, does not comply with the convention. We also agree that the cases in which such a claim will have a real prospect of success are rare. This is an area of the law much trampled over by the legislature as it has tried to respond to shifting and conflicting social and economic pressures. If there were enough suitable and affordable housing to share amongst those who needed it there would be no problem. But there is not, so priorities have to be established, either by Parliament or by the public sector landlord, who has to allocate this scarce resource in accordance with the priorities set by Parliament.

[186] The balance has changed over time in accordance with what were perceived to be the needs of the time. Once upon a time, it was thought necessary to control the freedom of private landlords to let for such terms and on such rents as the market allowed. Public sector landlords, on the other hand, could be left to manage the public housing stock in a responsible manner. Then things changed. Controls over private landlords were progressively relaxed, although never abandoned, with a view to expanding the supply of privately rented homes. Controls over public sector landlords, on the other hand, were increased and public sector tenants were given the security which previously only private sector tenants had enjoyed. This and other measures reduced the supply of public sector rented homes. These were all intensely political judgments. The extent to which, and the terms on which, public authorities should be engaged in providing housing for those who for whatever reason cannot or will not buy it on the private market was one of the most politically controversial issues of the twentieth century.

[187] To the extent that a court insists that a public authority does not rely upon its right to evict an occupier, it is obliging that public authority to continue to supply that person with a home in circumstances where Parliament has not obliged (and may not even have empowered) it to do so. In this politically contentious area of social and economic policy, any court should think long and hard before intervening in the balance currently struck by the elected legislature. There may be more scope for argument in a case not covered by statute, but the most obvious example of that is a trespasser who has never had any right to occupy the premises in question.

[188] We are also agreed as to the procedural route whereby a challenge to the general law may be made. Section 7(1) of the 1998 Act provides that a person who wishes to rely upon his convention rights may do so either in a free-standing action or by defending an action brought against him by a public authority. In those very rare cases where a person may be evicted from his home without any court order at all, a challenge would have to be raised by way of a free-standing action or judicial review. Otherwise, a defence can be raised in the possession action itself. However, the county court will not always be able to supply a remedy. In some cases the statute under which it is operating may be sufficiently flexible to enable the argument to be accommodated. But in many others, it will not. The very source of the complaint of incompatibility will be the inflexibility of the statutory scheme, leaving no discretion to the county court. The court will then have to decide whether the interpretative obligation in s 3 of the 1998 Act will enable it to solve the problem. If not, the matter could only be resolved by a declaration of incompatibility in the High Court, which would have no effect upon the outcome of the individual case.

[189] Thus far I believe that we are all agreed. But, as I understand it, some of your Lordships would go further and accept that there may be highly exceptional cases in which the occupier could argue that his individual personal circumstances made the application of the general law disproportionate in his case. When, if at all, should the court be able to say that, even [though] there is no obligation to continue to provide housing in these circumstances, it is not 'necessary in a democratic society' to permit the landowner to assert its property rights?

[190] My Lords, I myself do not think that the purpose of art 8 was to oblige a social landlord to continue to supply housing to a person who has no right in domestic law to continue to be supplied with that housing, assuming that the general balance struck by domestic law was not amenable to attack and that the authority's decision to invoke that law was not open to judicial review on conventional grounds. It should not be forgotten that in an appropriate case, the range of considerations which any public authority should take into account in deciding whether to invoke its powers can be very wide: see *R v Lincolnshire CC, ex p Atkinson* (1995) 8 Admin LR 529, *R (on the application of Casey) v Crawley BC* [2006] EWHC 301 (Admin), [2006] LGR 239.

[191] There is no doubt that art 8 entails both negative obligations—not to interfere—and positive obligations—to secure the right to respect for a person's private and family life, his home and his correspondence. But it does not confer any right to health or welfare benefits or to housing. The extent to which any member state assumes responsibility for supplying these is very much a matter for that member state. In this country, housing law defines the extent of the obligation and the power to provide housing at public expense. Social services law defines the extent of the obligation to provide services (which sometimes includes assistance with housing) for vulnerable people, such as children, the elderly, the sick and the disabled. If social services law does not provide assistance to an occupier whose personal circumstances are said to make eviction from this particular accommodation disproportionate, then I question whether housing law should be made to do so. In an appropriate case, it is incumbent upon the housing authority to liaise with the social services and education authorities before deciding to take action. There is nothing in the jurisprudence to indicate that art 8 requires more of them than is already required.

[192] The convention began life as a code of individual civil and political rights, not a code of social and economic rights. The distinction between the two is not clear-cut, particularly in the context of art 8. But to refuse to allow a landowner to recover possession of the dwelling to which he is entitled is to impose upon him a positive obligation to continue to make those premises available to the occupier. There might be more scope for argument where the claim lies in common law unregulated by legislation, but in such cases the landowner is likely to be a private person, upon whom no such positive obligation could be laid, or the occupiers are likely to be squatters who have never had a right to occupy the premises. There is nothing yet in the Strasbourg jurisprudence to require a reconsideration of the rule in *McPhail v persons, names unknown* [1973] 3 All ER 393, [1973] Ch 447. In common, therefore, with my noble and learned friends Lord Scott of Foscote and Lord Brown of Eaton under Heywood, I agree with the conclusions reached by my noble and learned friend, Lord Hope of Craighead, set out in [110], above.

[193] Each of the cases before us is a classic example of one in which a defence based upon art 8 would have no real prospect of success. In the *Leeds* case, it cannot plausibly be asserted that the respondents had established a home on the recreation ground. There was therefore no convention right to be interfered with. In the *Lambeth* cases, the occupiers had undoubtedly established homes in the dwellings but they had done so on terms which made them vulnerable, like many sub-tenants, to the superior claims of the landowner. Lambeth's attempts to evict them were in accordance with the law and in pursuit of the legitimate aim of regaining control over this short life housing stock. All the '*Bruton* tenants' were offered alternative accommodation. It would take a very different case from that pleaded to give their claims to remain in the particular dwellings occupied a real prospect of success.

[194] In agreement with all of your Lordships, therefore, I would dismiss both appeals.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[195] My Lords, the most important single question arising upon these appeals is to my mind whether a trial judge, seised of a home repossession claim, must in every case where the occupier seeks to raise a defence under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) consider, however peremptorily, whether the particular facts of the case enable (indeed require) him to make an order (either withholding or postponing possession) more favourable to the occupier than would be permissible under the applicable domestic property law.

[196] In *Harrow London BC v Qazi* [2003] UKHL 43, [2003] 4 All ER 461, [2004] 1 AC 983, the House by a majority held that 'contractual and proprietary rights to possession cannot be defeated by a defence based on art 8' (at [84] per Lord Hope of Craighead); 'there is no lack of respect, and no infringement of art 8, where the [possession] order is made in favour of the person entitled to possession by national law' (at [107] per Lord Millett); '[a]rticle 8 cannot be raised to defeat contractual and proprietary rights to possession' (at [149] per Lord Scott of Foscote). The dissenting view of the minority (Lord Bingham of Cornhill and Lord Steyn) was that in every home repossession case the question of justification under art 8(2), if raised, has to be considered although the domestic property law is 'likely to be crucial' (at [12] per Lord Bingham) and 'the occasions on which a court would be justified in declining

to make a possession order would be very highly exceptional' (at [25] per Lord Bingham).

[197] It is now contended by the appellants that two subsequent decisions of the European Court of Human Rights, *Connors v UK* (2004) 16 BHRC 639 and *Blecic v Croatia* (2005) 41 EHRR 185, are inconsistent with the majority view in *Qazi*'s case and support instead the approach of the minority.

[198] For my part I would accept that the recent Strasbourg jurisprudence requires some qualification to be placed on the *Qazi* principle; I cannot, however, agree that it requires, as the minority in *Qazi*'s case suggested, the consideration (even if usually only the most cursory consideration) of an art 8 defence every time it is raised. My opinion is rather, and at this stage I state it very broadly, that although art 8 is clearly engaged in every home repossession case, its requirements are satisfied provided only and always, first, that the substantive domestic law under which the order is sought strikes an acceptable balance between the competing needs and rights at stake and, secondly, that that law is properly applied by the domestic court with the occupier being given a fair opportunity to invoke any defence available to him under it. If either of those two conditions is not satisfied then, I accept, a complaint would properly sound under art 8. But, as I shall seek to show, it by no means follows that art 8 provides the occupier in such cases with a free-standing defence independent of whatever rights he may have under domestic law.

[199] *Connors v UK* exemplifies a failure of the first condition: the domestic law under which possession was sought and ordered could not be justified: only gipsies (indeed only gipsies living on local authority caravan sites) were excluded from the protection afforded by the Mobile Homes Act 1983 to those living in caravans or mobile homes as their only or main residence. I shall return to *Connors v UK* in a little more detail later. *Blecic v Croatia* illustrates the application of both conditions although in the event the European Court of Human Rights found that both were satisfied: Croatia's domestic law, under which a specially-protected tenancy was terminable if the tenant was unjustifiably absent for six months, was held to be within the wide margin of appreciation available to a state in implementing social and economic policy; and the domestic law had been reasonably and fairly applied—'the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force' being afforded the same 'wide margin of appreciation' as 'the domestic legislature' (see 197 (para 65)).

[200] The modest qualification which *Connors v UK* now requires to be made to the *Qazi* principle is that a defence to possession proceedings based upon the contention that our domestic law is incompatible with the occupier's art 8 rights is theoretically available to him. I say *theoretically available* because it seems to me that it will not in fact be open to the trial judge (whether in the High Court or, as will almost invariably be the case, the county court) to decide the case other than in accordance with the domestic law. Take, for example, the case of *Connors v UK* itself. Because the local authority there, once the defendant had disputed the original ground (essentially nuisance in breach of his licence conditions) on which possession was sought, relied instead on its absolute right to terminate his licence on notice, there was simply no answer to the claim under domestic law. The European Court of Human Rights found this law unjustifiable; the government having failed in its attempt to justify the exclusion of local authority gipsy sites from the protection otherwise available under the 1983 Act. Rather the court concluded (at 663 (para 84)), consistently with its judgment in *Chapman v UK* (2001) 10 BHRC 48 (a planning case, of course, not a possession case), that, because

of 'the vulnerable position of gipsies as a minority', art 8 imposes 'a positive obligation' on the state 'to facilitate the gipsy way of life'. The court therefore concluded (at 666–667 (para 95)) that the eviction—

> 'was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued . . .'

and so was in violation of art 8. That this was because of the deficiency in the substantive domestic law, however, is plain from the terms in which the court rejected Mr Connors' further complaint under art 13 (at 668 (para 109)):

> 'Article 13 does not go so far as to guarantee a remedy allowing a contracting state's primary legislation to be challenged before a national authority on grounds that it is contrary to the Convention. The applicant's complaints related in essence to the exemption conferred on local authority gypsy sites by the Mobile Homes Act 1983.'

There is, indeed, a striking resemblance between *Connors v UK* and the earlier (non-gipsy) case of *Larkos v Cyprus* (1999) 7 BHRC 244 in which the European Court of Human Rights found a violation of art 14 taken in conjunction with art 8 because *Larkos v Cyprus*, as a government tenant, did not enjoy the same security of tenure under domestic law as was enjoyed by tenants of private landlords.

[201] Following the decision in *Connors v UK* the domestic legislation was amended. With effect from 18 January 2005 s 4 of the Caravan Sites Act 1968 was amended by s 211 of the Housing Act 2004 to permit the county court to suspend, for up to 12 months at a time, any possession order in respect of a local authority caravan site which the court would otherwise be bound to make. Now, therefore, the county court would be entitled to suspend the order made against someone in Mr Connors' position; previously, it was not.

[202] By the same token moreover that the county court judge would have been unable, under the pre-existing law, to decline or postpone a possession order in the case of someone in Mr Connors' position, so too in my judgment he is unable in other cases to give greater effect or weight to the occupier's right to respect for his home than is allowed for under domestic law, whether that law is to be found in legislation or under the common law, or indeed a mixture of both. I refer to a mixture of both because there will be many cases where the landlord's contractual or proprietorial rights fall to be determined essentially under the common law but which nevertheless are affected by general statutory provisions. Section 3 of the Protection from Eviction Act 1977, for example, under the heading 'Prohibition of eviction without due process of law', precludes the owner from enforcing his right to recover possession of his premises once the tenancy comes to an end 'otherwise than by proceedings in the court'. And s 89 of the Housing Act 1980, under the heading 'Restriction on discretion of court in making orders for possession of land', prevents the court in certain cases from postponing (whether by the order or any variation, suspension or stay of execution) the giving up of possession of premises for more than 14 days, save where that would cause 'exceptional hardship' when the total permitted postponement is extended to six weeks.

[203] Of course, where the domestic law requires the court to make a judgment (most notably perhaps in those cases under Sch 2 to the Housing Act 1985 where repossession can only be ordered if the court considers it reasonable), or to exercise a discretion, the judge will bear in mind that he is performing this task in the context

of the defendant's art 8 right to respect for his home. But where under domestic law the owner's right to possession is plainly made out (whether at common law or, for example, under the legislation providing for assured shorthold tenancies or introductory tenancies), the judge in my opinion has no option but to assume that our domestic law properly strikes the necessary balances between competing interests (as envisaged in [32] and [33] of my noble and learned friend Lord Bingham's judgment) and that in applying it properly he is accordingly discharging his duty under s 6 of the 1998 Act. Where s 89 of the 1980 Act applies, the judge will to that extent have a discretion to postpone possession. That apart, however, he has no discretion and the order must be made, leading to the eventual execution of the warrant for possession. Where no statutory protection is afforded to occupiers that should be assumed to be Parliament's will: sometimes that will be clearly evident from the terms of the governing legislation (as in the cases considered by Lord Bingham at [35], above); even, however, where the owner's rights arise at common law, the absence of statutory protection must surely be, as my noble and learned friend Lord Hope suggests, the result of a deliberate decision by Parliament to leave the owner's right to recover possession in these cases unqualified. As Lord Bingham observes at [36], above it is not unrealistic to regard the general law as striking the required balance.

[204] One of the difficulties I have with the appellants' contended for application of art 8 in these cases is in understanding what sort of 'highly exceptional circumstances' (see Lord Bingham's expression at [35] and [36], above) could possibly entitle the county court judge to disregard a clear provision of domestic law so as to deprive the owner (who, according to the logic of the argument, could as well be a private landlord as a public one) of his apparently clear entitlement to possession; another is in understanding what are supposed to be the parties' respective rights and interests in the premises once the judge has felt obliged under art 8 to set aside the dictates of domestic law.

[205] I repeat, and will labour the point no further: if our domestic law is incompatible with art 8 (as it was in *Connors v UK*) then it is not for the county court judge to remedy it; he is to assume compatibility and simply apply the law as he finds it. That is something which county court judges have been doing for many years (long before the introduction of art 8 into domestic law): residential occupiers have never lightly been dispossessed from their homes. The rights and interests of others too, however, are at stake—and not merely landlords but the many others who also require homes—and the law as a whole has been developed to give effect to these as well.

[206] I doubt whether the legal regimes of many contracting states are more sensitive than ours to the rights of residential occupiers. If, indeed, art 8's impact upon property law is as wide-reaching as the appellants contend it is to my mind surprising that the Strasbourg jurisprudence is not replete with examples of successful claims. In fact, however, these are few and far between and, certainly in *Connors v UK* (and in *Larkos v Cyprus*), explicable by reference to unjustifiably discriminatory legislation rather than because of a want of sufficient discretion under domestic law to take account of exceptional circumstances. There is, for example, no possible support to be found in the Strasbourg case law for doubting the justifiability of the clear rule as to squatters established by the Court of Appeal in *McPhail v persons, names unknown* [1973] 3 All ER 393, [1973] Ch 447 (Mr McPhail himself being, one may note, a private landowner) and I would respectfully disagree with the suggestion to the contrary at [37] of Lord Bingham's opinion.

[207] I too, therefore, would dismiss both these appeals but I would do so for a reason more fundamental than that suggested by certain others of your Lordships. These appellants' defences must fail, not because they disclose no sufficient (highly exceptional) personal merit but because they depend upon establishing a free-standing art 8 right to remain in possession incompatible with the respective claimants' clear entitlement to possession under domestic property law. I would hold that no such free-standing right exists.

[208] I should perhaps just add this. These appeals were brought on the basis that it is for the trial judge, pursuant to his s 6 duty, to consider for himself the issue of justification under art 8(2) in any contested possession action. There is, however, a quite different basis upon which an occupier could challenge a public authority's claim for possession, namely on the conventional public law ground that the decision to bring the claim was itself so unreasonable as to be unlawful. Such a defence can clearly be advanced in the county court: see the decision of the House of Lords in *Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 461.

[209] The difficulty with such a defence, however, is that it would be well nigh impossible to make good, the challenge necessarily postulating that under domestic property law the claimant authority was entitled to possession. Accordingly the argument could only be that no reasonable public authority could properly invoke that domestic law right. This would be a more stringent test than would apply were the court, as the appellants assert, under a primary duty to reach its own judgment on the justifiability of making a possession order.

[210] For my part I think that such an argument could perhaps have been mounted successfully in *Connors v UK*: having regard to the great length of time (most of the preceding 16 years) that that gipsy family had resided on the site, it was unreasonable, indeed grossly unfair, for the local authority to claim possession merely on the basis of a determined licence without the need to make good any underlying reason for taking such precipitate action. That was *not*, be it noted, the basis of the actual judicial review application for which permission in that case was sought and refused. Indeed the council's decision there to drop the allegations of breach of licence and to assert instead a right to summary possession on the bald ground that the family were trespassers (see 643–644 (para 25)) followed rather than preceded the failed judicial review challenge.

[211] It is difficult to suppose, however, that a defence based on a public law challenge of this character to a public authority's decision to pursue its domestic law rights could properly succeed except in such an infinitely rare case as *Connors v UK* itself. Manifestly it could not have succeeded in either of the present cases which doubtless explains why defences of this particular character were not advanced.

[212] It follows from all this I am in full agreement with what Lord Hope says at [110], above.

[213] There is nothing which I wish to add on the other issues raised on these appeals: on the question of precedent I agree with all that Lord Bingham says. On the issue as to the appellants' occupation status in the *Lambeth* appeal I agree with the analysis and conclusions of my noble and learned friend Lord Scott of Foscote.

Appeals dismissed.

Kate O'Hanlon Barrister.

R (on the application of N) v Mental Health Review Tribunal (Northern Region)

[2005] EWCA Civ 1605

COURT OF APPEAL, CIVIL DIVISION

SIR ANTHONY CLARKE MR, RIX AND RICHARDS LJJ

7, 8 NOVEMBER, 21 DECEMBER 2005

Mental health – Mental health review tribunal – Discharge of restricted patient – Applicant applying for discharge of restriction order – Medical evidence – Statute requiring tribunal to discharge patient if not satisfied as to statutory criteria – Applicable standard of proof – Mental Health Act 1983, ss 72, 73.

The claimant was detained under the Mental Health Act 1983. He was the subject of a hospital order and a restriction order. Under s 72(1)[a] of the 1983 Act, where an application was made by a patient to a mental health review tribunal, the tribunal was, under sub-para (b), to direct the discharge of the patient if they were not satisfied (i) that he was then suffering from mental illness, psychopathic disorder, or mental impairment, or from any of those forms of disorder of a nature or degree which made it appropriate for him to be liable to be detained for treatment, or (ii) that it was necessary for his health or safety or for the protection of other persons that he should receive such treatment. Section 73(1)[b] applied where the application to the tribunal was made by a patient subject to a restriction order. The tribunal was to direct the absolute discharge of a patient if (a) it was not satisfied as to the matters mentioned in s 72(1)(b)(i) or (ii) and (b) it was satisfied that it was not appropriate for the patient to remain liable to be recalled to hospital for further treatment. As the tribunal had to direct discharge if it was not satisfied as to the specified matters the burden was on the detaining authority to satisfy the tribunal as to those matters. The claimant applied to the tribunal which decided not to direct his discharge. He brought proceedings for judicial review of the decision of the tribunal. He contended that the tribunal had erred in its approach to the required standard of proof. The judge held, inter alia, (i) that the applicable standard of proof was the ordinary civil standard of proof and (ii) that issues under ss 72 and 73 as to the appropriateness and necessity of continuing detention or the appropriateness of the patient remaining liable to be recalled were not susceptible to a defined standard of proof but involved a process of judgment, evaluation and assessment. The judge concluded that the only misdirection by the tribunal in the claimant's case, in applying the criminal standard of proof of 'beyond reasonable doubt', had been favourable to the claimant, and that the application for judicial review had therefore to be dismissed. The claimant appealed. The court considered, inter alia, (i) whether the correct standard of proof, in relation to those issues under ss 72 and 73 that were susceptible to proof to a defined standard, was the ordinary civil standard of proof; and (ii) whether certain issues under ss 72 and 73 were not susceptible to

a Section 72, so far as material, is set out at [6], below

b Section 73, so far as material, is set out at [7], below

proof to a defined standard but were to be determined by a process of evaluation and judgment.

Held – (1) The civil standard of proof, namely proof on the balance of probabilities, was flexible in its application and enabled proper account to be taken of the seriousness of the allegations to be proved and the consequences of proving them. But there was no intermediate standard between the civil standard of proof and the criminal standard of proof beyond reasonable doubt, nor was the civil standard to be broken down into sub-categories. The flexibility of the civil standard lay not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation had to be proved to a higher degree of probability) but in the strength or quality of the evidence that would in practice be required for an allegation to be proved on the balance of probabilities (see [59]–[70], below); *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1 explained.

(2) Evidence of an especially high strength or quality was not required to meet the civil standard of proof in the context of ss 72 and 73 of the 1983 Act although it was axiomatic that cogent evidence would in practice be required to satisfy the tribunal, on the balance of probabilities, that the conditions for continuing detention were met. Demanding an especially high evidential requirement would subvert the obvious purpose of the 1983 Act which sought both to protect the interests of the individual whose ability to act in his own best interest was impaired and at the same time enable a proportionate balance to be struck between individual and public interests. In the instant case the approach of the tribunal could not be faulted; directing itself by reference to the balance of probabilities, it had given a reasoned basis for preferring one group of experts over the other. The body of evidence it preferred had plainly been cogent and it was clear from the tribunal's reasons that its preference had been reasonably clear cut. In the determination of other disputed issues of fact the tribunal had been wrong to adopt a standard of proof akin to the criminal standard, although as the judge had held, that had been an error favourable to the claimant. The tribunal should apply the standard of proof on the balance of probabilities to all the issues it had to determine. Although the concept of a standard of proof was not particularly helpful in relation to the process of judgment and evaluation carried out by the tribunal there was no absurdity in a tribunal having some doubt as to the appropriateness or necessity of continuing detention yet being satisfied on the balance of probabilities that it was appropriate and necessary. Accordingly, the standard of proof had a potential part to play in the decision making process even in relation to issues that were the subject of judgment and evaluation. However, the difference between that approach and the approach of the judge did not have much practical significance, given the limited role that the standard of proof would have in relation to those matters. Accordingly, the appeal would be dismissed (see [72]–[77], [97]–[99], [103], [104], [108], below).

Notes

For the powers of the mental health review tribunal to direct discharge of restriction order patients, see 30(2) *Halsbury's Laws* (4th edn reissue) para 570.

For the Mental Health Act 1983, ss 72, 73, see 28 *Halsbury's Statutes* (4th edn) (2001 reissue) 936, 938.

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X v UK (1981) 4 EHRR 188, [1981] ECHR 7215/75, ECt HR.

Appeal

N, a person detained pursuant to a hospital order under s 37 of the Mental Health Act 1983 and subject to a restriction order under s 41 of the 1983 Act, appealed with permission of the Court of Appeal (Pill, Clarke LJJ and Rimer J) given on 12 July 2005 from the decision of Munby J on 11 April 2005 ([2005] EWHC 587 (Admin), [2005] All ER (D) 71 (Apr)) dismissing his claim for judicial review of the decision of a Mental Health Review Tribunal on 14 August not to direct his discharge under s 73 of the 1983 Act. The Secretary of State for the Home Department appeared as an interested party. The facts are set out in the judgment of the court.

Paul Bowen (instructed by *Bindman & Partners*) for the appellant.

Angus McCullough (instructed by the *Treasury Solicitor*) for the tribunal.

Tim Ward (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

21 December 2005. The following judgment of the court was delivered.

RICHARDS LJ.

[1] This is the judgment of the court. The appellant, N, is detained at Ashworth Hospital pursuant to a hospital order under s 37 of the Mental Health Act 1983. He is also subject to a restriction order under s 41. On 14 August 2004 the Mental Health Review Tribunal decided not to direct his discharge under s 73. N brought judicial review proceedings to challenge that decision, contending that the tribunal had erred in its approach to the standard of proof. The challenge was dismissed by Munby J in a lengthy judgment ([2005] EWHC 587 (Admin), [2005] All ER (D) 71 (Apr)) handed down on 11 April 2005. Permission to appeal to this court was granted on the basis that Munby J's judgment was likely to be applied by tribunals hearing applications around the country and there were compelling reasons why the court should consider whether that judgment was correct.

[2] There were in fact two applications for judicial review before Munby J. The other application was brought by an applicant called J, who was also detained under s 37 of the 1983 Act but who was not the subject of a restriction order under s 41. In his case, because there was no restriction order, the decision not to direct discharge was made under s 72 rather than s 73. Munby J dismissed that application too, for materially identical reasons. J had been discharged from hospital prior to the hearing before Munby J and does not pursue an appeal. It is necessary, however, to consider the position under s 72 as well as s 73, since the two sections are closely related and the relevant principles are common to both.

THE STATUTORY FRAMEWORK

[3] Before the Crown Court or a magistrates' court can make a hospital order under s 37(1) of the 1983 Act, the conditions in s 37(2) must be satisfied. By s 37(2):

> 'The conditions referred to in subsection (1) above are that—(a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that either—(i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition; or (ii) in the case of an offender who has attained the age of 16 years, the mental disorder is of a nature or degree which warrants his reception into guardianship under this Act; and (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section.'

[4] A restriction order under s 41 imposes special restrictions upon a patient's release. The circumstances in which such an order can be made are set out in s 41(1):

> 'Where a hospital order is made in respect of an offender by the Crown Court, and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do, the court may, subject to the provisions of this section, further order that the offender shall be subject to the special restrictions set out in this section, either without limit of time or during such period as may be specified in the order; and an order under this section shall be known as "a restriction order".'

[5] Applications for discharge are made to the tribunal. An application by a patient subject to a hospital order but not subject to a restriction order is made under s 66. An application by a patient who is also subject to a restriction order is made under s 70. The relevant powers and duties of the tribunal are set out in ss 72 and 73 of the 1983 Act respectively.

[6] Section 72 provides, so far as material:

> '(1) Where application is made to a Mental Health Review Tribunal by or in respect of a patient who is liable to be detained under this Act, the tribunal may in any case direct that the patient be discharged, and . . . (b) the tribunal shall direct the discharge of a patient liable to be detained otherwise than under section 2 above if they are not satisfied—(i) that he is then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or (ii) that it is necessary for the health or

safety of the patient or for the protection of other persons that he should receive such treatment . . .' a

[7] Section 73 provides, so far as material:

'(1) Where an application to a Mental Health Review Tribunal is made by a restricted patient who is subject to a restriction order, or where the case of such a patient is referred to such a tribunal, the tribunal shall direct the absolute discharge of the patient if—(a) the tribunal are not satisfied as to the matters mentioned in paragraph (b)(i) or (ii) of section 72(1) above; and (b) the tribunal are satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment. b

(2) Where in the case of any such patient as is mentioned in subsection (1) above—(a) paragraph (a) of that subsection applies; but (b) paragraph (b) of that subsection does not apply, the tribunal shall direct the conditional discharge of the patient.' c

[8] Under both s 72 and s 73 the tribunal *must* direct discharge if it is *not* satisfied as to the specified matters. Thus the burden is on the detaining authority to satisfy the tribunal as to those matters. Prior to November 2001 there was a burden on the patient to establish that at least one of the criteria for his continued detention was not satisfied, and thus to disprove the lawfulness of his detention. In *R (on the application of H) v London North and East Region Mental Health Review Tribunal* [2001] EWCA Civ 415, (2001) 61 BMLR 163, [2002] QB 1, the Court of Appeal held that such provisions were contrary to art 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the convention) and granted a declaration of incompatibility under s 4 of the Human Rights Act 1998. Sections 72 and 73 of the 1983 Act in their present form embody the legislative changes that were made in response to that ruling. d e f

THE TRIBUNAL'S CONSIDERATION OF N'S CASE

[9] The background to N's case was summarised as follows in Munby J's judgment ([2005] All ER (D) 71 (Apr) at [5]):

'In January 1984 N carried out the particularly unpleasant and frenzied killings of a mother and her two children. He was found unfit to plead and admitted in March 1985 to what is now Ashworth Hospital following a direction made under s 5 of the Criminal Procedure (Insanity) Act 1964. Having subsequently been found fit to plead he was convicted at the Central Criminal Court in November 1987 on three counts of manslaughter on the ground of diminished responsibility. He was made the subject of a hospital order under s 37 and a restriction order under s 41 of the Mental Health Act 1983. He has remained in Ashworth Hospital ever since. Applications to the tribunal for his discharge were refused in 1987 (twice), 1989, 1993, 1997, 1999 and 2001. He made a further application under s 70 of the Act in 2004. The tribunal convened on 27 July 2004 and heard a considerable body of evidence over 5 days. On 14 August 2004 the tribunal decided that N should not be discharged.' g h j

[10] The evidence placed before the tribunal included that of Dr Mulligan, who was N's responsible medical offer and a consultant forensic psychiatrist; Dr McInerney, a consultant forensic psychiatrist instructed by the Home Office; and Dr Ireland, a chartered forensic psychologist employed by Ashworth. All

three supported the view that the criteria for detention continued to be met. Evidence in support of N's application for discharge was given by three independent consultant forensic psychiatrists: Dr Williams, Dr Lomax and Professor Sashidharan.

[11] For the purposes of its decision under s 73 of the 1983 Act, and in the light of the evidence before it, the tribunal had to determine the following issues.

(1) Was N suffering from a 'psychopathic disorder' within the meaning of the 1983 Act? Such a disorder is defined in s 1(2) as 'a persistent disorder or disability of mind . . . which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned'. On the first limb of that definition the issue was whether N suffered from a personality *disorder* (which it was accepted would amount to a persistent disorder or disability of mind) or merely had certain personality *traits* but no personality disorder. On the second limb of the definition, the issue was whether the disorder, if established, had resulted in abnormally aggressive or seriously irresponsible conduct in the past and there was a real risk that, if treatment in hospital were discontinued, it would do so in the future (see *R (on the application of P) v Mental Health Review Tribunal (East Midlands and North East Region)* [2002] EWCA Civ 697, [2002] All ER (D) 84 (Apr)). In paras 2–7 of its statement of reasons the tribunal gave detailed reasons for preferring the evidence of Dr Mulligan, Dr McInerney and Dr Ireland and for concluding that N was suffering from a psychopathic disorder as defined.

(2) If N suffered from a psychopathic disorder, was the condition 'treatable' in the sense that treatment was available in hospital which was likely to alleviate or prevent a deterioration of the disorder? Although there is no express requirement as to treatability in s 73, the requirement applies to the making of a hospital order in the first place under s 37 and it was not in dispute that, following *Reid v Secretary of State for Scotland* [1999] 1 All ER 481, [1999] 2 AC 512, it is also imported into s 73. It does not matter for this purpose whether it is treated as a discrete criterion or as an aspect of the appropriateness criterion considered in sub-para (3) below. The case advanced on behalf of N before the tribunal was that further detention in hospital would be counter-productive and that any treatment that might benefit him could only be given in the community. The tribunal rejected that argument, stating in para 8 of its reasons that it had no hesitation in concluding that N was treatable.

(3) If N suffered from a psychopathic disorder, was it 'of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment' (see s 37(2) of the 1983 Act)? In para 9 of its reasons the tribunal stated that N's lack of insight and the amount of work to be done meant that it was not only appropriate but necessary for him to be detained for such treatment. It added in para 10 that N's view of his ability to cope in the community was unrealistic and that it was satisfied that there was a serious risk of relapse should he not receive further treatment in hospital to prepare him to manage relevant risk factors.

(4) Was it 'necessary for the health and safety of the patient or for the protection of other persons' that he should receive such treatment in hospital (see s 72 of the 1983 Act)? The tribunal stated at the end of para 10 of its reasons that it followed from its previous findings that it was satisfied that the criterion was met.

[12] The tribunal's findings on those four issues meant that it was satisfied as to all the criteria for continued detention. That made it unnecessary for it to consider a further issue under s 73(1)(b) as to the appropriateness of N remaining

liable to be recalled for further treatment, though it was in fact conceded by N that, if discharged, he should remain so liable and that his discharge should be subject to conditions. A final issue, which is not material for present purposes, was whether, if it did not direct discharge, the tribunal should make a non-statutory recommendation for transfer to conditions of lesser security: at paras 11–12 it recommended a trial move to a medium secure unit.

[13] The tribunal had been addressed by counsel for N on the question of standard of proof, though the submissions were much less elaborate than those now made to this court. In para 1 of its reasons the tribunal set out the approach it had adopted in reaching its decision:

> 'We firstly considered interesting submissions on the standard of proof to be applied to our deliberations and concluded that in relation to an assessment of conflicting expert opinions and diagnoses a balance of probabilities is the realistic standard. However we consider that in accordance with our normal [practice] whenever it is necessary to resolve important issues of fact upon which important consequence[s] flow a much higher standard, akin to the criminal standard, is both fair and reasonable. This has been our approach throughout our consideration of the evidence in this Application.'

[14] The correctness of that approach was the question for determination in the judicial review proceedings.

THE JUDGMENT OF MUNBY J

[15] In addition to submissions from those who have appeared before us, Munby J heard submissions from counsel for MIND. MIND had filed evidence in the form of statements by a number of mental health professionals identifying a variety of concerns. There were said to be uncertainties among practitioners as to the appropriate standard of proof, and a lack of consistency between tribunals. There were also concerns about the basing of decisions on hearsay evidence, linked with a perception on the part of some that tribunals tended to prefer the evidence of professional witnesses over the evidence of the patient even if the patient was the only person present with personal knowledge of the matter in dispute. The more a patient protested that something had been wrongly recorded in his notes, the more he might be faced with the accusation that he was failing to take responsibility for his actions and failing to acknowledge the 'truth'. One of the suggestions was that the imposition of a higher standard of proof was necessary to protect patients from those supposedly undesirable practices.

[16] Having set out the background, Munby J identified two main issues ([2005] All ER (D) 71 (Apr) at [23]). The first related to the standard of proof to be applied by the tribunal, in so far as the concept of 'proof' was relevant. The second related to the question of whether and to what extent the nature of the task upon which the tribunal was engaged involved a standard of proof at all.

[17] On the first issue, the judge started (at [24]–[29]) with what he described as some basic or general principles and with some obiter dicta in existing authorities to the effect that the standard of proof in this statutory context is the balance of probabilities. He then examined and rejected (at [30]–[47]) the primary case advanced before him on behalf of N and MIND, that the relevant standard was the criminal standard of proof beyond reasonable doubt rather than the civil standard of proof on a balance of probabilities. He looked next (at [49]–[71]) at the alternative case advanced by N and MIND that, if the relevant standard of

proof was not the criminal standard, it was or ought to be the standard of 'clear and convincing evidence' applied by the United States Supreme Court in *Addington v Texas* (1979) 441 US 418. It was held in *Addington v Texas* that to commit an individual to a mental institution in civil proceedings, the state was required by the 'due process' clause of the United States Constitution to prove by clear and convincing evidence the statutory preconditions to commitment. That was an intermediate standard, between proof beyond reasonable doubt and proof on the preponderance of the evidence, which was held to strike a fair balance between the rights of the individual and the legitimate concerns of the state. Whilst quoting extensively from *Addington v Texas*, Munby J stated that English law did not recognise the intermediate standard and that the case did not assist N or MIND. He also examined various decisions of the English and Strasbourg courts on the application of the convention, and various Commonwealth authorities, all of which he likewise found not to assist.

[18] Following that exegesis of the authorities, the judge expressed his conclusion on the first issue as follows:

> '[71] In my judgment the applicable standard of proof is the ordinary civil standard of proof "on a balance of probability". That is consistent with authority and principle. It accords with the dicta in *Reid v Secretary of State for Scotland* [1999] 1 All ER 481, [1999] 2 AC 512 and in *R (on the application of H) v London North and East Region Mental Health Review Tribunal* (2001) 61 BMLR 163, [2002] QB 1. And, as Mr McCullough submits . . . it is confirmed by a purposive construction of the Act and a consideration of the statutory context in which the tribunal operates.'

[19] He added that in the not wholly dissimilar context of the Parole Board the civil standard had been held to apply and he could think of no good reason why the tribunal should adopt a different standard from that applied by the Parole Board: both bodies had to conduct very similar exercises in not very different contexts.

[20] Munby J then moved to consider (at [75]–[116]) the second main issue, namely the extent to which the nature of the task on which the tribunal was engaged involved a standard of proof at all. He referred to the subtlety and complexity of the task faced by doctors and tribunals when considering issues of the kind identified by ss 72 and 73 of the 1983 Act, and to the position of patients who are subject to restriction orders, where it is necessary to balance the interests of the patient against those of public safety. He described the procedure of the tribunal as being to a significant extent inquisitorial, referred to authorities on the proportionality balancing exercise, and observed that in approaching its task the tribunal must use its expertise and look at the reality of the situation. He stated (at [87]):

> 'I have said enough to show that in many aspects of its task the tribunal is not concerned so much with finding facts which are capable of exact demonstration by "hard" science but rather with a process of judgment, evaluation and assessment which involves the appreciation and evaluation of inherently imprecise and often differing or conflicting psychiatric evidence. Moreover the tribunal is necessarily peering into an as yet unknown and unknowable future and, particularly in the case of a restricted patient, seeking to evaluate, assess and minimise future risks—risks of medical relapse and, it may be, risks of re-offending.'

[21] He referred to analogous situations, including the work of the Parole Board and the assessment of danger to national security in deportation cases. He then returned specifically to ss 72 and 73 of the 1983 Act and expressed his conclusions as follows:

> '[100] As Mr Bowen correctly observes, under s 72 the tribunal has to consider a number of issues, including: (i) Does the patient suffer from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder? (ii) If so, is it of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment? (iii) Is it necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment, that is, treatment in hospital? In the case of a restricted patient there is a further issue to be considered under s 73: (iv) Alternatively, is it appropriate for the patient to remain liable to be recalled to hospital for further treatment (and therefore to be conditionally rather than absolutely discharged)? To what extent, if at all, are any of these issues susceptible to proof?
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> [101] In my judgment issue (i) involves matters which are, in principle, susceptible to proof and which therefore fall to be determined by reference to the civil standard of proof "on a balance of probability". Whether someone is suffering from some (and if so what) form of mental illness or mental disorder is a question of fact—present fact. The nature and degree of a patient's condition, although involving questions of diagnosis and matters of medical opinion, are nonetheless matters of present fact which are, in principle, amenable to proof in the same way as any other matter of past or present fact. Brian CJ in 1477 may have observed (I translate the law French —"le Diable n'ad conusance de l'entent de home") that "the Devil himself knoweth not the thought of man" (see YB 17 EdwIV, Easter, fo 2 pl 2), but it has been trite law ever since 1885, as Bowen LJ famously said in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483, [1881–5] All ER Rep 856 at 861, that: "the state of a man's mind is as much a fact as the state of his digestion."
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> [102] Issues (ii), (iii) and (iv), however, of their very nature raise quite different questions. In large measure they are all looking not just to the present but also to the future. More significantly, they are all issues which involve an evaluative judgment and which are not susceptible to a defined standard of proof. They are, in my judgment, issues to be determined not by the application of the civil (or indeed any other) standard of proof but, as I have already indicated, by a process of evaluation and judgment. The tribunal is not here concerned so much with finding facts which are capable of exact demonstration but rather with a process of judgment, evaluation and assessment which involves the appreciation and evaluation of inherently imprecise and often differing or conflicting psychiatric evidence. Moreover the tribunal is necessarily peering into the future and, particularly in the case of a restricted patient, seeking to evaluate, assess and minimise future risks—risks of medical relapse and, it may be, risks of re-offending.'

[22] The judge acknowledged that the burden (which he thought it more accurate and appropriate to describe as the 'onus' or 'persuasive burden') lay on the detaining authority to establish all the relevant criteria, but did not consider this to affect his conclusion. He observed that the fact that an applicant has the burden of persuading the court of something before he can obtain the order he

seeks does not of itself mean that he necessarily has to persuade the court of that 'something' to some standard of proof: it all depends upon the particular statutory or other context. Likewise he observed that the mere fact that a statute requires a court to be 'satisfied' of something before it makes an order does not mean that it necessarily has to be satisfied to the civil standard of proof: it all depends upon the nature of the matter about which the court has to be satisfied.

[23] The judge held that if, in relation to the issues that the tribunal has to decide, a specific allegation of past conduct is relied on, the tribunal must decide as a matter of fact, and applying the ordinary civil standard of proof, whether the allegation has been proved: if it is not proved, then it cannot of itself be the basis for any continuing detention of the patient. But however many allegations of past conduct may fail to be proved, this does not mean that the tribunal is bound to order the patient's discharge. For the tribunal is looking to what may happen in the future rather than to what has happened in the past. It must examine the case as a whole, recognising that the range of facts which may properly be taken into account is infinite; it must attach appropriate weight to all the relevant facts when coming to an overall conclusion; and it must reach an assessment or judgment on the particular issue by asking itself whether or not, adopting a global approach and having regard to the cumulative effect of all the relevant facts, it is satisfied.

[24] The judge then set out the questions that the tribunal must ask itself when considering applications under s 72 and s 73 of the 1983 Act, and what he considered to be the 'default position' under each:

> '[117] Under s 72 the tribunal has to ask itself the following questions when considering an application for the discharge of a patient who is subject to a hospital order but is not a restricted patient. (i) Are we satisfied (see s 72(1)(b)(i)) that (a) the patient is now suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder (b) of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment? (ii) Are we satisfied (see s 72(1)(b)(ii)) that it is necessary (a) for the health or safety of the patient or (b) for the protection of other persons that he should receive such treatment? The onus of establishing this is on the detaining authority. If the answer to *both* these questions is "No, we are not satisfied" then the tribunal must discharge the patient (see s 72(1)(b)). If the answer to *either* question is "Yes, we are satisfied", then the tribunal is not obliged to discharge the patient but may nonetheless decide to do so: see the opening words of s 72(1) . . .
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> [118] The "default position" under s 72, therefore, is this. If the tribunal is not satisfied of the matters referred to in *either* s 72(1)(b)(i) or s 72(1)(b)(ii)—if, in other words, the detaining authority fails to establish its case under s 72(1)(b)(i) *and* fails to establish its case under s 72(1)(b)(ii)—then the tribunal must direct the discharge of the patient. In any other case it may direct his discharge.
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> [119] Under s 73 the tribunal has to ask itself the following questions when considering an application for the discharge of a restricted patient. (i) Are we satisfied (see ss 73(1)(a) and 72(1)(b)(i)) that (a) the patient is now suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder (b) of a nature or degree which makes it appropriate for him to be liable to be detained in a

hospital for medical treatment? (ii) Are we satisfied (see ss 73(1)(a) and 72(1)(b)(ii)) that it is necessary (a) for the health or safety of the patient or (b) for the protection of other persons that he should receive such treatment? (iii) Are we satisfied (see s 73(1)(b)) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment? The onus of establishing the matters referred to in questions (i) and (ii) is on the detaining authority. The onus of establishing the matter referred to in question (iii) is on the patient . . . If the answer to *both* question (i) and question (ii) is "No, we are not satisfied"—if, in other words, the detaining authority fails to establish its case under s 72(1)(b)(i) *and* fails to establish its case under s 72(1)(b)(ii)—*and* if the answer to question (iii) is "Yes, we are satisfied"—if, in other words, the patient does establish his case under s 73(1)(b)—then the tribunal must direct the absolute discharge of the patient (see s 73(1)). If the answer to *both* question (i) and question (ii) is "No, we are not satisfied" *but* the answer to question (iii) is also "No, we are not satisfied"—if, in other words, the detaining authority fails to establish its case under s 72(1)(b)(i) and fails to establish its case under s 72(1)(b)(ii) but at the same time the patient fails to establish his case under s 73(1)(b)—then the tribunal must direct the conditional discharge of the patient (see s 73(2)). In any other circumstances the tribunal will not direct the discharge of the patient.

[120] The ultimate "default position" under s 73, therefore, is this. If the tribunal is not satisfied of *any* of the matters referred to in either limb of s 72(1)(b) or in s 73(1)(b), then it must direct the conditional discharge of the patient.'

[25] In the last part of his judgment (from [121]) Munby J considered the concerns expressed by MIND about the approach of tribunals to the assessment of evidence, in particular hearsay evidence, and gave guidance on the approach that should be adopted. He emphasised that a decision under s 72 or s 73 of the 1983 Act is a matter of extreme gravity not merely for the patient but also for the general public. On the one hand are the patient's claims not merely to liberty but also to autonomy and bodily integrity. On the other hand there are powerful interests that may pull in the other direction: not merely the public interest in safety, but also the patient's own interest in treatment which may protect him from the risk of harm or self-harm and may remove or reduce the prospect of future compulsory detention. The judge concluded by saying that bearing in mind the gravity—typically both for the patient and for the public—of the issue with which it is grappling, the tribunal will always want to bring to its task particular care and consideration and will want to scrutinise the evidence with especial care.

[26] The overall conclusion expressed in the judgment (at [137]) was that the only misdirection by the tribunal in the case of N was favourable to the patient and that the application for judicial review must be dismissed.

THE ISSUES ON THE APPEAL

[27] There are three issues on the appeal. (1) Did the judge err in holding that the correct standard of proof, in relation to those issues under ss 72 and 73 of the 1983 Act that are susceptible to proof to a defined standard, is the ordinary civil standard of proof on the balance of probabilities? (2) Did the judge err in holding that certain issues under ss 72 and 73 are not susceptible of proof to a defined standard but are to be determined by a process of evaluation and judgment?

(3) Did the judge err in his formulation of the 'default position' under ss 72 and 73?

[28] To the extent that Munby J's judgment ranged more widely than those issues, it has not been the subject of consideration in argument before us.

Issue 1: standard of proof

The appellant's case

[29] Mr Bowen submits that Munby J was wrong to hold that the applicable standard of proof is 'the ordinary civil standard of proof "on a balance of probability"' (see [2005] All ER (D) 71 (Apr) at [71]). Equally, the obiter dicta in *Reid v Secretary of State for Scotland* [1999] 1 All ER 481 at 503, [1999] 2 AC 512 at 539 and *R (on the application of H) v London North and East Region Mental Health Review Tribunal* (2001) 61 BMLR 163 at [32], [2002] QB 1 at [32], to the effect that proof is on a balance of probabilities, are mistaken. The issue of standard of proof in this context has not previously been the subject of a considered decision.

[30] Drawing on an article by Dr Mike Redmayne 'Standards of Proof in Civil Litigation' (1999) 62 MLR 167, and observations of Burger CJ in *Addington v Texas* (1979) 441 US 418, Mr Bowen submits that the ordinary civil standard of proof on the balance of probabilities represents an equal sharing (50:50) of the litigation risk between the parties, on the basis that the same utility may be ascribed to one party wrongly (ie unjustly) winning a case as to another wrongly losing it. The criminal standard, on the other hand, places almost the entire litigation risk on the state, on the basis that there is an interest of transcending value at stake (the liberty of the accused) and society places a much higher value upon ensuring that the innocent are not convicted than it does upon ensuring that the guilty are convicted.

[31] Mr Bowen submits that there are, however, many circumstances in which an interest of transcending value falls to be determined in a civil context where an equal sharing of the litigation risk is not appropriate. The common law has long recognised that in certain contexts the ordinary civil standard of proof may accordingly require modification, as where serious allegations of a criminal nature are made in civil cases or the consequences of a finding one way or the other will be particularly grave for the individual concerned, for third parties or for the general public. In some cases more than one such feature may exist and the competing utilities of the individual's rights and those of third parties or the wider public interest may have to be balanced.

[32] Mr Bowen suggests that four different solutions have been adopted as regards the standard of proof in such cases.

(1) The 'flexible standard' approach, in which the civil standard, while expressed as the balance of probabilities, is nevertheless capable of a range of differing degrees of probability, from 'more likely than not' to something approaching the criminal standard of 'beyond reasonable doubt'. Cases in this category are said to include *Bater v Bater* [1950] 2 All ER 458, [1951] P 35, *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, [1957] 1 QB 247, *Blyth v Blyth* [1966] 1 All ER 524, [1966] AC 643 and *Khawaja v Secretary of State for the Home Dept* [1983] 1 All ER 765, [1984] AC 74. A similar approach has been adopted in Australia (see *Briginshaw v Briginshaw* (1938) 60 CLR 336, which has been the basis of state and federal legislation) and Canada (see *Smith v Smith* [1952] 2 SCR 312).

(2) The 'fixed civil standard', where the standard of proof remains fixed but the degree of evidence needed to satisfy it varies because events such as serious

criminal offences are said to be less probable. Cases in this category are said to include *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771, [1964] 1 WLR 451, *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1, [1996] AC 563 and *Secretary of State for the Home Dept v Rehman* [2001] UKHL 47, [2002] 1 All ER 122, [2003] 1 AC 153.

(3) The 'quasi-criminal standard' approach, in which the 'flexible standard' approach is said to be taken to its logical conclusion so as to encompass the criminal standard. Cases placed in this category include *B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 All ER 562, [2001] 1 WLR 340, *Gough v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351, [2002] 2 All ER 985, [2002] QB 1213 and *R (on the application of McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London BC* [2002] UKHL 39, [2002] 4 All ER 593, [2003] 1 AC 787.

(4) The 'single third standard of proof', which rests between a bare civil standard and the criminal standard. This was rejected in this jurisdiction in *Re H* but has been recognised in the United States of America as the standard of 'clear and convincing evidence' and is applied to cases involving infringements of fundamental rights, including mental health cases (see, for example, *Addington v Texas* (1979) 441 US 418).

[33] Reference is also made to the 'convincing evidence' standard ('convincingly established') that has been applied by the European Court of Human Rights when determining whether an interference with various qualified rights under the convention is necessary and proportionate. The same approach has been adopted by the European Court of Human Rights, and in this jurisdiction by the Court of Appeal in *R (on the application of N) v Dr M* [2002] EWCA Civ 1789, [2003] 1 FCR 124, [2003] 1 WLR 562, in determining whether there is a medical necessity for compulsory medical treatment that would otherwise amount to a violation of art 3. It is submitted that, although the question has not been directly answered in the Strasbourg case law, the same standard should apply under art 5 to the justification of a detention in hospital on grounds of unsoundness of mind.

[34] By analogy with those situations where a higher standard of proof has been held to be appropriate (quasi-criminal cases, disciplinary proceedings, contempt proceedings) and by reference to the approach adopted in other common law jurisdictions, it is submitted that the transcending values of liberty and autonomy are such that the social cost of erroneous detentions must be seen as greater than that of erroneous decisions to release. While the potential cost of erroneous decisions to release is that patients so released will harm themselves or others, in the generality of cases that is an extremely small risk.

[35] In these circumstances it is submitted that a higher than ordinary civil standard of proof should be applied to decisions under ss 72 and 73 of the 1983 Act. In the course of his submissions Mr Bowen put forward various formulations of an appropriate self-direction by the tribunal. By the end of his reply he had refined them into four possibilities, all of which were said to meet the requirements of fairness and of art 5, though the first was preferred: (i) the tribunal must be satisfied to a high degree of probability that the criteria for detention are made out; (ii) the tribunal must be so satisfied by convincing evidence; (iii) the tribunal must be so satisfied by clear and convincing evidence; and (iv) the tribunal must be so satisfied to the civil standard of proof with the strictness appropriate to the seriousness of the matters to be proved and the implications of proving them.

The main English authorities

[36] We think it helpful to start by looking at the main English authorities chronologically rather than by reference to the classifications adopted by Mr Bowen, though we leave to one side, for the time being, the cases dealing specifically with the convention.

[37] *Bater v Bater* [1950] 2 All ER 458, [1951] P 35 concerned a wife's petition for divorce on the ground of cruelty. The Court of Appeal held that it was not a misdirection for the trial judge to have stated that the petitioner must prove her case beyond reasonable doubt. Bucknill LJ, with whom Somervell LJ agreed, considered that 'a high standard of proof' was required because of the importance of such a case to the parties and the community. Denning LJ stated ([1950] 2 All ER 458 at 459, [1951] P 35 at 36–37):

> 'The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. Likewise, a divorce court should require a degree of probability which is proportionate to the subject-matter.'

[38] The issue in *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, [1957] 1 QB 247 was the standard of proof in a civil claim for fraudulent misrepresentation. The Court of Appeal held that the trial judge had directed himself correctly by reference to the balance of probability. Denning LJ referred back to the views he had expressed in *Bater v Bater*. Hodson LJ expressed his complete agreement with those views, adding ([1956] 3 All ER 970 at 977, [1957] 1 QB 247 at 264):

> 'Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others.'

[39] Morris LJ's observations ([1956] 3 All ER 970 at 978, [1957 1 QB 247 at 266–267) are particularly illuminating:

> 'It is, I think, clear from the authorities that a difference of approach in civil cases has been recognized. Many judicial utterances show this. The phrase "balance of probabilities" is often employed as a convenient phrase to express the basis upon which civil issues are decided. It may well be that no clear-cut logical reconciliation can be formulated in regard to the authorities on these topics. But perhaps they illustrate that "the life of the law is not logic but experience". In some criminal cases liberty may be involved; in

some it may not. In some civil cases the issues may involve questions of reputation which can transcend in importance even questions of personal liberty. "Good name in man or woman is . . . the immediate jewel of their souls".

In truth no real mischief results from an acceptance of the fact that there is some difference of approach in civil actions. Particularly is this so if the words which are used to define that approach are the servants but not the masters of meaning. Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities. This view was denoted by Denning LJ when in his judgment in [*Bater v Bater* [1950] 2 All ER 458 at 459, [1951] P 35 at 36–37] he spoke of a "degree of probability which is commensurate with the occasion" and of "a degree of probability which is proportionate to the subject-matter."

In English law the citizen is regarded as being a free man of good repute. Issues may be raised in a civil action which affect character and reputation, and these will not be forgotten by judges and juries when considering the probabilities in regard to whatever misconduct is alleged.'

[40] The factual background to *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771, [1964] 1 WLR 451 was that a husband and wife, having made mutual wills each leaving their estate to the other, had been found dead in their home from coal gas poisoning. The husband was presumed to have died first. The question then arose as to whether the wife had feloniously killed him. As regards the standard of proof, Ungoed-Thomas J referred to the observations of Morris LJ in *Hornal v Neuberger Products Ltd* and continued ([1964] 1 WLR 451 at 454–455):

'It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but, as Morris LJ says, that the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. This is perhaps a somewhat academic distinction and the practical result is stated by Denning LJ ([1957] 1 QB 247 at 258): "The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law." In this case the issue is whether or not the wife feloniously killed the husband. There can hardly be a graver issue than that, and its gravity weighs very heavily against establishing that such a killing took place, even for the purpose of deciding a civil issue.'

[41] The issue in *Blyth v Blyth* [1966] 1 All ER 524, [1966] AC 643 was the standard of proof applicable to the question whether adultery had been condoned. The House of Lords held by a majority that it was the balance of probability. Lord Denning, referring back to *Bater v Bater* [1950] 2 All ER 458, [1951] P 35 and to *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, [1957] 1 QB 247, said this ([1966] 1 All ER 524 at 536–537, [1966] AC 643 at 669):

'In short it comes to this: so far as the *grounds* for divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear. So far as the *bars* to divorce are concerned, like connivance or condonation, the petitioner need only show that on balance of probability he did not connive or condone as the case may be.'

[42] In *Khawaja v Secretary of State for the Home Dept* [1983] 1 All ER 765, [1984] AC 74 it was held by the House of Lords that, on an application for judicial review of an order detaining a person as an illegal entrant, it was for the executive to prove to the satisfaction of the court, on the balance of probabilities, the facts relied on by the immigration officer as justifying his conclusion that the applicant was an illegal entrant. Lord Scarman dealt at length with the standard of proof. Having cited *Bater v Bater*, *Hornal v Neuberger Products Ltd*, *Re Dellow's Will Trusts* and *Blyth v Blyth*, he continued ([1983] 1 All ER 765 at 784, [1984] AC 74 at 113–114):

'My Lords, I would adopt as appropriate to cases of restraint put by the executive on the liberty of the individual the civil standard flexibly applied in the way set forth in the cases cited; and I would direct particular attention to the words of Morris LJ already quoted. It is not necessary to import into the civil proceedings of judicial review the formula devised by judges for the guidance of juries in criminal cases. Liberty is at stake; that is, as the court recognised in [*Bater v Bater* [1950] 2 All ER 458, [1951] P 35] and in [*Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, [1957] 1 QB 247], a grave matter. The reviewing court will therefore require to be satisfied that the facts which are required for the justification of the restraint put on liberty do exist. The flexibility of the civil standard of proof suffices to ensure that the court will require the high degree of probability which is appropriate to what is at stake. "The nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue" (see Dixon J in *Wright v Wright* (1948) 77 CLR 191 at 210). I would, therefore, adopt the civil standard flexibly applied in the way described in the case law to which I have referred. And I completely agree with the observation made by my noble and learned friend, Lord Bridge of Harwich, that the difficulties of proof in many immigration cases afford no valid ground for lowering the standard of proof required.

Accordingly, it is enough to say that, where the burden lies on the executive to justify the exercise of a power of detention, the facts relied on as justification must be proved to the satisfaction of the court. A preponderance of probability suffices; but the degree of probability must be such that the court is satisfied. The strictness of the criminal formula is unnecessary to enable justice to be done; and its lack of flexibility in a jurisdiction where the technicalities of the law of evidence must not be allowed to become the master of the court could be a positive disadvantage inhibiting the efficacy of the developing safeguard of judicial review in the field of public law.'

[43] Lord Fraser expressed agreement with Lord Scarman on that issue, stating ([1983] 1 All ER 765 at 772, [1984] AC 74 at 97):

'the appropriate standard is that which applies generally in civil proceedings, namely proof on a balance of probabilities, the degree of probability being proportionate to the nature and gravity of the issue. As cases such as those in the present appeals involve grave issues of personal liberty, the degree of probability required will be high.'

[44] Similarly, Lord Bridge, with whom Lord Templeman expressed agreement, concluded ([1983] 1 All ER 765 at 792, [1984] AC 74 at 124):

'the civil standard of proof by a preponderance of probability will suffice, always provided that, in view of the gravity of the charge of fraud which has to be made out and of the consequences which will follow if it is, the court should not be satisfied with anything less than probability of a high degree.'

[45] The next authority in the chronological sequence is one of central importance. *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1, [1996] AC 563 concerned s 31 of the Children Act 1989 which, in summary, empowers the court to make an order placing a child in the care of the local authority if satisfied that the child (i) is suffering significant harm or (ii) is likely to do so. The mother in that case had four children, all girls. The local authority applied for a care order in respect of the three youngest girls, basing its application solely on allegations of sexual abuse of the eldest girl. The House of Lords held by a majority that, just as there must be facts, properly proved to the court's satisfaction if disputed, on which the court can properly conclude that a child 'is suffering' harm, so too there must be facts from which the court can properly conclude that a child 'is likely to suffer' harm (ie, as was also held, that there is a real possibility that the child will suffer harm in the future); and here too, if the facts are disputed, the court must resolve the dispute so far as necessary to reach a proper conclusion on the issue.

[46] That is the context within which their Lordships considered a further issue, as to the standard of proof required to prove relevant facts, such as the allegations of sexual abuse on which the application was founded. On that issue Lord Nicholls of Birkenhead stated, in a passage ([1996] 1 All ER 1 at 16–17, [1996] AC 563 at 586–587) that we think it necessary to quote almost in full:

'Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the established general principle. There are exceptions such as contempt of court applications, but I can see no reason for thinking that family proceedings are, or should be, an exception . . . Family proceedings often raise very serious issues, but so do other forms of civil proceedings.

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his

temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J expressed this neatly in *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771 at 773, [1964] 1 WLR 451 at 455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

This substantially accords with the approach adopted in authorities such as the well-known judgment of Morris LJ in *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970 at 978, [1957] 1 QB 247 at 266. This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.

No doubt it is this feeling which prompts judicial comment from time to time that grave issues call for proof to a standard higher than the preponderance of probability ... The law looks for probability, not certainty. Certainty is seldom attainable. But probability is an unsatisfactorily vague criterion because there are degrees of probability. In establishing principles regarding the standard of proof, therefore, the law seeks to define the degree of probability appropriate for different types of proceedings. Proof beyond reasonable doubt, in whatever form of words expressed, is one standard. Proof on a preponderance of probability is another, lower standard having the inbuilt flexibility already mentioned. If the balance of probability standard were departed from, and a third standard were substituted in some civil cases, it would be necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond reasonable doubt, what would it be? The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences. A formula to this effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty. As at present advised I think it is better to stick to the existing, established law on this subject. I can see no compelling need for a change.'

[47] Lord Goff of Chieveley and Lord Mustill agreed with Lord Nicholls. Lord Browne-Wilkinson, although dissenting in part on other issues, agreed with Lord Nicholls that 'the standard of proof is the ordinary civil standard, i e balance of probabilities' (see [1996] 1 All ER 1 at 3, [1996] AC 563 at 572).

[48] *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1, [1996] AC 563 was considered in *Secretary of State for the Home Dept v Rehman* [2002] 1 All ER

122, [2003] 1 AC 153, which concerned the making of a deportation order under s 3(5)(b) of the Immigration Act 1971 on the ground that deportation would be conducive to the public good in the interests of national security. The Special Immigration Appeals Commission held that the Secretary of State had not established to a high degree of probability that the applicant had been or was likely to be a threat to national security. The Court of Appeal allowed the Secretary of State's appeal. The House of Lords, in upholding the Court of Appeal's decision, held that the concept of standard of proof was not applicable to the evaluation of whether the risk to national security was sufficient to justify deportation, but that where past acts were relied on they should be proved to the civil standard of proof. As to that, Lord Hoffmann stated (at [55]):

> 'I turn next to the commission's views on the standard of proof. By way of preliminary I feel bound to say that I think that a "high civil balance of probabilities" is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1 at 16, [1996] AC 563 at 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.'

[49] Lord Clyde and Lord Hutton agreed with Lord Hoffmann. Lord Slynn of Hadley, with whom Lord Steyn and Lord Hutton agreed, referred (at [22]) simply to the need to prove facts 'to the civil standard of proof'.

[50] In view of the submissions made by Mr Bowen, we should note that *Khawaja v Secretary of State for the Home Dept* [1983] 1 All ER 765, [1984] AC 74 was not cited to the House of Lords in *Re H (minors) (sexual abuse: standard of proof)* (though all the other cases that we have mentioned so far in this chronological survey were), but that it was cited in *Secretary of State for the Home Department v Rehman*.

[51] The next case to consider is *B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 All ER 562, [2001] 1 WLR 340, which arose out of an application to the magistrates' court for a sex offender order under s 2 of the Crime and Disorder Act 1998. On such an application it must be proved that the conditions mentioned in s 2(1) are fulfilled, namely:

> '(a) that the person is a sex offender; and (b) that the person has acted, since the relevant date, in such a way as to give reasonable cause to believe that an order under this section is necessary to protect the public from serious harm from him'.

The Divisional Court held that such an application was properly characterised as a civil, not a criminal, proceeding and that the justices were accordingly required to apply the civil standard of proof. As to that standard, however, Lord Bingham CJ, giving the leading judgment, went on to observe:

'[30] It should, however, be clearly recognised, as the justices did expressly recognise, that the civil standard of proof does not invariably mean a bare balance of probability, and does not so mean in the present case. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters (see *Bater v Bater* [1950] 2 All ER 458, [1951] P 35, *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, [1957] 1 QB 247, and *R v Secretary of State for the Home Dept, ex p Khawaja* [1983] 1 All ER 765, [1984] AC 74).

[31] In a serious case such as the present the difference between the two standards is, in truth, largely illusory. I have no doubt that, in deciding whether the condition in s 2(1)(a) is fulfilled, a magistrates' court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard. In deciding whether the condition in s 2(1)(b) is fulfilled the magistrates' court should apply the civil standard with the strictness appropriate to the seriousness of the matters to be proved and the implications of proving them.'

[52] It should be noted that, although earlier cases were referred to in para [30] of Lord Bingham's judgment, neither *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1, [1996] AC 563 nor *Secretary of State for the Home Dept v Rehman* [2002] 1 All ER 122, [2003] 1 AC 153 was cited to the court.

[53] The subject matter of *Gough v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351, [2002] 2 All ER 985, [2002] QB 1213 was an application to a magistrates' court for a banning order under s 14B of the Football Spectators Act 1989. The Court of Appeal held that proceedings under that section were civil in character. As regards the standard of proof, however, Lord Philips of Worth Matravers MR, giving the judgment of the court, stated:

'[90] It does not follow from this that a mere balance of probabilities suffices to justify the making of an order. Banning orders under s 14B fall into the same category as antisocial behaviour orders and sex offenders' orders. While made in civil proceedings they impose serious restraints on freedoms that the citizen normally enjoys. While technically the civil standard of proof applies, that standard is flexible and must reflect the consequences that will follow if the case for a banning order is made out. This should lead the magistrates to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard—see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 All ER 562 at 573–574, [2001] 1 WLR 340 at 354 and *R (on the application of McCann) v Crown Court at Manchester* [2001] EWCA Civ 281 at [66], [2001] 4 All ER 264 at [66], [2001] 1 WLR 1084.

[91] Thus the necessity in the individual case to impose a restriction upon a fundamental freedom must be strictly demonstrated. The first thing that has to be proved under s 14B(4)(a) is that the respondent has caused or contributed to violence or disorder in the United Kingdom or elsewhere. Mr Pannick conceded that the standard of proof of this is practically indistinguishable from the criminal standard.

[92] The same is true of the next requirement, that imposed by s 14B(4)(b), though this is less easily derived from the language of the statute. The court must be "satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches". In practice the "reasonable grounds"

will almost inevitably consist of evidence of past conduct. That conduct must be such as to make it reasonable to conclude that if the respondent is not made subject to a banning order, he is likely to contribute to football violence or disorder in the future. The past conduct may or may not consist of or include the causing or contributing to violence or disorder that has to be proved under s 14B(4)(a), for that violence or disorder is not required to be football related. It must, however, be proved to the same strict standard of proof. Furthermore it must be conduct that gives rise to the likelihood that, if the respondent is not banned from attending prescribed football matches, he will attend such matches, or the environs of them, and take part in violence or disorder.

[93] These matters are not readily susceptible of proof. We can well understand the practice that is evidenced by this case of using a football intelligence service to build up profiles of "football prominents". Such a practice may well be the only way of assembling evidence sufficiently cogent to satisfy the requirements of s 14B(4)(b). Those requirements, if properly applied in the manner described above, will provide a satisfactory threshold for the making of a banning order . . .'

[54] Lord Phillips MR referred (at [90]) to the decision of the Court of Appeal in *R (on the application of McCann) v Crown Court at Manchester*. *McCann's* case was the subject of a further appeal to the House of Lords [2002] UKHL 39, [2002] 4 All ER 593, [2003] 1 AC 787. The case concerned an application to the magistrates' court for anti-social behaviour orders under s 1 of the Crime and Disorder Act 1998. Again this was held to be a civil proceeding. Nevertheless their Lordships went on to hold that the standard of proof to be applied to allegations about the defendants' past behaviour was the criminal standard. Lord Steyn stated (at [37]):

'Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of the matters involved, at least some reference to the heightened civil standard would usually be necessary (see *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1 at 16–17, [1996] AC 563 at 586, per Lord Nicholls of Birkenhead). For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under s 1 apply the criminal standard . . .'

[55] Lord Hope of Craighead gave the following reasons for indorsing the approach of applying the criminal standard:

'[82] Mr Crow for the Secretary of State said that his preferred position was that the standard to be applied in these proceedings should be the civil standard. His submission, as it was put in his written case, was that although the civil standard was a single, inflexible test, the inherent probability or improbability of an event was a matter to be taken into account when the evidence was being assessed. He maintained that this view was consistent

with the position for which he contended, that these were civil proceedings which should be decided according to the civil evidence rules. But it is not an invariable rule that the lower standard of proof must be applied in civil proceedings. I think that there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made.

[83] This . . . was the view which the Court of Session took in *Constanda v M* 1997 SC 217 when it decided that proof to the criminal standard was required of allegations that a child had engaged in criminal conduct although the ground of referral to a children's hearing was not that he had committed an offence but that he was exposed to moral danger. There is now a substantial body of opinion that, if the case for an order such as a banning order or a sex offender order is to be made out, account should be taken of the seriousness of the matters to be proved and the implications of proving them. It has also been recognised that if this is done the civil standard of proof will for all practical purposes be indistinguishable from the criminal standard (see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 All ER 562 at 573–574, [2001] 1 WLR 340 at 354, per Lord Bingham of Cornhill CJ; [*Gough v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351 at [90], [2002] 2 All ER 985 at [90], [2002] QB 1213], per Lord Phillips of Worth Matravers MR). As Mr Crow pointed out, the condition in s 1(1)(b) of the [Crime and Disorder Act 1998] that a prohibition order is necessary to protect persons in the local government area from further anti-social acts raises a question which is a matter for evaluation and assessment. But the condition in s 1(1)(a) that the defendant has acted in an anti-social manner raises serious questions of fact, and the implications for him of proving that he has acted in this way are also serious. I would hold that the standard of proof that ought to be applied in these cases to allegations about the defendant's conduct is the criminal standard.'

[56] The other members of the House in *McCann*'s case agreed with Lord Steyn and Lord Hope.

[57] Finally in this chronological survey, reference should be made to the decision of the Privy Council in *Campbell v Hamlet* [2005] UKPC 19, [2005] 3 All ER 1116. In that case there had been a finding of professional misconduct by an attorney. One of the issues on the appeal was the correct standard of proof to apply to such proceedings. Lord Brown of Eaton-under-Heywood stated (at [16]) that their Lordships entertained no doubt that the criminal standard was the correct standard. He continued (at [17]):

> 'It has, of course, long been established that there is flexibility in the civil standard of proof which allows it to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters.'

[58] He then referred with evident approval (at [17]–[19]), to passages that we have already cited from *B v Chief Constable of Avon and Somerset Constabulary*, *Gough v Chief Constable of the Derbyshire Constabulary* and *R (on the application of McCann) v Crown Court at Manchester* [2002] 4 All ER 593, [2003] 1 AC 787 in which it was indicated that, in the situations there under consideration, the civil

standard of proof would for all practical purposes be indistinguishable from the criminal standard. *a*

Discussion

[59] We have set out those authorities in chronological order because, in our judgment, it helps to show that Mr Bowen's submissions seek to impose an unwarranted straitjacket of classification upon them. Certainly there are *b* differences in the language used and the rationalisations given over time; but the essential point that runs through the authorities is that the civil standard of proof is flexible in its application and enables proper account to be taken of the seriousness of the allegations to be proved and of the consequences of proving them.

[60] Whatever differences in expression there have been over time, it was laid *c* down clearly by the House of Lords in *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1, [1996] AC 563 and *Secretary of State for the Home Dept v Rehman* [2002] 1 All ER 122, [2003] 1 AC 153 that in English law the civil standard is one single standard, namely proof on the balance of probabilities (or preponderance of probability). The other standard is the criminal standard of proof beyond reasonable doubt. There is no intermediate standard, nor is the *d* civil standard to be broken down into sub-categories designed to produce one or more intermediate standards. (We leave out of account for the purposes of this analysis the standards applicable in certain specific statutory contexts, such as a 'reasonable likelihood' of persecution in asylum cases. The present case is governed by the general rules.)

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[61] We reject Mr Bowen's contention that the decision in *Re H* might have been different if *Khawaja v Secretary of State for the Home Dept* [1983] 1 All ER 765, [1984] AC 74 had been cited in it. Lord Nicholls in *Re H* considered his approach substantially to accord with that in *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, [1957] 1 QB 247, which was approved in *Khawaja*'s case and which Mr Bowen would place in the same category as *Khawaja*'s case. In any event *f* *Khawaja*'s case was cited in *Rehman*'s case, where *Re H* was followed. The point might equally be made that *Re H*, in turn, was not cited in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 All ER 562, [2001] 1 WLR 340 or *Gough v Chief Constable of the Derbyshire Constabulary* [2002] 2 All ER 985, [2002] QB 1213, though it was in *R (on the application of McCann) v Crown Court at Manchester* [2002] *g* 4 All ER 593, [2003] 1 AC 787, and that *Rehman*'s case was not cited in any of those three cases. In our view, however, this does not mean that successive cases have been decided per incuriam or that the law has been getting into a state of confusion. Full citation of earlier authorities has not been necessary in these cases, for the very reason that their broad thrust has been the same (albeit that, as we explain below, slightly different language might sometimes have been used if *h* *Re H* had been cited in some of the more recent cases).

[62] Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the *j* allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.

[63] The flexibility that exists in the application of the standard is clear from *Re H* itself, where Lord Nicholls, whilst affirming the existence of a single civil standard, stressed ([1996] 1 All ER 1 at 16, [1996] AC 563 at 586) that it had 'a generous degree of flexibility' in respect of the seriousness of the allegation (see also his reference ([1996] 1 All ER 1 at 17, [1996] AC 563 at 587) to 'the in-built flexibility already mentioned').

[64] It is true that the rationalisation put forward in *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1, [1996] AC 563 and followed in *Secretary of State for the Home Dept v Rehman* [2002] 1 All ER 122, [2003] 1 AC 153 focused on the seriousness of the allegation rather than on the seriousness of the consequences if the allegation is proved. The reasoning was that the more serious the allegation the less likely it is that the event occurred, and that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. In general, the seriousness of an allegation is a function of the seriousness of its consequences, and vice versa, so that the rationalisation in *Re H* and *Rehman*'s case will take due account of the seriousness of the consequences if an allegation is proved. We accept Mr Bowen's submission, however, that there will be cases where proof of an allegation may have serious consequences even though it cannot be said that the matter alleged is inherently improbable. It seems to us that the same general approach must apply in such cases, even though the rationalisation put forward in *Re H* does not readily accommodate it. The more serious the consequences, the stronger the evidence required in practice to prove the matter on the balance of probabilities.

[65] In terms of outcome, and however difficult it may be to accommodate it within his reasoning, that conclusion accords with the way in which Lord Nicholls evidently thought of the matter in *Re H*. The alternative, intermediate standard which he formulated for consideration but then rejected was 'commensurate with the gravity of the allegation *and the seriousness of the consequences*' (see [1996] 1 All ER 1 at 17, [1996] AC 563 at 587) (emphasis added). In rejecting it, however, he doubted whether in practice it would add much to the balance of probbility standard. Moreover Morris LJ in *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, [1957] 1 QB 247, with whose judgment Lord Nicholls considered his own approach substantially to accord, was plainly of the view that the seriousness of the consequences, whether for liberty or reputation, was a matter to be taken into account when deciding on the balance of probabilities (see the latter part of the passage quoted at [39], above).

[66] The more recent cases provide uniform confirmation of the need to take account of the seriousness of the consequences or implications of what has to be proved when applying the civil standard: (see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 All ER 562 at [30], [2001] 1 WLR 340, *Gough v Chief Constable of the Derbyshire Constabulary* [2002] 2 All ER 985 at [90], [2002] QB 1213 and *R (on the application of McCann) v Crown Court at Manchester* [2002] 4 All ER 593 at [83], [2003] 1 AC 787. The relevant passages are set out above and we do not need to repeat them.

[67] Some of the language used in those cases might be thought to have the potential for confusion. For example, Lord Bingham CJ said in *B v Chief Constable of Avon and Somerset Constabulary* that the civil standard of proof 'does not invariably mean a bare balance of probability' (see [2001] 1 All ER 562 at [30]), and Lord Steyn referred in *McCann*'s case to 'the heightened civil standard' (see [2002] 4 All ER 593 at [37]). Such observations are an echo of references in some of the

earlier cases to higher degrees of probability being required where the allegations are more serious. In *Secretary of State for the Home Dept v Rehman* [2002] 1 All ER 122, [2003] 1 AC 153, however, Lord Hoffmann took issue with that kind of language, which does not sit comfortably with a single standard of balance of probabilities. If *Rehman*'s case had been cited in the later cases, or indeed if *Re H* had been cited in *B v Chief Constable of Avon and Somerset Constabulary*, it may well be that different words would have been used. But in our view it is only a matter of words. We do not think that anything said in the later cases affects the substance of the position as set out in *Re H* and *Rehman*'s case.

[68] In all of this we take comfort from Morris LJ's observations in *Hornal v Neuberger Products Ltd*, quoted at [39], above, that it may well be that no clear-cut logical reconciliation can be formulated in regard to the authorities, but perhaps they illustrate that 'the life of the law is not logic but experience', and that the words which are used to define the approach must be the servants not the masters of meaning.

[69] Although there remains a distinction in principle between the civil standard and the criminal standard, the practical application of the flexible approach demonstrated in the authorities means that they are likely in certain contexts to produce the same or similar results. Indeed, there are exceptional situations in which, for reasons of policy or pragmatism, the actual criminal standard is used in civil proceedings, as in contempt of court (see *Re Bramblevale Ltd* [1969] 3 All ER 1062, [1970] Ch 128), the making of anti-social behaviour orders (*McCann*'s case) or certain disciplinary contexts (*Campbell v Hamlet* [2005] 3 All ER 1116). These are exceptions to the general rule. Mr Bowen has not argued before us that the mental health context constitutes a further exception in which the criminal standard applies, and we are sure he is right not to have done so.

[70] To recapitulate, we do not accept Mr Bowen's submission that the House of Lords in *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1, [1996] AC 563 somehow took a wrong turn, reflecting only one strand in the earlier case law and resulting in the erroneous adoption of a fixed standard instead of a flexible standard, or that there is an irreconcilable conflict between *Re H* and later cases such as *R (on the application of McCann) v Crown Court at Manchester* [2002] 4 All ER 593, [2003] 1 AC 787. *Re H* is in line with the overall thrust of the case law, whilst analysing the matter in terms of a single civil standard (balance of probabilities) which is to be applied flexibly according to the seriousness of the matters to be proved and the consequences of proving them. The reasoning in support of the adoption of a single standard may not provide a complete explanation of that flexibility in its application, but the seriousness of the consequences if a matter is proved is nonetheless a factor to be taken into account when deciding in practice whether the evidence is sufficiently strong to prove that matter on the balance of probabilities.

[71] We have not spent time on the Commonwealth authorities, such as *Briginshaw v Briginshaw* (1938) 60 CLR 336, to which Mr Bowen referred us, but due account is taken of them in the English cases that we have examined. Although the United States cases are of no direct assistance, since they were decided in the somewhat different context of the 'due process' clause of the United States constitution and they lay down an intermediate standard which, as *Re H* makes clear, is no part of English law, they do focus on a similar problem and it seems to us that the 'clear and convincing evidence' test in *Addington v Texas* (1979) 441 US 418, the language of 'reliably shown' or 'convincingly shown'

in the convention context, and the flexible application of the balance of probabilities standard may all lead to much the same result in practice.

The application of the standard of proof

[72] Given that the standard of proof is flexible in its application, there remains the question whether evidence of an especially high strength or quality is required to meet the standard in the context of ss 72 and 73 of the 1983 Act (to the extent that the issues arising under those sections are susceptible of proof to a defined standard at all). We take it as axiomatic, and it is not in dispute, that cogent evidence will in practice be required in order to satisfy the tribunal, on the balance of probabilities, that the conditions for continuing detention are met. But we would not put it any higher than that.

[73] As submitted by Mr McCullough on behalf of the tribunal, the mental health context is very different from other situations where individual liberty is at stake. The unwarranted detention of an individual on grounds of mental disorder is a very serious matter, but the unwarranted release from detention of an individual who is suffering from mental disorder is also a very serious matter. The decision of the United States Supreme Court in *Addington v Texas*, quoted extensively by Munby J in his judgment ([2005] All ER (D) 71 (Apr) at [51]–[57]), is valuable for its discussion of the competing interests of the individual and the state in this area. The court concluded that the individual's interest was of such weight and gravity that clear and convincing evidence was required to justify his involuntary confinement. Although the court dealt with the matter in terms of an intermediate standard of proof, its reasoning is relevant to the strength of the evidence required in the flexible application of the English balance of probabilities standard. In our view it supports a requirement of cogent evidence but does not compel a more demanding evidential requirement than that.

[74] Several considerations weigh against pitching the evidential requirement unduly high. One of the points made by Burger CJ in rejecting the criminal standard of proof was that:

> 'One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma . . . It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.'

Furthermore the consequences that may flow from the release of a person suffering from mental disorder include not only a risk to the individual's own health and safety (eg self-harm, even suicide), but also a risk of harm to other members of the public. It is not to be forgotten that a person whose case is being considered under s 73 of the 1983 Act was detained in the first place pursuant to a hospital order under s 37 following conviction for a criminal offence, often an offence of violence: the appalling facts of N's own case are very much in point. Some of those whose cases are considered under s 72 will also have been detained pursuant to s 37. All those factors are taken into account in the operation of the statutory machinery under the 1983 Act.

[75] The matter is expressed very well by Munby J (at [71]). In the continuation of the passage quoted at [18], above, the judge said:

> 'I agree with [Mr McCullough] that to raise the standard of proof above the ordinary civil standard of proof would subvert the obvious purpose of the Act, which seeks both to protect the interests of the individual whose

ability to act in his own best interests is impaired and at the same time enable a *proportionate* balance ... to be struck between individual and public interests. It would, as Mr McCullough submits, relegate the interests of the patient, as objectively ascertained, and of the public, to a position subsidiary to the principle of personal autonomy—an approach for which there is no principled basis. And it would thereby create a heightened risk to patients and the public—contrary, as it seems to me, to the very scheme and purpose of the Act.'

That was said in support of the judge's conclusion that the applicable standard of proof is the ordinary civil standard of proof on the balance of probabilities; but it also tells against demanding an especially high evidential requirement in order to meet that standard.

[76] Turning to the actual decision in the present case, the tribunal was faced with competing expert opinions as to whether N was suffering from a psychopathic disorder within the meaning of the 1983 Act. Directing itself by reference to the balance of probabilities, it gave a reasoned basis for preferring one group of experts over the other, concluding in effect that the diagnosis of psychopathic disorder was more likely than not to be the correct one. The body of evidence it preferred was plainly cogent and it is clear from the tribunal's reasons that its preference was reasonably clear cut. The tribunal's approach cannot be faulted. The position would have been the same, however, even if *both* sets of competing opinions could fairly have been described as cogent and the decision between them had been a finely balanced one. We do not think that more is required than that the decision is based on cogent evidence which is accepted as correct on the balance of probabilities. It is not necessary, for example, for one body of evidence to have a much higher degree of cogency before it can be accepted on the balance of probabilities.

[77] The same general considerations apply to the determination of other disputed issues of fact such as whether the patient has behaved in a particular way or said a particular thing in the past. The tribunal was wrong to adopt a standard of proof 'akin to the criminal standard' (though, as Munby J held, it was an error favourable to N and cannot help him in these proceedings). The tribunal's approach not only expresses the standard of proof incorrectly, but also suggests an evidential requirement higher than is appropriate for the proper application, in the present context, of the correct standard of proof. As regards the cogency of evidence required, we see no reason to disagree with the guidance given by Munby J at [121] et seq of his judgment, where he dealt in particular with the evaluation of hearsay evidence; though we should stress that the detail of the points covered in that part of the judgment has not been the subject of argument before us.

Conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

[78] In our judgment, the conclusion we have expressed above is in full conformity with the requirements of the convention.

[79] In determining whether a detention on grounds of mental illness complies with art 5, the European Court of Human Rights has consistently applied the test laid down in *Winterwerp v Netherlands* (1979) 2 EHRR 387. For example, in *HL v UK* (2004) 17 BHRC 418 at 450 (para 98), the court stated:

'It is recalled that an individual cannot be deprived of his liberty on the basis of unsoundness of mind unless three minimum conditions are satisfied: he must reliably be shown to be of unsound mind; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder (*Winterwerp v Netherlands* [1979] ECHR 6301/73 at para 39 . . .).'

The court examined the material on which the applicant's detention had been based, and found ((2004) 17 BHRC 418 at 451 (para 101)) that 'the applicant has been reliably shown to have been suffering from a mental disorder of a kind or degree warranting compulsory confinement . . .'

[80] It seems to us that full effect is given to the *Winterwerp* test by the application of a standard of proof on the balance of probabilities and a recognition that cogent evidence will in practice be required to meet that standard. We note, too, that in *Hutchison Reid v UK* (2003) 14 BHRC 41 at 58 (para 70), where the court repeated the *Winterwerp* test, there was no suggestion that the standard of proof on the balance of probabilities was inappropriate or incompatible with the requirements of the convention, even though the court gave specific consideration to the two cases containing obiter dicta in support of that standard, namely *Reid v Secretary of State for Scotland* [1999] 1 All ER 481, [1999] 2 AC 512 and *R (on the application of H) v London North and East Region Mental Health Review Tribunal* (2001) 61 BMLR 163, [2002] QB 1.

[81] Mr Bowen has cited cases concerning the standard of proof required in other convention contexts. For example, in *R (on the application of N) v Dr M* [2003] 1 FCR 124, [2003] 1 WLR 562 it was common ground, in the light of the decision of the European Court of Human Rights in *Herczegfalvy v Austria* (1992) 18 BMLR 48, that the standard of proof for the purposes of determining whether medical treatment to which the patient does not consent is compatible with art 3 is that the medical necessity has been 'convincingly shown' (see the judgment of the Court of Appeal [2003] 1 FCR 124 at [17]). The court rejected (at [18]) a contention that the test was in effect the same as the criminal standard of proof, stating that no useful purpose is served by importing the language of the criminal law, that the phrase 'convincingly shown' is easily understood and that the standard is a high one but it does not need elaboration or further explanation. In *R (on the application of B) v S* [2005] EWHC 1936 (Admin), [2005] All ER (D) 38 (Sep), Charles J considered, but left open, the relationship between the 'convincingly shown' standard adopted in *R (on the application of N) v Dr M* and the decision of the House of Lords in *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1, [1996] AC 563 as to the civil standard of proof in English law. He proceeded on the basis of the 'convincingly shown' standard, treating it (as the parties had apparently agreed) as lying between the English civil standard and criminal standard.

[82] Although the 'convincingly shown' standard is arguably different from 'reliably shown' and it is not necessary to decide whether that is so or not for the purposes of this appeal, it seems to us, as indicated above, that they are not likely to produce materially different results from each other or from the 'clear and convincing evidence' test in *Addington v Texas* (1979) 441 US 418. Indeed, it seems to us to be desirable, so far as possible, for one single (though flexible) approach to be adopted for these different problems in the civil law.

[83] However that may be, the language of 'reliably shown' has been consistently applied under the convention for many years in the context of

detention on grounds of mental health. It must be taken as the correct test, and the application of the standard of proof on the balance of probabilities in the way we have described is capable of meeting it.

Issue 2: issues susceptible to proof to the defined standard

[84] All parties accept that Munby J was right to hold that, whatever standard of proof is determined under issue 1 to be the correct standard in this context, it can and should be applied to the question whether a person is suffering from a mental disorder within s 72(1)(b)(i) of the 1983 Act (including, as we understand the concessions, the nature and degree of that disorder) and to any issue of past conduct that the tribunal may have to determine.

[85] Mr Bowen submits, however, that the judge was wrong to hold that the remaining issues under ss 72 and 73 are not susceptible to proof to a defined standard but are to be determined by a process of evaluation and judgment. His case is that the same standard of proof is applicable to the tribunal's determination of all the issues that arise under those sections.

[86] This question is not governed by any binding authority, though Mr Bowen draws support from obiter dicta in two cases. In *Reid v Secretary of State for Scotland* [1999] 1 All ER 481 at 503, [1999] 2 AC 512 at 539, Lord Clyde evidently considered there to be a burden on the patient to satisfy the decision maker on the balance of probabilities as to each of the conditions contained in the Scottish equivalent of s 72. The case pre-dated the amendment to the 1983 Act which placed the burden of proof on the detaining authority; but whether an issue is susceptible to proof to a particular standard should not depend on where the burden of proof lies. There was, however, no argument on the standard of proof or its scope. Similarly, in *R (on the application of H) v London North and East Region Mental Health Review Tribunal* (2001) 61 BMLR 163 at [32], [2002] QB 1 the Court of Appeal referred in general terms to the relevant conditions being demonstrated on a balance of probability, but again this was obiter and there was no argument on the point.

[87] In developing his submissions, Mr Bowen takes as his starting-point the proposition that there is a *burden* on the detaining authority to satisfy the tribunal that the conditions for detention are met. The existence of that burden is common ground and is supported by *R (on the application of H) v London North and East Region Mental Health Review Tribunal* and by the decision of the European Court of Human Rights in *Hutchison Reid v UK* (2003) 14 BHRC 41 (at least to the extent that the issues that arise under ss 72 and 73 of the 1983 Act are also within the scope of art 5 of the convention). The existence of the burden is unaffected by the fact that aspects of the tribunal's procedures are inquisitorial in nature (for example, the requirement of a medical examination by the medical member of the tribunal and the power to require the attendance of witnesses and to call for further information).

[88] Mr Bowen's essential argument is that where there is a burden of proof, there must be a corresponding standard of proof. If no standard applies, then there is in truth no burden of proof. It makes no sense to talk in terms of a burden of proof unless there is a standard by reference to which the matter must be proved; and if a standard does apply, it must be the same standard as that held to apply to the determination of issues of fact.

[89] We are not persuaded by the logic of that argument. It is inherent in the statutory language that the detaining authority has to satisfy the tribunal that the relevant conditions are met: 'the tribunal shall direct the discharge of a

patient . . . if they are not satisfied' as to the appropriateness and necessity, etc, of continuing detention (see s 72 of the 1983 Act). If the authority fails to satisfy the tribunal as to any of the conditions, the tribunal must order discharge. Thus the authority has the burden of persuading the tribunal to form the requisite judgments. Munby J preferred to describe this as an onus or persuasive burden (see [2005] All ER (D) 71 (Apr) at [106]). Whether or not one prefers that language, the point of substance is the same. The existence of a burden does not mean that there must be a particular standard of proof in play.

[90] The point can be illustrated by reference to *R (on the application of McCann) v Crown Court at Manchester* [2002] 4 All ER 593, [2003] 1 AC 787, upon which the judge relied as authority at the highest level against Mr Bowen's argument. We have already explained that *McCann*'s case concerned applications for anti-social behaviour orders. Such an application is made by a local authority to a magistrates' court. Section 1(4) of the Crime and Disorder Act 1998 provides that: 'If, on such an application, it is proved that the conditions mentioned in subsection (1) . . . are fulfilled', the court may make an order. The conditions in sub-s (1) are '(a) that the person has acted . . . in an anti-social manner . . . ; and (b) that such an order is necessary to protect . . . persons from further anti-social acts by him'. Having held that pragmatism favoured the adoption of the criminal standard of proof under s 1, Lord Steyn continued (at [37]):

> 'If the House takes this view it will be sufficient for the magistrates, when applying s 1(1)(a) *to be sure* that the defendant has acted in an anti-social manner . . . The inquiry under s 1(1)(b), namely that such an order is necessary to protect persons from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgment or evaluation.'

We have set out previously the passage (at [83]) where Lord Hope expressed a similar view (see [55], above). We have also pointed out that the rest of their Lordships expressed agreement with both Lord Steyn and Lord Hope.

[91] Mr Bowen seeks to deflect the force of *McCann*'s case by submitting, as a matter of inference, that their Lordships considered that neither a burden nor a standard of proof was applicable under s 1(1)(b). That cannot be right. It is plain from the terms of s 1(4) that there is a burden on the local authority to prove that the conditions in s 1(1) are met. The effect of *McCann*'s case is that, in order to prove that the condition in s 1(1)(b) is met, the local authority must persuade the court to form a judgment that an order is 'necessary'. Standard of proof does not come into it, but there is still a burden of proof.

[92] There are other statutory contexts in which it has been held that the concept of standard of proof is inapplicable or unhelpful in relation to questions of judgment or evaluation, especially as regards the assessment of future risk.

[93] Munby J (at [91]–[93]) cited passages from the decisions of the Court of Appeal and the House of Lords in *Secretary of State for the Home Dept v Rehman*. A sufficient flavour is given by this passage from the speech of Lord Hoffmann ([2002] 1 All ER 122 at [56], [2003] 1 AC 153):

> 'In any case, I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an

evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.'

[94] It must be borne in mind that in *Rehman*'s case the primary decision-maker was the Secretary of State, who had to form an executive judgment as to whether there was a danger to national security, and that the House of Lords was considering the correct approach of the Special Immigration Appeals Commission when reviewing the Secretary of State's decision. So there is not a precise parallel with the present situation, where the detaining authority has the burden of satisfying the primary decision-maker, the tribunal, that certain conditions are met. Nevertheless, *Rehman*'s case is important for the contrast it draws between matters of fact, which the Secretary of State had to establish to the civil standard of proof (see also [2002] 1 All ER 122 at [22] per Lord Slynn), and matters of judgment and evaluation, in relation to which the concept of standard of proof was considered to be not particularly helpful.

[95] Munby J also referred to a number of cases concerning the approach of the Parole Board in determining whether it is safe to release a prisoner. In *R v Lichniak, R v Pyrah* [2002] UKHL 47 at [16], [2002] 4 All ER 1122 at [16], [2003] 1 AC 903, Lord Bingham doubted—

'whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release, since this is an administrative process requiring the board to consider all the available material and form a judgment'.

In *R (on the application of Sim) v Parole Board* [2003] EWCA Civ 1845 at [42], [2004] QB 1288 at [42], [2004] 2 WLR 1170, Keene LJ accepted that 'the concept of a burden of proof is inappropriate when one is involved in risk evaluation'. That was followed in *R (on the application of Brooks) v Parole Board* [2004] EWCA Civ 80 at [28], [2004] All ER (D) 142 (Feb) at [28], where Kennedy LJ stated that what the Parole Board must do is to decide in the light of all the relevant material placed before it whether, in the terms of s 28(6)(b) of the Crime (Sentences) Act 1997, it 'is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined'. Although Munby J considered this to be the most obvious analogy with the present case, we accept Mr Bowen's point that the relevant function of the Parole Board is treated as an administrative decision-making process in which the burden of proof has no part to play, so that it does not help directly with the question whether a standard of proof applies where there is a burden on the detaining authority. Nevertheless, it seems to us that the reasoning in such cases provides support also for the view that a risk evaluation of the kind engaged in by the Parole Board is not susceptible to proof to a defined standard.

[96] On the other hand, it would seem that in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 All ER 562 at [31], [2001] 1 WLR 340 Lord Bingham CJ considered that the magistrates' court could apply the civil standard of proof (with

appropriate strictness) in deciding whether the defendant 'has acted . . . in such a way as to give reasonable cause to believe that an order . . . is necessary to protect the public from serious harm from him' (see para [51], above). A similar point may be made in relation to *Gough v Chief Constable of the Derbyshire Constabulary* [2002] 2 All ER 985 at [90]–[93], [2002] QB 1213 (quoted at [53], above), where the magistrates' court had to be satisfied inter alia 'that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder . . .' In each case, as *Gough*'s case (at [92]) brings out, the focus is on evidence of past conduct, in relation to which there is no difficulty in applying a standard of proof. But in each case there is also an additional element of judgment and evaluation of risk. Yet no distinction was drawn in either case between that element and the fact-finding element as regards the applicability of the civil standard of proof.

[97] Against that background we turn to consider the conclusion reached by Munby J at [101], [102]) to the effect that issues under ss 72 and 73 of the 1983 Act as to the appropriateness and necessity of continuing detention (as well as the alternative question under s 73 as to the appropriateness of the patient remaining liable to be recalled) are not susceptible to a defined standard of proof.

[98] We agree with the judge that, in relation to those issues, the tribunal 'is not . . . concerned so much with finding facts which are capable of exact demonstration but rather with a process of judgment, evaluation and assessment' (see para [102]). We also agree that this is very similar in nature to the process of judgment or evaluation referred to in cases such as *R (on the application of McCann) v Crown Court at Manchester, Secretary of State for the Home Dept v Rehman* and the Parole Board cases.

[99] We would accept that the concept of a standard of proof is 'not *particularly* helpful' (per Lord Hoffmann in *Rehman*'s case, with emphasis added) in relation to such a process. But we would not go so far as to hold that there is no room for its application at all. An opinion on the appropriateness or necessity of continuing detention may in principle be held with different degrees of certainty, and it may be important for the tribunal to know what degree of certainty is called for. Under ss 72 and 73 of the 1983 Act the tribunal has to be 'satisfied' as to the relevant matters. As Lord Lloyd of Berwick observed in *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1 at 7, [1996] AC 563 at 576, 'is satisfied' is an expression with a range of meanings covering the criminal standard of proof ('satisfied so as to be sure'), through the civil standard ('satisfied on a balance of probabilities') to being a synonym for 'concludes' or 'determines' and therefore having an entirely neutral function. We see no absurdity in a tribunal having some doubt as to the appropriateness or necessity of continuing detention, yet being satisfied on the balance of probabilities that it is appropriate and necessary. Accordingly, as it seems to us, the standard of proof has a potential part to play in the decision-making process even in relation to issues that are the subject of judgment and evaluation. In practice, we would expect the tribunal generally either to form the requisite judgment or not to form it, without needing to have specific regard to any standard of proof. But the standard of proof provides a backdrop to the decision-making process and may have an important role in some cases.

[100] Analysis of this issue is not helped by the fact that 'proof' in the phrase 'standard of proof' and 'probabilities' in the phrase 'balance of probabilities' are words which go naturally with the concept of evidence relating to fact, but are less than perfect with evaluative assessments. That is why the courts have started to speak of the 'burden of persuasion'. Where a court has to be satisfied

'on balance' in evaluative matters, it needs to be satisfied on the balance of the argument, where the argument depends in part on evidence (there is always going to be some factual substratum) and in part on evaluation. Since the evidence cannot be divorced from the argument, and since there is also argument on pure issues of fact, it is perfectly acceptable to refer to the whole process as one in which the court has to be satisfied on the balance of probabilities. In relation to the evaluative part of the process that may involve an element of shorthand, but it gives rise to no conceptual or practical difficulty.

[101] A related consideration is that one of the issues arising for determination in the present context, namely the question under s 72(1)(b)(i) of the 1983 Act whether the person is suffering from a mental disorder 'of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment', is a mixed question of fact and judgment or evaluation. The nature and degree of the mental disorder is a question of fact and is accepted to be susceptible to proof on the balance of probabilities. There is a certain artificiality in applying a standard of proof to that question but not to the related question whether the nature and degree of the disorder make detention appropriate. For example, a modest parallel can be drawn with the apparent view of the court in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 All ER 562, [2001] 1 WLR 340 that a standard of proof should be applied to the entire question whether the defendant 'has acted . . . in such a way as to give reasonable cause to believe that an order . . . is necessary to protect the public from serious harm from him'.

[102] We bear in mind too that, although the observations about the standard of proof in *Reid v Secretary of State for Scotland* [1999] 1 All ER 481, [1999] 2 AC 512 and *R (on the application of H) v London North and East Region Mental Health Review Tribunal* (2001) 61 BMLR 163, [2002] QB 1 were obiter, in each case the court evidently saw no difficulty in applying the standard of proof to the full range of issues to be decided by the tribunal.

[103] We also think it likely that the tribunal's task will be made easier if, instead of dividing up the issues into matters that are susceptible to proof to a defined standard and those that are not, it approaches the entire range of issues by reference to the standard of proof on the balance of probabilities, whilst recognising that in practice the standard of proof will have a much more important part to play in the determination of disputed issues of fact than it will generally have in matters of judgment as to appropriateness and necessity.

[104] For all those reasons, we respectfully differ from the conclusion reached by Munby J on this issue. We would hold that the tribunal should apply the standard of proof on the balance of probabilities to all the issues it has to determine. We would not, however, expect the difference between that approach and the approach favoured by Munby J to have much practical significance, given the limited role that the standard of proof will have in relation to matters of judgment and evaluation. Nor does the difference affect the outcome of the present appeal, since the tribunal appears to have applied the standard of proof on the balance of probabilities to all issues save the factual issues to which it applied a standard akin to the criminal standard.

Issue 3: the default position under ss 72 and 73 of the 1983 Act

[105] This issue arises out of the passage in Munby J's judgment (at [117]–[120]) which we have quoted fully at [24], above. In effect, the judge states in that passage that the tribunal is obliged to discharge a patient under s 72 or s 73

only when the detaining authority fails to satisfy it *both* as to the s 72(1)(b)(i) criterion *and* as to the s 72(1)(b)(ii) criterion.

[106] As all parties before us accept, that is an error. The correct position is that those two criteria are cumulative and the tribunal is obliged to discharge a patient if the detaining authority fails to satisfy it as to *either* of them (see *Reid v Secretary of State for Scotland* [1999] 1 All ER 481 at 503–504, [1999] 2 AC 512 at 539–540).

[107] Nothing, however, turns on this slip. The judge's observations about the default position were unnecessary for his decision and do not impact on the reasoning in the main part of the judgment. All that is needed, therefore, is to note the error so as ensure that it does not give rise to any confusion in the future.

CONCLUSION

[108] Although our reasoning differs in some respects from that of Munby J, we are in agreement with his conclusion that the only misdirection by the tribunal in the case of N was favourable to the patient and that N's judicial review application fell to be dismissed. It follows that this appeal must also be dismissed.

Appeal dismissed.

Melanie Martyn Barrister.

R (on the application of Amoako) v Director of Public Prosecutions

[2006] EWHC 1572 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

OUSELEY J

24 FEBRUARY 2006

Extradition – Extradition order – Appeal – Notice of appeal – Permitted period for lodging notice of appeal being seven days starting with day on which order made – Extradition hearing in which extradition ordered concluding after six pm – Whether extradition order made on next business day – Extradition Act 2003, s 26(4).

The hearing of the application in the magistrates' court for the claimant's extradition ended at about quarter past six on a Friday evening. The district judge ordered the claimant's extradition. Section 26(4)[a] of the Extradition Act 2003 provided that notice of an appeal had to be given 'before the end of the permitted period, which is 7 days starting with the day on which the order is made'. The notice of appeal was lodged on the Monday week and the court office rejected it on the grounds that it was out of time. The claimant applied for judicial review. He submitted that because the magistrates' court had concluded its hearing after business hours on the Friday the order should have been treated as having been made on the next business day, which was the following Monday, and that therefore the notice of appeal had been given before the end of the permitted period.

Held – The day on which an extradition order was made was the actual day on which the district judge pronounced that the order for extradition was being made. The extension of a court's sitting hours beyond normal business hours for the court's offices did not alter the day on which the court made its order. There was nothing in any statute or procedural provisions to displace the normal meaning of 'day'. Accordingly, in the instant case, the extradition order had been made on the Friday. It followed that the notice of appeal had been lodged out of time (see [5], [6], [7], [11], below).

Notes

For appeal against extradition order, see Supp to 17(2) *Halsbury's Laws* (4th edn reissue) para 1419.

For the Extradition Act 2003, s 26, see 18 *Halsbury's Statutes* (4th edn) (2005 reissue) 825.

Application

The claimant, Kofi Amoako, lodged a notice of appeal under s 26 of the Extradition Act 2003 on 24 February 2006. The court office rejected the notice on the grounds that it was out of time. The claimant applied for judicial review. The facts are set out in the judgment.

a Section 26, so far as material, is set out at [2], below

Paul Spreadborough (instructed by *Charles Allotey & Co*) for the claimant.
Adina Ezekiel (instructed by the *Crown Prosecution Service*) for the defendant.

OUSELEY J.

[1] This is a procedural application in which the claimant, Mr Amoako, has had his notice of appeal rejected by the court office on the grounds that it is out of time. It is contended on his behalf that it is in time.

[2] The way the matter arises is this: in the course of extradition proceedings before the district judge at Bow Street Magistrates' Court, adjourned to 17 February 2006, the judge, who had a heavy list, concluded the hearing of the application for extradition at about a quarter past six in the evening. The provisions of s 26 of the Extradition Act 2003 say in sub-s (4): 'Notice of an appeal under this section must be given in accordance with the rules of court before the end of the permitted period, which is 7 days starting with the day on which the order is made.'

[3] The notice of appeal was sought to be lodged today, in the morning of 24 February 2006. It follows therefore that if Friday, 17 February was the day on which the order was made, then the notice of appeal was lodged out of time and it is agreed that there is no power in this court to extend time.

[4] The argument that has been put forward by Mr Spreadborough, on behalf of the person whose extradition is sought, is that because the magistrates' court concluded its hearing after business hours on 17 February, the order should be treated as having been made on the Monday and accordingly he was not out of time making his application, lodging his notice of appeal today, 24 February. I say the Monday, because it is clear that if the order was not made on Friday because of business hours, the next business day would have been the Monday. It would also follow in accordance with that argument that if the seven days started on the Monday, they would not expire until the following Monday. The argument therefore turns on what is meant by the day on which the order is made.

[5] It is important, in my judgment, that there be legal certainty over when the order is made. In any normal use of language, the day on which the order is made is the day when the district judge pronounces that the order for extradition was being made. That, in this case, was the Friday. That means that the time expired on Thursday at the close of business hours in this court.

[6] It is a commonplace amongst magistrates' courts, and sometimes it happens indeed in these courts, that sitting hours extend beyond the normal business hours for the court's offices, but that in my judgment does not alter at all the day on which the court makes its order.

[7] Accordingly, I considered whether there is anything to displace what would be the normal conclusion that the order was made on Friday. There are no indications in the 2003 Act. There is nothing in the Interpretation Act 1978 either and the CPR contain nothing which suggests that the 'business day' interpretation of 'day', upon which Mr Spreadborough relies is right. Part 2 does not define 'day' as 'business day'. Rule 2.8 contains no definition of 'day'.

[8] What it says in r 2.8(5) is that:

> 'When the period specified—(a) by these Rules or a practice direction; or (b) by any judgment or court order, for doing any act at the court office ends on a day on which the office is closed, that act shall be in time if done on the next day on which the court office is open.'

[9] That does not advance the matter at all. The office was open on Thursday, the last lodging day, and in any event that is dealing with the rules and not the 2003 Act.

[10] Mr Spreadborough is right to point out that business hours for the courts are set in the practice direction as between 10.00 am and 4.30 pm, subject to exceptions. But all that that means is that if the act has to be done within the seven days, starting with the day on which the order was made, it is too late if, on the last day of the period, it is sought to be done after 4.30 pm.

[11] Accordingly, I see nothing in any statute or procedural provisions to displace the normal meaning of 'day'. Nor do I see any disadvantage to a would-be appellant. Seven days starting with the day on which the order is made is a perfectly adequate period for the modest endeavour required to lodge a notice of appeal.

[12] The provision of seven days, starting with the day on which the order is made, will always include a period of a weekend, but it would be very strange if the length of period available could be so adventitiously extended even up to a matter of four days, it seems to me, if an order is made late on Friday by the fact that it might have exceeded by a few minutes the normal business hours.

[13] Far from it being a fair position that Mr Spreadborough contends for, it would in fact introduce considerable uncertainty, looking at the clock to see at precisely what moment the district judge uttered the words of extradition and the extent to which he uttered them before he gave his reasons or after he gave his reasons and whether he completed what he had to say by 4.30 pm or 4.31 pm. This, in my judgment, is perfectly clear.

[14] Mr Spreadborough suggests that this is a matter which could merit the attention of the House of Lords. I think not.

Application dismissed.

Dilys Tausz Barrister.

Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd and others

[2006] EWHC 1444 (QB)

QUEEN'S BENCH DIVISION

LANGLEY J

15, 16 JUNE 2006

Costs – Assessment – Detailed assessment – Paying party refusing to comply with order for interim payment of costs on account – Whether court having jurisdiction to debar paying party from taking part in detailed assessment unless interim payment made.

The claimant brought proceedings against the defendants for damages for breach of a distribution agreement. The agreement provided for English jurisdiction and the defendants submitted to that jurisdiction. The result was that the claimant was awarded damages in excess of £10m and costs to be assessed if not agreed. The defendants were ordered to make an interim payment on account of costs of £2m. The defendants were granted permission to appeal on condition that they paid the claimant both the principal and interest due on the judgment sum, made the interim payment on account of costs and paid the sum of £150,000 into court as security for the costs of the appeal. The defendants paid nothing and the appeal was struck out. Following the application of the claimant that the defendants give evidence as to their means the second and third defendants were ordered to attend court. They failed to do so and were committed for contempt. The claimant also brought enforcement proceedings in Taiwan. It obtained security by way of a bank guarantee which would only be available if and when, and to the extent that, the claimant finally succeeded in the proceedings in Taiwan. Meanwhile, in the costs assessment proceedings in England, the claimant served its bill of costs. The defendant served lengthy points of dispute, estimating that the costs hearing would itself take some 30 to 40 days with costs in excess of £350,000. Against that background, the claimant applied to the costs judge for an order that unless the defendants paid the interim costs order plus interest, a final costs certificate should be issued in the amount claimed. The costs judge refused the application, emphasising the enforcement proceedings in Taiwan and doubting his jurisdiction to make the order sought. The claimant sought permission to appeal, with the substantive appeal to follow if permission were granted.

Held – In the exercise of its inherent jurisdiction to control its own processes the court had the power to make an order which would have the effect of debarring the defendants from taking part in a detailed costs assessment because of their failure to obey a court order. The jurisdiction of the court was not itself in issue and it would be a matter of concern if the court were unable to impose appropriate sanctions on those who chose to ignore its orders and yet continued to seek its processes for their own ends. It was to be emphasised that the order sought would only preclude the defendants from pursuing their arguments on assessment if they failed to make the payment which they had been ordered to make. There was, moreover, a general power of the court to debar a party in

contempt from being heard, which was also a proper basis for the order sought, as the defendants' contempt derived from a failure to meet an order which directly related to the very assessment in which they sought to participate and they did so not intending to abide by the outcome of the assessment whatever it might be. Permission to appeal would, accordingly, be granted and the appeal would be allowed. However, it would not be right, even if there were jurisdiction to do so, simply to permit the claimant to have the costs in effect rubber-stamped in the amount claimed. There would be an assessment but the defendants would not be permitted to participate further in that assessment unless they made the required interim payment together with the agreed amount of accrued interest (see [18]–[20], [23], [25]–[27], [30], below).

Notes

For interim and final costs certificates, see 10 *Halsbury's Laws* (4th edn reissue) paras 168, 169.

Cases referred to in judgment

Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065, [2001] All ER (D) 258 (Dec).

Motorola Credit Corp v Uzan [2003] EWCA Civ 752, [2004] 1 WLR 113.

Applications and appeal

The claimant, Days Healthcare Ltd (formerly Days Medical Aid Ltd) (Days), applied (i) for permission for further evidence to be adduced on its application for permission to appeal the judgment of Costs Judge Wright given on 23 March 2006 refusing its application for an order that a final costs certificate should be issued in the amount claimed unless the defendants, Pihsiang Machinery Manufacturing Co Ltd, Pihsiang Wu and Chiang Ching Ming Wu, paid the interim costs order of £2m plus interest made by Langley J on 16 February 2004 following judgment given on 29 January 2004 ([2004] EWHC 44 (Comm), [2004] 1 All ER (Comm) 991) in proceedings brought by Days against the defendants; and (ii) for permission to appeal the judgment of Costs Judge Wright with appeal to follow if permission were granted. The facts are set out in the judgment.

Stephen Auld QC (instructed by *Lovells*) for Days.

Robert Marven (instructed by *Hammonds*) for the defendants.

LANGLEY J.

THE APPLICATIONS

[1] There are two applications before the court. The first is by the claimant (to whom I shall refer as Days) to permit further evidence to be adduced on Days' application for permission to appeal a judgment of Costs Judge Wright given on 23 March this year; the second application is for that permission to be granted. I ordered that both applications and, if permission were granted, the appeal itself should be heard together today. I did so partly because the applications relate to and may affect an assessment of costs due to commence by way of a hearing of certain preliminary issues over three days commencing on 19 July, and partly because the application for permission itself seemed to me at first blush to raise

potentially important questions and so would itself involve consideration of the merits.

[2] The costs judge refused permission to appeal on the basis that his decision was a case management decision and he saw no real prospect of an appeal succeeding. As will be seen, I do not agree.

BACKGROUND/FACTS

[3] The essential background and facts, sufficient to address the applications, are as follows.

[4] Days claimed against the defendants (as I shall call Pihsiang and Mr and Mrs Wu) for damages for repudiation of a distribution agreement. The claim was tried before me in late 2003. The agreement in issue was subject to English law and contained a non-exclusive English jurisdiction clause. I handed down my judgment on 29 January 2004 ([2004] EWHC 44 (Comm), [2004] 1 All ER (Comm) 991). Days succeeded (in part) on their claim. I was very critical of the conduct and evidence of the defendants. On 16 February 2004 I ordered the defendants to pay Days a sum in excess of £10m by way of damages and to pay the costs of the action to be assessed if not agreed. I also ordered the defendants to pay Days an interim payment on account of costs of £2m pursuant to CPR 44.3(8). That rule provides that where the court has ordered a party to pay costs it may order an amount to be paid on account before the costs are assessed. The salutary object of the rule is to enable a party to recover at least a substantial part of his expenditure on costs before (and to an extent in the hope of avoiding) what can be a protracted and expensive process in carrying out a detailed assessment. It also is intended to provide a useful sanction and discipline generally in the context of the costs of litigation. In this case I said that the total figure for Days' costs, then put at some £3·9m, did not surprise me and expressed the now seen to be forlorn hope that an order in the sum of £2m would enable the parties to settle the final figure without the need for a detailed assessment. The bill of costs, I am now informed, is in fact in a sum approaching £4·7m.

[5] I refused the defendants permission to appeal. On 13 July 2004 the Court of Appeal did grant permission but only on conditions that the defendants paid Days itself both the principal and interest due on the judgment sum and the interim payment costs order and also paid into court £150,000 security for the costs of the appeal. Each payment was ordered to be made by no later than 24 August 2004. The defendants paid nothing. In accordance with the Court of Appeal's order the appeal was therefore struck out on 13 September 2004.

[6] That remains the position today. Nothing has been paid. Nor is it a case of want of means. The defendants have the means but refuse to pay. They choose not to pay and challenge not just Days but the court to make them do so. Days applied under CPR Pt 71 for Mr Wu to give evidence as to his means. Mr Wu failed to attend when ordered to do so. He was found to be in contempt and committed to prison for 28 days by Wakerly J in an order dated 23 July 2004. Both Mr and Mrs Wu were ordered to attend court on 7 October 2004 and both failed to do so. A final order of committal was then made against Mr Wu by Gibbs J and a suspended order against Mrs Wu. She failed to attend again on 18 January 2005 and a final 28-day committal order was then made against her by Field J.

[7] The costs of Days associated with the applications to the Court of Appeal and the Pt 71 applications are said to be slightly in excess of £350,000.

THE FURTHER EVIDENCE

[8] I cannot sensibly refer to the steps taken by Days to enforce the court's orders against the defendants in Taiwan without referring to the witness statement of Sonya Hsu which is one of the statements the subject of Days' (opposed) application to rely on further evidence. Each party in effect accuses the other of being economical with the truth about the proceedings in Taiwan. There can be no argument that some of the events in those proceedings played a part in the submissions to and decision of the costs judge. The defendants' evidence in the proceedings before the costs judge came in very late albeit they blame Days for being late with their evidence to which it was responsive. I can see no good reason why this court should not have before it the accurate information so far as it is material and which is largely incontrovertible and I therefore propose to grant the application. I would add that the defendants have responded to the new evidence and I have also taken that response into account. The other witness statement sought to be relied upon by Days does no more than exhibit a transcript of the hearing before the costs judge and a copy of his approved judgment. It also makes the point that certain interim costs orders made by the costs judge against the defendants in an amount of £31,600 plus interest which should have been paid on 13 April have also not been paid. Again, I can see no reason not to admit this evidence and indeed every reason why it should be before the court and I propose to allow the application in relation to it also.

TAIWAN

[9] To return, then, to Taiwan, but with this introduction. In the course of imposing the conditions which he did upon the permission granted to the defendants to appeal to the Court of Appeal, Dyson LJ said:

> 'To put the matter more broadly, the defendants' conduct in refusing to comply with court orders that have been made, without explanation, and their behaviour in relation to the Pt 71 matter, strongly suggest that they will place every obstacle they can in the path of an attempt by the claimants to enforce the judgment.'

[10] That 'strong suggestion' is more than borne out by subsequent events here and in Taiwan. I have no doubt at all that the defendants will not honour any orders which involve payment or of which they otherwise disapprove made by any court in this country and will pay nothing unless and until the legal machinery in a country where they have assets successfully executes an order against those assets. They have, in contrast, paid and no doubt will continue to pay the legal and other costs incurred on their own behalf in this country and in Taiwan in whatever proceedings seem to them to be of benefit to them or damaging to Days.

[11] At the end of November 2004, Days sought to enforce this court's order in Taiwan. The procedure is by way of a recognition lawsuit—in effect seeking recognition of the order of the English courts by the courts of Taiwan. Days has been required in the course of the procedure to deposit the substantial sum of £4·5m as a bond. On 25 November 2005, and despite opposition from the defendants on a number of grounds, the District Court in Hsinchu found in favour of Days. But in late December the defendants appealed as of right to the High Court. At about the same time Days attached assets of Pihsiang which were only released when a bond by way of bank guarantee was provided by the

defendants in the sum of about £14m representing the damages and costs and interest. There has also been a flurry of applications by the defendants seeking to challenge the attachment and other court orders. There have been three hearings to date of the substantive appeal and a fourth is currently scheduled for 19 June. In summary, I think the evidence shows plainly enough that the defendants will pursue every avenue they think open to them to prevent or delay a final enforceable order being made against them in Taiwan and the system of appeals and likely lapse of time before decisions can be reached is such that it cannot be predicted when any final conclusion may be arrived at. But it can be predicted with certainty that the defendants are prepared not only to incur whatever expense may be involved but also to see to it that Days are exposed to equal if not greater expense.

[12] The bank guarantee lodged by the defendants in Taiwan will only be available if and when, and to the extent that, Days finally succeed in the proceedings in Taiwan. That, as stated, is unpredictable in its timing, could be several years away and cannot be certain. I should add that Days' evidence is that should the defendants make any payment in the English proceedings, credit would be given for it in the Taiwanese proceedings and in the amount of the guarantee given on behalf of the defendants. Whilst it seems the defendants do not accept that evidence, it must at least be the case that enforcement against the guarantee could only be for whatever sum would be outstanding at the time.

[13] I would make this further comment. What was at issue before the costs judge and is at issue on these applications is what if any sanction the English courts can and should impose for the defendants' conduct towards this court and its orders in a context in which the defendants are seeking to engage the court in an exercise estimated by Days to require some 30 to 40 days of court time (the defendants' estimate is 23 days) for an assessment of costs which the defendants have been ordered to pay but which on the evidence it is reasonable to infer they will not pay even when they are assessed. The defendants have of course been ordered to pay £2m towards those very costs in advance of that assessment and have refused to do so. In that context I agree with Mr Auld QC, for Days, that the fact that in Taiwan security has been provided which would, subject to any further challenges, be available in the event the courts in Taiwan finally decide that Days may execute against it, is of little relevance. It is this court's powers and orders which the defendants seek to use in so far as they may suit their purposes but to ignore when they do not. That is not just holding Days to ransom but making this court and its orders look impotent and pointless.

THE ASSESSMENT PROCEEDINGS

[14] I will now turn to the costs assessment proceedings themselves which led to the judgment in issue. Days served their bill of costs on 13 April 2005. Points of dispute were served by the defendants, after several extensions of time, on 15 September 2005. Reply points were served on 30 November. The points of dispute, I am told, fill a lever arch file and challenge 'virtually every minute worked on the case' by Days' advisers and experts. The costs of a hearing over 30 to 40 days are said to be likely to exceed £350,000.

[15] On 21 February 2006 Days' solicitors wrote to the defendants' solicitors with draft directions for the detailed assessment and included application for the orders the subject of the judgment of the costs judge which is now sought to be appealed, namely that unless the defendants paid the interim costs order of £2m plus interest a final costs certificate should be issued in the amount claimed. They

also sought, upon compliance by the defendants with that condition, a hearing of certain preliminary matters arising on the assessment. The defendants' solicitors had not responded, despite a chaser, by 15 March when Days issued their application notice seeking the order and served it the next day.

THE DECISION OF THE COSTS JUDGE

[16] The costs judge described the decision he had to make as 'extremely difficult'. In para 11 of his judgment, he said he had 'serious reservations' about whether he could make an order debarring the defendants from taking part in a detailed assessment because of their failure to obey a court order. He said in the following paragraph that the proper and usual approach to an order for payment was to enforce it and that was what was going on in Taiwan and the defendants should not be shut out from participating in a detailed assessment of large bills of costs as a method of enforcement.

[17] As I have already said, I do not think the emphasis on enforcement in Taiwan was appropriate. What was in issue was the defendants' defiance of and yet wish to use the courts of this country. I also think the costs judge was wrong to question his jurisdiction to make an order of the nature sought.

JURISDICTION

[18] Mr Auld submits that there are several bases on which jurisdiction can be founded to make an order of the nature of that sought by Days. As he submitted, this is not a case where the jurisdiction of the court is itself in issue: the relevant agreement provided for English jurisdiction and the defendants submitted to that jurisdiction.

[19] In those circumstances it would, indeed, be concerning if the court was unable to impose appropriate sanctions on those who choose to ignore its orders and yet continue to seek its processes for their own ends. It is commonplace for orders to be made debarring parties from defending claims where justice and fairness require such a course. It should also be emphasised that the order sought would not preclude the defendants from pursuing their arguments on the assessment, it would only have that consequence should they fail to make the payment the court ordered them to make towards the costs the subject of the assessment. Indeed, and I am sure rightly, in the course of his well-presented submissions, Mr Marven for the defendants accepted that the court did have jurisdiction to debar the defendants from participating in the assessment. His submission was that there was no jurisdiction, because of the wording of CPR 47.16, to order the issue of a final costs certificate which was the primary application of Days.

[20] In my judgment, quite apart from any specific rule, the court has an inherent jurisdiction to control its own processes sufficient to enable it to make an order of the nature sought here. CPR 3.1(1) expressly preserves the inherent powers of the court. Further r 3.1(3)(a) provides that where the court makes an order in the course of its general powers of management it may do so subject to conditions, including a condition to pay a sum of money into court. Mr Marven submitted that this power was limited to the attachment of a condition to a direction the court was being asked to make, such as a condition of a grant of permission to appeal. I do not agree. The wording of the rule is quite general and there are no applicable specific rules which could be said to limit its scope.

[21] Mr Auld referred me to a dictum of Clarke LJ in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065 at [48], [2001] All ER (D) 258 (Dec) at [48] where, in the context of CPR 52.9, he said:

> 'We do, however, take the view that the new regime of the CPR, with its emphasis on the timely payment of costs, and the use of costs as a sanction, warrants a robust approach to appellants who fail to obey orders for the payment of a judgment debt and costs when they can afford to pay them . . .'

[22] The context was, of course, different. But the principle, in my judgment, applies generally and is apposite.

[23] Mr Auld also submitted that the general power of the court to debar a party in contempt from being heard was also a proper basis for the order sought by Days. He referred me to the judgment of Potter LJ in *Motorola Credit Corp v Uzan* [2003] EWCA Civ 752, [2004] 1 WLR 113, in particular at [45]–[58]. This is not a case (as that was) in which the defendants are seeking to be heard on a challenge to the orders which constituted or underlay the contempt. Nor is it a case in which the defendants seek to challenge their obligation to pay the costs which will be assessed, but only their amount. It is a case in which their contempt derives from a failure to meet an order which directly relates to the very assessment in which they seek to participate and they do so, as I think it fair to conclude, not intending to abide by the outcome of the assessment whatever it may be. That is not sensibly to be characterised as 'defensive' litigation. In those circumstances I also think that the contempt of the defendants provides a proper basis for an order of the nature of that which is sought by Days.

THE BASIS OF AN APPEAL/PERMISSION

[24] An appeal from a costs judge is governed by CPR 52.11. It is limited to 'a review' of the decision of the lower court unless the court 'considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing'. An appeal will be allowed where the decision of the lower court was 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings . . .'

[25] It will be apparent from the foregoing that, in my judgment, the costs judge was wrong to doubt his jurisdiction to make an order debarring the defendants and wrong to place the emphasis he did on the attempts by Days to enforce the orders in Taiwan. Nor do I think his decision can realistically be characterised as a case management decision, granted the consequences at stake, and in so far as it was an exercise of discretion it was, I think, based on the two erroneous premises to which I have referred. Moreover I can think of few cases of greater injustice than a case in which a party for no legitimate reason seeks to contest issues, to put his opponent to great expense, and yet to defy the outcome.

[26] For those reasons I think it right to grant Days permission to appeal.

THE APPEAL

[27] For the same reasons I think the appeal should be allowed subject to Mr Marven's further submission that the application by Days was made too late. Mr Marven points to the fact that the defendants have indeed served substantial points of dispute and did so in September 2005, before the present issues were raised. He also points to the fact that the preliminary issues are due to be heard in mid-July, in May Days served evidence in support of them, and, in accordance

with the order of the costs judge, the defendants are due to serve any evidence they may wish to rely upon by 23 June.

[28] The nature of Days' application has, however, been known to the defendants since February 2006. At that time, no date for the assessment had been set and it was only on the hearing of the application itself that a three-day hearing for preliminary issues was established upon the rejection by the costs judge of the application.

[29] In those circumstances I do not think the application was made so late as to preclude the relief sought. Nor do I think it was so late as to require the hearing of the preliminary issues to go ahead in any event. But I do think the fact that points of dispute have been served and were served before the present matter was raised should not be ignored in considering the form of order to be made.

THE ORDER

[30] I do not think (as he did not think) that the costs judge can ignore the contents of the points of dispute. They have been properly served. Nor do I think, at least on the present hearing, it would be right, even if there is jurisdiction to do so (which Mr Marven submits there is not) simply to permit Days to have the costs in effect rubber-stamped in the amount claimed. There should be an assessment. But the defendants must not be permitted to participate further in that assessment unless they make payment to Days of the interim payment I ordered in the sum of £2m together with accrued interest to today's date. That figure, it is agreed, is £2·373m. If that payment is not made by 12 noon on Tuesday, 27 June then the sanction will apply. No doubt, in that event, the costs judge and Days will wish to review the timing and nature of the assessment itself and it should be expected to take up only a small fraction of the estimates to which I have referred. If payment is made then the defendants' time for serving any evidence will be extended to 4pm on Friday, 30 June. I will also hear the parties on the wording of the order and any ancillary matters which cannot be agreed on a date to be agreed.

Order accordingly.

Aaron Turpin Barrister.

Re G (children) (residence: same-sex partner)

[2006] UKHL 43

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD SCOTT OF FOSCOTE, LORD RODGER OF EARLSFERRY, LORD WALKER OF GESTINGTHORPE AND BARONESS HALE OF RICHMOND

6, 10, 26 JULY 2006

Family proceedings – Orders in family proceedings – Residence order – Shared residence order – Same sex couple – Children born to one partner by anonymous donor insemination – Significance of fact of parentage – Children Act 1989, s 1(1).

G and W lived together in a lesbian relationship from 1995 until 2002. They wanted to have a family together and arranged for G to be inseminated using sperm from an anonymous donor at a clinic abroad. G gave birth to two daughters, born in 1999 and 2001. W had a son, who regarded the girls as his sisters. The relationship between G and W broke down in 2002 when W began a relationship with her present partner. G and the children moved into a property nearby. G began a relationship with a new partner and she and the children moved to the partner's home in Leicester. W's application for a shared residence order, which would have conferred parental responsibility on her, was refused, but the judge made an order that G, who wished to move with her partner and the children to Cornwall, should continue to live in the Leicester area. W's appeal against the refusal of a shared residence order was allowed and an order was made. While the children were on holiday with W, G and her partner completed the sale of their home in Leicester and the purchase of a house in Cornwall. They collected the children at the regular handover point and went to their new home, in breach of the court's order. W issued applications under the Family Law Act 1986 in order to locate the children. The contact arrangements were reinstated and G abided by them. G applied for the residence restriction to be lifted and W applied for the residential arrangements to be changed, so that the children's primary home would be with her. The judge granted W's application for primary care and that decision was upheld by the Court of Appeal. G appealed. G contended that whatever the test to be adopted, it had been wrong of the courts below, having regard to s 1(1)[a] of the Children Act 1989 under which the child's welfare was to be the court's paramount consideration, to attach no significance whatever to the fact that she was the children's mother. Further, the judge had allowed herself to be distracted, by her disapproval of G and her behaviour, from a full consideration of the evidence relating to the children's welfare, which would have led her to a different conclusion. In particular, when concluding that she had no confidence that the mother would not seek to marginalise W in the future, she had given no weight to the fact that regular and good quality contact had been continuing since it had been re-established after the move.

a Section 1, so far as material, is set out at [25], below

Held – The fact of parentage was to be regarded as an important and significant factor in considering which proposals better advanced the welfare of the child. In the instant case the unusual context had distracted the courts below from principles of universal application. The fact that G was the natural mother of the children, while raising no presumption in her favour, was an important and significant factor in determining what would be best for them at the present time and in the future. But that factor had not been explored. Moreover, while it might well be in the best interests of children to change their living arrangements if one of their parents was frustrating their relationship with the other parent who was able to offer them a good and loving home, that was unlikely to be in their best interests while that relationship was in fact being maintained in accordance with the order of the court. Accordingly, the appeal would be allowed (see [1], [3]–[5], [31], [38], [44], [45], below).

Notes

For persons entitled to exercise parental responsibility and for residence orders, see 5(3) *Halsbury's Laws* (4th edn reissue) paras 138–142, 406.

Cases referred to in opinions

C (MA) (an infant), Re [1966] 1 All ER 838, [1966] 1 WLR 646, CA.

D (contact and parental responsibility: lesbian mothers and known father), Re [2006] EWHC 2 (Fam), [2006] 1 FCR 556.

E (minors) (residence: conditions), Re [1997] 3 FCR 245, CA.

Evelyn, Re [1998] FamCA 55, Aus Fam Ct.

H (a minor) (interim custody), Re [1991] FCR 985, CA.

Hodak v Newman (1993) 17 Fam LR 1, Aus Fam Ct.

J v C [1969] 1 All ER 788, [1970] AC 668, [1969] 2 WLR 540, HL.

K (a minor) (ward: care and control), Re [1990] 3 All ER 795, [1990] 1 WLR 431, CA.

KD (a minor) (ward: termination of access), Re [1988] 1 All ER 577, [1988] AC 806, [1988] 2 WLR 398, HL.

O'Hara, Re [1900] 2 IR 232, Ir CA.

Rice v Miller (1993) 16 Fam LR 970, Aus Fam Ct.

V-P v V-P (access to child) (1978) 1 FLR 336, CA.

W (a minor) (residence order), Re [1993] 2 FCR 589, CA.

Cases referred to in list of authorities

A (a minor) (care order: significant harm), Re [1994] 2 FCR 125, CA.

Brixey v Lynas [1997] 1 FCR 220, HL.

C (a minor) (wardship and adoption), Re (1979) 2 FLR 177, CA.

C v C (custody of child) [1991] FCR 254, CA.

Dudgeon v UK (1981) 4 EHRR 149, [1981] ECHR 7525/76, ECt HR.

Fitzpatrick v Sterling Housing Association Ltd [1999] 4 All ER 705, [2001] 1 AC 27, [1999] 3 WLR 1113, HL.

G v F (shared residence: parental responsibility) [1998] 3 FCR 1.

Ghaidan v Mendoza [2004] UKHL 30, [2004] 3 All ER 411, [2004] 2 AC 557, [2004] 3 WLR 113.

H (a child: residence), Re [2002] 3 FCR 277, CA.

H (a minor) (child's circumstances: direction to investigate), Re [1993] 2 FCR 277.

H v H (residence order: leave to remove from jurisdiction) [1995] 2 FCR 469, CA.

J (a child) (return to foreign jurisdiction: convention rights), Re [2005] UKHL 40, [2005] 3 All ER 291, [2006] 1 AC 80, [2005] 3 WLR 14.

N (residence: appointment of solicitor: placement with extended family), Re [2001] 1 FLR 1028, CA.
O (a minor) (contact: imposition of conditions), Re [1996] 1 FCR 317, CA.
P (a minor), Re (1983) 4 FLR 401, CA.
S v M (access order) [1997] 1 FLR 980, sub nom *Sanderson v McManus* 1997 SC (HL) 55, Scot HL.
Secretary of State for Work and Pensions v M [2006] UKHL 11, [2006] 1 FCR 497, [2006] 2 WLR 637.
SM (a minor) (access), Re [1991] FCR 492.
W (a minor) (adoption: homosexual adopter), Re [1997] 3 All ER 620, [1998] Fam 58, [1997] 3 WLR 768.
W (a minor), Re [1989] 1 FLR 163.

Appeal

CG appealed with permission of the House of Lords Appeal Committee given on 15 May 2006 from the decision of the Court of Appeal (Thorpe, Laws and Hallett LJJ) on 6 April 2006 ([2006] EWCA Civ 372, [2006] 1 FCR 681) dismissing her appeal from the decision of Bracewell J on 15 February 2006 making a shared residence order in respect of A and B in favour of CW and CG, with the household of CW being their primary home. The facts are set out in the opinion of Baroness Hale of Richmond.

Peter Jackson QC (instructed by *Family Law in Partnership* acting as agents for *Ashtons*, Truro) for CG.
Stephen Cobb QC and *Lorna Meyer* (instructed by *Bindman & Partners*) for CW.

Their Lordships took time for consideration.

26 July 2006. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree that, for the reasons she gives, this appeal should be allowed.

[2] I wish to emphasise one point. In this case the dispute is not between two biological parents. The present unhappy dispute is between the children's mother and her former partner Ms CW. In this case, as in all cases concerning the upbringing of children, the court seeks to identify the course which is in the best interests of the children. Their welfare is the court's paramount consideration. In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests, both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. A child should not be removed from the primary care of his or her biological parents without compelling reason. Where such a reason exists the judge should spell this out explicitly.

LORD SCOTT OF FOSCOTE.

[3] My Lords, I had intended to write an opinion in this case but having had the advantage of reading in advance the opinion of my noble and learned friend Baroness Hale of Richmond I find myself so completely in agreement with the

conclusion she has reached and her reasons for reaching it that an opinion from me would be otiose. I would simply say that in my opinion both Bracewell J and, in the Court of Appeal, Thorpe LJ failed to give the gestational, biological and psychological relationship between CG and the girls the weight that that relationship deserved. Mothers are special and, even after account is taken of CG's breach of the 'residence' order (the justification for which I, for my part, doubt) and her reprehensible attitude towards the important relationship between the girls and CW, their other parent, CG was, on the evidence, a good and loving mother. I find myself unable to accept that the circumstances of this case came even close to justifying the judge's and the Court of Appeal's conclusion that the welfare of the girls required their primary home to be changed from that of their mother to that of CW. I concur in my noble and learned friend's opinion that this appeal must be allowed and that the order referred to in [45], below, should be made.

LORD RODGER OF EARLSFERRY.

[4] My Lords, I have had the advantage of considering the speech which my noble and learned friend, Baroness Hale of Richmond, is to deliver. I agree with it and with the speech of my noble and learned friend, Lord Nicholls of Birkenhead. For the reasons which they give I too would allow the appeal and make the order proposed.

LORD WALKER OF GESTINGTHORPE.

[5] My Lords, I have had the privilege of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree with it and for the reasons that she gives I would allow this appeal.

BARONESS HALE OF RICHMOND.

[6] My Lords, the issues in this case arise in a novel context but they are issues which may arise whenever there are disputes about the future care and upbringing of children. The context is that of a lesbian couple who made the conscious decision to have children together, who together arranged for anonymous donor insemination at a clinic abroad, and who brought up the children together until their relationship broke down. Now, sadly, they are locked in a dispute about the future of those children which is just as bitter as the disputes which arise between heterosexual couples. And the issues arising are just the same as those which may arise between heterosexual couples. The legal principles are also the same.

[7] There are two issues of principle. The first is the weight to be attached to the fact that one party is both the natural and legal parent of the child and the other is not. This will require us to explore the concept of 'natural' parenthood and its significance both for the adults and for the child. The second is the approach to be adopted by the court where the party with whom the child has her principal home is reluctant to acknowledge the importance of the other party in the child's life.

THE HISTORY

[8] CG and CW lived together in a lesbian relationship from 1995 until 2002. They wanted to have a family together. When the relationship began CG was aged about 21 and CW about 36. They arranged for CG to be inseminated using sperm from an anonymous donor at a clinic abroad. (Many might see this as the

more responsible choice, not only for safety reasons, but also to avoid the sort of confusion and conflict which arose in *Re D (contact and parental responsibility: lesbian mothers and known father)* [2006] EWHC 2 (Fam), [2006] 1 FCR 556. It does mean that the couple and their wider families are the only family that the child can at that stage have and in most cases this must be what they both intend.)

[9] CG gave birth to two children, both girls. Child A was born [in] February 1999 and is now aged seven. Child B was born [in] June 2001 and is now aged five. Both were breast fed. CW has a son, C, who is now aged 17, born as a result of anonymous donor insemination during a previous relationship. It was agreed at an early stage in the proceedings that the girls have a positive relationship with him and regard him as their brother, and that he regards them as his sisters.

[10] The relationship between CG and CW broke down in 2002 when CW began a relationship with her present partner, LP. They plan to enter into a civil partnership next month. But the family continued to live together in the family home in Shropshire until May 2003. Then CG and the girls moved into a property nearby. In July 2003, CW and LP began living together in the former family home. Also in the summer of 2003, CG began a relationship with a new partner, MG, who lived in Leicester. They have already registered their civil partnership, in December last year.

[11] Proceedings began in September 2003, when CW applied for contact and a shared residence order. She was entitled to make such an application in relation to child A, who had lived with her for more than three years: see s 10(5)(b) of the Children Act 1989. But she required leave to apply in relation to child B, who was then only two years old. Leave was swiftly granted and an order made for interim contact two evenings a week and every other weekend. A CAFCASS officer, Mrs Barrow, was appointed to make a report.

[12] At that stage, CG was training to be a teacher and had a placement at a school in Shropshire. The girls attended a nursery in the same town. But in November or December 2003 CG decided to move to MG's home in Leicester. She obtained a placement at a school in Leicester for the New Year and enrolled the girls in a nursery and school there. CW was not told or consulted about the move in advance.

[13] In January 2004, in accordance with Mrs Barrow's recommendations, it was ordered that alternate weekend contact continue, with CW collecting the children from school and nursery on Friday afternoon and returning them on Monday morning, so that they could spend the whole of Sunday with C.

[14] CW's applications were heard by Judge Hughes over three days in June and November 2004. By that time, CG had qualified as a teacher but her partner MG was working from home and playing a major part in the children's care. Mrs Barrow's report confirmed that CG questioned CW's right to be involved in the children's lives and was opposed to a shared residence order which would confer parental responsibility upon CW. CW was now proposing that the children live with her in Shropshire. The girls clearly enjoyed life in both homes. Mrs Barrow recommended the continuation of the current arrangements, together with a move towards the equal sharing of school holidays. She also recommended a shared residence order:

> 'I would suggest that the importance and value of [CW's] role in their lives needs to be acknowledged . . . I would suggest that such a move would help to ensure that [A] and [B] grow up with a better chance of understanding the

> complexity of their own identity and should not be seen as detracting from [CG's] role, as their main carer.'

[15] During the hearing in November, CG gave evidence that she wanted to move with MG and the children to Cornwall. Mrs Barrow's view was that this was not in the children's interests, as they were happy and settled with the present situation, which met their needs. The judge agreed with Mrs Barrow on this point and concluded that the proposed move was in part deliberately designed to frustrate the current contact arrangements. Accordingly she ordered that CG continue to live with the children in the Leicester area until further order. Such orders are only made in exceptional cases, as the courts generally regard them as 'an unwarranted imposition upon the right of the parent to choose where he/she will live within the United Kingdom'; but where the children will live is one of the relevant factors in deciding with whom they should live: see *Re E (minors) (residence: conditions)* [1997] 3 FCR 245 at 249.

[16] The judge rejected the proposal for a shared residence order, largely because of the hostility between the parties. Nevertheless, she had no doubt that the children had developed a good and close relationship with CW and with C and that this relationship should be maintained throughout their minority. But CW's important place both historically and in the future could be maintained and reinforced by good quality frequent contact. She therefore continued the alternate weekend contact from Friday to Monday and defined holiday contact on a roughly equal basis. She also provided for CW to be informed about the children's education and medical treatment.

[17] CW appealed to the Court of Appeal against the refusal of a shared residence order. On 6 April 2005, her appeal was allowed: *Re G (residence: same sex partner)* [2005] EWCA Civ 462, [2006] 1 FCR 436. Thorpe LJ explained at [27]:

> 'But perhaps more crucial for me was the judge's finding that between the first and second days of the hearing the mother had been developing plans to marginalise Miss W . . . The CAFCASS officer had expressed a clear fear that unless a parental responsibility order was made there was a real danger that Miss W would be marginalised in the children's future. I am in no doubt at all that, on the judge's finding, the logical consequence was the conclusion that the children required firm measures to safeguard them from diminution in or loss of a vital side of family life—not only their relationship with Miss W, but also with her son . . . The judge's finding required a clear and strong message to the mother that she could not achieve the elimination of Miss W, or even the reduction of Miss W from the other parent into some undefined family connection.'

Hence a shared residence order was made defining the time which the children would spend in each household (as provided for in s 11(4) of the 1989 Act). The order requiring CG to continue to live in Leicester (which she had not appealed) was expressly affirmed. (CG later described the Court of Appeal's decision as 'appalling' and she would not be the first person to be appalled by an adverse decision in court.)

[18] Only one month later, CG's solicitors wrote requesting CW's agreement to a move to Cornwall. This was refused. Correspondence between solicitors continued and a letter from CG's solicitors in August 2005 indicated that she intended to apply to the court for the restriction to be lifted. However, while the children were on holiday with CW, CG and MG completed the sale of their home

in Leicester and the purchase of a house in Cornwall. They collected the children at the regular handover point in Leicester and drove them through the night to their new home. Both CW and the girls had been kept in ignorance of the plan. This was not only a clear breach of the court's order. As the children's guardian was later to say in evidence:

> '. . . from a child care perspective whether that order existed or not, to move the children in that way, in secret, without them having the opportunity to say goodbye to their friends and their school friends, I think . . . was an appalling thing to do to them . . . the flouting of the order was bad, but the way in which it was achieved and the emotional impact it had upon those children, was a terrible thing to do to them.'

[19] CW had to issue applications under the Family Law Act 1986 in order to locate the girls. The proceedings were transferred to the High Court and the children joined as parties. Mr Martin was appointed as the children's guardian. CG applied for the residence restriction to be lifted and CW applied for the residential arrangements to be changed, so that the children's primary home would be with her and they would attend schools in Shropshire. On 30 September, detailed arrangements for contact were made, pending the hearing fixed for February 2006. Over the intervening period, the children spent roughly every other weekend, the whole half-term week and nine days of the Christmas holidays with CW.

[20] The applications were heard by Bracewell J. By that time, Mr Martin had spent a considerable amount of time in both homes and got to know the children and the parties well. Of CG and the children he said this in his report:

> 'She is clearly devoted to her children and they are to her. Observation of her interaction with them displays two very confident and happy children. There is a lot of laughter in the household and even when tired from work CG's interaction with them is positive and child-need led.'

Of CW and the children he said this:

> 'CW is an impressive woman who has clear and well thought out ideas. I did not gain the impression that she was seeking control via her children. I believe that she is genuinely driven by a desire to protect her children and that she has tried always to act in their best interests.'

He also reported favourably, in different ways, of both MG and LP. Of C and the girls he said this:

> '[C] impressed as an articulate and intelligent young man . . . His observed interaction with them was excellent. He joins in all the games, constructs games for them and is there for the rough and tumble. He is also good at spotting and deflecting situations. [C] obviously has a deep love for his sisters and this was demonstrably reciprocated.'

[21] He concluded that CG had been extremely foolish in defying court orders and exposing her children to the risk of emotional harm by moving to Cornwall and thereby reducing the level of involvement of CW. Nevertheless, he did not believe that removing them from CG's care and uprooting them to Shropshire would be in their best interests. There should be no further moves to marginalise CW, who was a highly significant person in their lives. He did not believe that fortnightly contact was likely to be harmful and recommended that contact be

reinstated at the level ordered by Judge Hughes. He also recommended a family assistance order, as he believed that he had established a good relationship with the family and could be of further help in improving communication between them.

[22] His oral evidence was given after he had heard CG and MG give their evidence. He found their attitudes disturbing. It undermined his confidence in CG obeying court orders in future. He still believed that on balance the children should remain with her 'but I would stress now that I see that as a fine balance, and I believe that the court would have to be confident that in future any orders would be complied with'. This was because CG 'has provided the majority of the care for these children since they were born and I think that the emotional trauma of being removed from their mother's care at this stage would be extremely harmful to them'. He later said that it would also 'be extremely emotionally harmful for these children if [CW] was marginalised'. Under cross-examination he conceded that each would be 'equally emotionally harmful'. Nevertheless he maintained his recommendations.

[23] Bracewell J reached a different conclusion. She found the balance of the risks of emotional harm of moving the girls to the principal care of CW, on the one hand, and of maintaining the present placement with the risk of their being deprived of their relationship with CW, on the other, to be the crux of the case. She gave ten reasons for rejecting the guardian's assessment. Her first, and the one which was emphasised by the Court of Appeal, was that she had no confidence that if the children remained in Cornwall CG would promote the children's essential close relationship with CW and her family. Accordingly, she preserved the shared residence order but reversed the times allocated to each home. She also made a family assistance order which is due to expire next month.

[24] CG appealed to the Court of Appeal on the same two grounds as she appealed to this House and to which I shall shortly turn. On 6 April 2006 her appeal was dismissed: [2006] EWCA Civ 372, [2006] 1 FCR 681. Thorpe LJ rejected Mr Jackson's submission on behalf of CG that 'cogent reasons must exist if a court is to prefer the claims of a person who is not a child's natural parent to one who is', although he accepted the propositions that 'the identity of a child's natural (biological) parents is always a matter of significance' and that 'in each case the weight to be given to the blood relationship will depend upon the matter in issue, the identity of the parties and the court's assessment of all other factors in the welfare checklist'. Given that the guardian's recommendation was conditional on the court being satisfied that CG would obey court orders in future, the judge was fully entitled to conclude that she was not so satisfied. Hallett LJ, however, agreed only with a degree of hesitation (at [58]):

> 'I am very concerned at the prospect of removing these children from the primary care of their only identifiable biological parent who has been their primary carer for most of their young lives and in whose care they appear to be happy and thriving. She is both a biological parent and a "psychological" parent. Mindful as I am of the changing social and legal climate, on the facts of this case, I would attach greater significance perhaps than some to the biological link between the appellant and her children.'

It is this point which Mr Peter Jackson QC has put at the forefront of his submissions on behalf of the mother. He argues that, whatever the test to be adopted, it was wrong for the courts below to attach no significance whatever to the fact that CG is the child's mother. He also argues that the judge allowed

herself to be distracted, by her disapproval of the mother and her behaviour, from a full consideration of the evidence relating to the children's welfare, which would have led her to a different conclusion.

THE WELFARE PRINCIPLE AND THE NATURAL PARENT

[25] Section 1(1) of the 1989 Act is clear:

> 'When a court determines any question with respect to—(a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.'

Section 1(3) supplements this by a list of factors to be considered in contested cases:

> '... (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding); (b) his physical, emotional and educational needs; (c) the likely effect on him of any change in his circumstances; (d) his age, sex, background and any characteristics of his which the court considers relevant; (e) any harm which he has suffered or is at risk of suffering; (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (g) the range of powers available to the court under this Act in the proceedings in question.'

[26] The statutory ancestor of this principle was s 1 of the Guardianship of Infants Act 1925 (later consolidated with minor changes of terminology in s 1 of the Guardianship of Minors Act 1971) which read:

> 'Where in any proceeding before any court ... the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.'

[27] The 1925 Act was passed at a time when the father was sole guardian of his legitimate children and the mother the only person with parental rights over her illegitimate child. Section 1 clearly meant that, in future, such legal claims were to be ignored and the child's welfare was to prevail. In the landmark case of *J v C* [1969] 1 All ER 788, [1970] AC 668, this House held that this was equally applicable to disputes between parents and non-parents. In an oft-quoted passage Lord MacDermott explained the meaning of the words 'shall regard the welfare of the infant as the first and paramount consideration' thus:

> '... it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first

importance and *the paramount consideration because it rules on or determines the course to be followed.*' (See [1969] 1 All ER 788 at 820–821, [1970] AC 668 at 710–711; my emphasis.)

The House therefore rejected the proposition that there was any presumption in favour of the natural parents of the child. Lord MacDermott put their position in this way:

'2. In applying s 1, the rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to that issue.

3. While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, *can be capable of ministering to the total welfare of the child in a special way*, and must therefore preponderate in many cases . . .' (See [1969] 1 All ER 788 at 824, [1970] AC 668 at 715; my emphasis.)

Lord MacDermott also referred, as did Lord Oliver of Aylmerton in *Re KD (a minor) (ward: termination of access)* [1988] 1 All ER 577 at 590, [1988] AC 806 at 828, to a proposition of FitzGibbon LJ in the Irish case of *Re O'Hara* [1900] 2 IR 232 at 240, decided before the enactment of the paramountcy principle in 1925:

'In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded.'

[28] Since then, the position has been put in a variety of ways in the Court of Appeal. Some have repeated the reference to the parental right: see, for example, Fox LJ in *Re K (a minor) (ward: care and control)* [1990] 3 All ER 795 at 798, [1990] 1 WLR 431 at 434; and Butler-Sloss LJ in *Re H (a minor) (interim custody)* [1991] FCR 985 at 987. In *Re K*, however, Waite J pointed out:

'The speeches in the House of Lords make it plain that the term "parental right" is not there used in a proprietary sense, but rather as describing the right of every child, as part of its general welfare, to have the ties of nature maintained, wherever possible, with the parents who gave it life.' (See [1990] 3 All ER 795 at 800, [1990] 1 WLR 431 at 437.)

But he went on to say that the question was: 'Are there any compelling factors which *require* me to override the prima facie right of this child to an upbringing by its surviving natural parent?'

[29] In *Re H* [1991] FCR 985 at 988–989, Lord Donaldson of Lymington MR explained matters this way:

'So it is not a case of parental right opposed to the interests of the child, with an assumption that parental right prevails unless there are strong reasons in terms of the interests of the child. It is the same test which is being applied, the welfare of the child. And all that *Re K* is saying, as I understand it, is that of course, there is *a strong supposition* that, other things being equal,

a it is in the interests of the child that it shall remain with its natural parents. But that has to give way to particular needs in particular situations.'

That was the last word before the 1989 Act came into force. In *Re W (a minor) (residence order)* [1993] 2 FCR 589 at 599, Balcombe LJ agreed 'wholeheartedly' with Lord Donaldson and hoped that 'this divergence of views, if such it really is, can finally be stilled'. Waite LJ also agreed with Lord Donaldson's formulation b at 605, and remarked that—

> '[t]he authorities which have been cited by Balcombe LJ illustrate the difficulty of finding, within the infinite variety of circumstances in which the welfare of a child may fall to be applied as the paramount consideration, some principle which does precise justice to the element in c every child's welfare represented by the advantage of maintaining the ties of nature with its own parent.'

[30] My Lords, the 1989 Act brought together the government's proposals in relation to child care law and the Law Commission's recommendations in relation to the private law. In its working paper *Family Law: Review of Child* d *Law: Custody* (working paper no 96 (1986)) para 6.22, having discussed whether there should be some form of presumption in favour of natural parents, the commission said this:

> 'We conclude, therefore, that the welfare of each child in the family should continue to be the paramount consideration whenever their custody or e upbringing is in question between private individuals. The welfare test itself is well able to encompass any special contribution which natural parents can make to the emotional needs of their child, in particular to his sense of identity and self-esteem, as well as the added commitment which knowledge of their parenthood may bring. We have already said that the indications are f that the priority given to the welfare of the child needs to be strengthened rather than undermined. We could not contemplate making any recommendation which might have the effect of weakening the protection given to children under the present law.'

Nor should we. The statutory position is plain: the welfare of the child is the g paramount consideration. As Lord MacDermott explained, this means that it 'rules upon or determines the course to be followed'. There is no question of a parental right. As the Law Commission explained, 'the welfare test itself is well able to encompass any special contribution which natural parents can make to the emotional needs of their child' or, as Lord MacDermott put it, the claims and h wishes of parents 'can be capable of ministering to the total welfare of the child in a special way'.

[31] None of this means that the fact of parentage is irrelevant. The position in English law is akin to that in Australian law, as explained by Lindenmayer J in *Hodak v Newman* (1993) 17 Fam LR 1, and subsequently approved by the Full Court of the Family Court of Australia in *Rice v Miller* (1993) 16 Fam LR 970 and j *Re Evelyn* [1998] FamCA 55:

> 'I am of the opinion that *the fact of parenthood is to be regarded as an important and significant factor in considering which proposals better advance the welfare of the child.* Such fact does not, however, establish a presumption in favour of the natural parent, nor generate a preferential position in favour of the natural parent from which the court commences its decision making process

> . . . Each case should be determined upon an examination of its own merits and of the individuals there involved.' (My emphasis.)

[32] So what is the significance of the fact of parenthood? It is worthwhile picking apart what we mean by 'natural parent' in this context. There is a difference between natural and legal parents. Thus, the father of a child born to unmarried parents was not legally a 'parent' until the Family Law Reform Act 1987 but he was always a natural parent. The anonymous donor who donates his sperm or her egg under the terms of the Human Fertilisation and Embryology Act 1990 is the natural progenitor of the child but not his legal parent: see ss 27 and 28 of the 1990 Act. The husband or unmarried partner of a mother who gives birth as a result of donor insemination in a licensed clinic in this country is for virtually all purposes a legal parent, but may not be any kind of natural parent: see s 28 of the 1990 Act. To be the legal parent of a child gives a person legal standing to bring and defend proceedings about the child and makes the child a member of that person's family, but it does not necessarily tell us much about the importance of that person to the child's welfare.

[33] There are at least three ways in which a person may be or become a natural parent of a child, each of which may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case. The first is genetic parenthood: the provision of the gametes which produce the child. This can be of deep significance on many levels. For the parent, perhaps particularly for a father, the knowledge that this is 'his' child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child (see, for example, the psychiatric evidence in *Re C (MA) (an infant)* [1966] 1 All ER 838, [1966] 1 WLR 646). For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up. The knowledge of that genetic link may also be an important (although certainly not an essential) component in the love and commitment felt by the wider family, perhaps especially grandparents, from which the child has so much to gain.

[34] The second is gestational parenthood: the conceiving and bearing of the child. The mother who bears the child is legally the child's mother, whereas the mother who provided the egg is not: see s 27 of the 1990 Act. While this may be partly for reasons of certainty and convenience, it also recognises a deeper truth: that the process of carrying a child and giving him birth (which may well be followed by breast-feeding for some months) brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other.

[35] The third is social and psychological parenthood: the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting. The phrase 'psychological parent' gained most currency from the influential work of Goldstein, Freud and Solnit *Beyond the Best Interests of the Child* (1973), who defined it thus:

> 'A psychological parent is one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs.

a The psychological parent may be a biological, adoptive, foster or common law parent.'

[36] Of course, in the great majority of cases, the natural mother combines all three. She is the genetic, gestational and psychological parent. Her contribution to the welfare of the child is unique. The natural father combines genetic and b psychological parenthood. His contribution is also unique. In these days when more parents share the tasks of child rearing and breadwinning, his contribution is often much closer to that of the mother than it used to be; but there are still families which divide their tasks on more traditional lines, in which case his contribution will be different and its importance will often increase with the age of the child.

c [37] But there are also parents who are neither genetic nor gestational, but who have become the psychological parents of the child and thus have an important contribution to make to their welfare. Adoptive parents are the most obvious example, but there are many others. This is the position of CW in this case. Whatever may have been the mother's stance in the past, Mr Jackson on d her behalf has not in any way sought to diminish the importance of CW's place in these children's lives or to challenge the legal arrangements put in place as a result of the first proceedings. Indeed, he asks us to restore those orders.

[38] What Mr Jackson challenges is the reversal in the parties' positions in response to the mother's removal of the children to Cornwall. He points out that, with one exception at the beginning of Bracewell J's judgment, there was no e reference to the important fact that CG is these children's mother. While CW is their psychological parent, CG is, as Hallett LJ pointed out, both their biological and their psychological parent. In the overall welfare judgment, that must count for something in the vast majority of cases. Its significance must be considered and assessed. Furthermore, the evidence shows that it clearly did count for f something in this case. These children were happy and doing very well in their mother's home. That should not have been changed without a very good reason.

THE CHILDREN'S WELFARE

[39] Mr Jackson argues that there was not a very good reason to change the children's primary home. The judge over-emphasised what she saw as the 'crux' g of the case at the expense of the overall picture of what would be best for these children. Although she twice referred to the 'checklist' of relevant factors in s 1(3) of the 1989 Act, had she gone through the evidence relating to each of those factors systematically, giving proper weight to the children's relationship with their mother, she could not have reached the conclusion which she did. In h particular, when concluding that she had no confidence that the mother would not seek to marginalise CW in the future, she gave no weight to the fact that regular and good quality contact had been continuing since it was re-established after the move.

[40] My Lords, it is of course the case that any experienced family judge is well j aware of the contents of the statutory checklist and can be assumed to have had regard to it whether or not this is spelled out in a judgment. However, in any difficult or finely balanced case, as this undoubtedly was, it is a great help to address each of the factors in the list, along with any others which may be relevant, so as to ensure that no particular feature of the case is given more weight than it should properly bear. This is perhaps particularly important in any case where the real concern is that the children's primary carer is reluctant or

unwilling to acknowledge the importance of another parent in the children's lives.

[41] Making contact happen and, even more importantly, making contact work is one of the most difficult and contentious challenges in the whole of family law. It has recently received a great deal of public attention. Courts understandably regard the conventional methods of enforcing court orders as a last resort: fining the primary carer will only mean that she has even less to spend upon the children; sending her to prison will deprive them of their primary carer and give them a reason to resent the other parent who invited this. Nor does punishment address the real sources of the problem, which may range from a simple failure to understand what the children need, to more complex fears resulting from the parents' own relationship. That is why the assistance of a professional such as Mr Martin in this case can be so valuable. It is also why more constructive measures are to be introduced under the Children and Adoption Act 2006. The court will be able to direct either parent to engage in activities which will help them to understand and work through the difficulties. The range of penalties for breach of court orders will include an order to engage in unpaid work, thus reducing the risk that punishing the parent will also punish the child.

[42] However, at least as long ago as *V-P v V-P (access to child)* (1978) 1 FLR 336, it was realised that a more potent encouragement to comply with court orders may be to contemplate changing the child's living arrangements. Ormrod LJ put it very directly (at 339, 340):

> '. . . I do not want to issue threats, but the mother should, I think, realize this: the father has a home with the half brother in it, he is unemployed, he is available to look after both these children full time. The mother is fully occupied, so that the grandmother is playing a very important part in this child's life . . .
>
> That being so, it would be a mistake on the part of the mother, in my judgment, to assume that the order for custody in her favour is inevitable; it is not and if the situation goes on as it is at present then it may be necessary to reconsider the question of custody.'

It is, I believe, becoming more common for family judges not only to issue such warnings but also to implement them. However, the object is to ensure that the arrangements which the court has made in the best interests of the child are actually observed. Only if this is not happening will the court conclude that other arrangements will be better for the child.

[43] In this particular case, the mother had behaved very badly. She, together with MG, had deliberately disobeyed the court's order. This had required considerable planning and the deception of her own solicitor. More importantly, it had been a terrible thing to do to the children. The aim had been to frustrate the contact arrangements ordered by the court. However, once she had been located and contact arrangements reinstated, she had abided by them. Had this been the usual case of a similar dispute between mother and father, I find it impossible to believe that a court would have contemplated changing the children's primary home and schooling while contact was continuing in accordance with the court's order. Of course, were the contact itself to be further frustrated, that would be a different matter.

CONCLUSION

[44] My Lords, I am driven to the conclusion that the courts below have allowed the unusual context of this case to distract them from principles which are of universal application. First, the fact that CG is the natural mother of these children in every sense of that term, while raising no presumption in her favour, is undoubtedly an important and significant factor in determining what will be best for them now and in the future. Yet nowhere is that factor explored in the judgment below. Secondly, while it may well be in the best interests of children to change their living arrangements if one of their parents is frustrating their relationship with the other parent who is able to offer them a good and loving home, this is unlikely to be in their best interests while that relationship is in fact being maintained in accordance with the court's order.

[45] I would therefore allow the appeal and make the order which Mr Jackson invites us to make. This is simply to reverse the names in the current allocation of time between the two households. I would also make a fresh family assistance order so that Mr Martin may continue his excellent work with this family for a further six months from today's date. That order may, of course, be repeated in due course and Mr Martin may refer the case back to court if the arrangements are not working: see s 16(6) of the 1989 Act. I am very conscious, as was Dr Sturge, the child psychiatrist who gave evidence in the case of *Re D (contact and parental responsibility: lesbian mothers and known father)* [2006] 1 FCR 556, of the vulnerability of someone in CW's position. Her importance in these children's lives has been stressed by both the professionals and all the judges who have decided this case. The mother should now be in no doubt about that or about the possible consequences should she not adhere to the arrangements which we have ordered. It is, however, always possible for parents to modify their arrangements by agreement. Modifications become inevitable as children grow older and develop lives of their own. Agreed arrangements are almost always preferable to those imposed by a court. I am sad to see these two women, who deliberately brought these children into the world for them to share, and who both love and want the best for them, locking themselves into the same sort of battles that, sadly, we so often see between mothers and fathers. I hope that they can now move on from this dispute into a happier and more co-operative future for the sake of their children.

Appeal allowed.

Celia Fox Barrister.

Customs and Excise Commissioners v Barclays Bank plc

[2006] UKHL 28

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD HOFFMANN, LORD RODGER OF EARLSFERRY, LORD WALKER OF GESTINGTHORPE AND LORD MANCE

10, 11 MAY, 21 JUNE 2006

Bank – Duty of care – Freezing order – Claimant serving on bank freezing orders prohibiting disposals from clients' accounts – Clients transferring money from accounts after claimant serving orders on bank – Whether bank owing duty of care to claimant to prevent payment of money from accounts.

The claimant commissioners obtained freezing orders in respect of outstanding value added tax against two companies, both of which held current accounts with the defendant bank. The orders specifically prohibited disposal of or dealing with assets up to a stated amount, including in particular any money in specified accounts at the bank. The bank was served with copies of the orders. Several hours later the bank authorised payments to be made out of the companies' respective accounts. The claimants claimed damages against the bank in the sums paid out in breach of the injunctions, alleging that the bank had been negligent in permitting the payments to be made after being notified of the freezing orders. The bank denied that it owed any duty of care to the claimants to prevent the payments and that question was ordered to be tried as a preliminary issue. The judge held that the bank did not owe a duty of care to the claimants but the Court of Appeal reversed his decision. The bank appealed.

Held – A bank, notified by a third party of a freezing injunction granted to the third party against one of the bank's customers affecting an account held by the customer with the bank owed no duty to the third party to take reasonable care to comply with the terms of the injunction. It would not be fair, just and reasonable to impose such a duty of care. The freezing order jurisdiction had developed as one exercised by court order enforceable only by the court's power to punish those who broke its orders. The only duty owed by a notified party was to the court. The freezing order carried its own remedies and its reach did not extend any further. As it could not be suggested that the customer owed a duty to the party which obtained an order it would be strange and anomalous if an action in negligence lay against a notified party. To hold that a non-consensual court order, without more, gave rise to a duty of care owed to the party obtaining the order involved a radical innovation. It was unjust and unreasonable that the bank should on being notified of an order which it had had no opportunity to resist become exposed to a liability. The duty was not alleged to arise from anything which the bank was doing. Its involvement with the commissioners was involuntary. Accordingly, the appeal would be allowed (see [15]–[19], [23]–[25], [38], [39], [41], [64]–[68], [77], [94], [109], [113], [114], below).

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, *Caparo Industries plc v Dickman* [1990] 1 All ER 568 and *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v*

Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq) [1994] 3 All ER 506 considered.

Decision of the Court of Appeal [2005] 3 All ER 852 reversed.

Notes

For the test for determining notional duty of care and for pure economic loss, see 33 *Halsbury's Laws* (4th edn reissue) paras 604, 613.

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A-G v Leveller Magazine Ltd [1979] 1 All ER 745, [1979] AC 440, [1979] 2 WLR 247, HL.

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A-G v Times Newspapers Ltd [1991] 2 All ER 398, [1992] 1 AC 191, [1991] 2 WLR 994, HL.

Al-Kandari v JR Brown & Co [1988] 1 All ER 833, [1988] QB 665, [1988] 2 WLR 671, CA; *rvsg* [1987] 2 All ER 302, [1987] QB 514, [1987] 2 WLR 469.

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Brooks v Metropolitan Police Comr [2005] UKHL 24, [2005] 2 All ER 489, [2005] 1 WLR 1495.

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Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq) [1994] 3 All ER 506, [1995] 2 AC 145, [1994] 3 WLR 761, HL.

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Appeal

The defendant Barclays Bank plc appealed with permission of the House of Lords Appeal Committee given on 8 March 2005 from the decision of the Court of Appeal (Peter Gibson, Longmore LJJ and Lindsay J) on 22 November 2004 ([2004] EWCA Civ 1555, [2005] 3 All ER 852) allowing the appeal of the claimant Customs and Excise Commissioners from the decision of Colman J on 3 February 2004 ([2004] EWHC 122 (Comm), [2004] 2 All ER 789) determining, as a preliminary issue in proceedings brought by the commissioners against the bank, that the bank, which had been notified of freezing orders relating to current accounts of certain of the bank's customers and had failed to prevent transfers of funds out of those accounts, did not owe the commissioners a duty of care. The facts are set out in the opinion of Lord Bingham of Cornhill.

Michael Brindle QC and *Richard Handyside* (instructed by *Lovells*) for the bank.

Philip Sales and *Daniel Stilitz* (instructed by the *Solicitor for Revenue and Customs*) for the commissioners.

Their Lordships took time for consideration.

21 June 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, the important question raised by this appeal is whether a bank, notified by a third party of a freezing injunction granted to the third party against one of the bank's customers, affecting an account held by the customer with the bank, owes a duty to the third party to take reasonable care to comply with the terms of the injunction. The question arises in these proceedings brought by the Commissioners of Customs and Excise against Barclays Bank plc (the bank), and has been resolved as a preliminary issue on facts assumed to be true but not proved. Colman J at first instance resolved the issue in favour of the bank (see [2004] EWHC 122 (Comm), [2004] 2 All ER 789, [2004] 1 WLR 2027). The Court of Appeal (Peter Gibson and Longmore LJJ and Lindsay J) reversed his

decision and ruled in favour of the commissioners (see [2004] EWCA Civ 1555, [2005] 3 All ER 852, [2005] 1 WLR 2082). The bank challenges that ruling.

[2] In January 2001 Brightstar Systems Ltd (Brightstar) and Doveblue Ltd (Doveblue) held current accounts with the bank. Both accounts were substantially in credit, but both companies owed the commissioners large sums of unpaid VAT. The commissioners believed that both companies would dissipate their assets in order to defeat judgments which the commissioners were likely to obtain. They accordingly applied for freezing injunctions against each of the companies, which were granted on 26 and 30 January 2001 respectively. The value of the assets restrained was £1,800,000 in the first case and £3,928,130 in the second. In each order a numbered account held by the company at the bank was specified, and in the second order the branch also. The first order was served on the bank by fax at about 12.33 pm on 29 January, the second (also by fax) at about 11.38 am on 30 January 2001. At about 2.30 pm on 29 January 2001 the bank authorised payments totalling £1,240,570 to be made out of the Brightstar account, and at about 2.00 pm on 30 January it permitted payments totalling £1,064,289 out of the Doveblue account. In due course the commissioners entered judgment against Brightstar for £2,285,788·98 and against Doveblue for £3,944,095·85. Neither company paid any part of the judgment, although the commissioners obtained and enforced garnishee orders absolute against residual sums remaining in the accounts of the companies. In these proceedings the commissioners claim damages against the bank in the sums paid out in breach of the respective injunctions plus interest for the appropriate periods. It is alleged (and for present purposes assumed) that the bank was negligent to permit the payments to be made.

[3] On being notified of each injunction the bank sent to the commissioners a standard letter confirming that the bank would abide by the terms of the order and notifying the commissioners of their duty to reimburse the bank for its costs incurred in complying with the order. Neither letter reached the commissioners before the respective payments were made, and neither influenced the conduct of the commissioners in any way. Had the letters reached the commissioners before release of the funds, the judge would have attached significance to them (see [2004] 2 All ER 789 at [76]–[81], [2004] 1 WLR 2027). But in my respectful opinion they were of no significance. The bank was bound to comply with the order of the court irrespective of any confirmation on its part. The letters did not affect the factual or the legal position. Their purpose was to pave the way to reimbursement of the costs of compliance incurred by the bank.

THE TEST OF TORTIOUS LIABILITY IN NEGLIGENCE FOR PURE FINANCIAL LOSS

[4] The parties were agreed that the authorities disclose three tests which have been used in deciding whether a defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort. The first is whether the defendant assumed responsibility for what he said and did vis-à-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant (what Kirby J in *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 676, (1999) 198 CLR 180 at 275 (para 259), succinctly labelled 'policy'). Third is the incremental test, based on the observation of Brennan J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–44, (1985) 157 CLR 424 at 481,

approved by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 576, [1990] 2 AC 605 at 618, that:

> 'It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed".'

Mr Brindle QC for the bank contended that the assumption of responsibility test was most appropriately applied to this case, and that if applied it showed that the bank owed no duty of care to the commissioners on the present facts. But if it was appropriate to apply either of the other tests the same result was achieved. Mr Sales for the commissioners submitted that the threefold test was appropriate here, and that if applied it showed that a duty of care was owed. But if it was appropriate to apply either of the other tests they showed the same thing. In support of their competing submissions counsel made detailed reference to the leading authorities including *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465; *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 223; *Smith v Eric S Bush (a firm), Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831; *Caparo Industries Plc v Dickman; Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145; *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207; *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296; *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830; and *Phelps v London Borough of Hillingdon, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor)* [2000] 4 All ER 504, [2001] 2 AC 619. These authorities yield many valuable insights, but they contain statements which cannot readily be reconciled. I intend no discourtesy to counsel in declining to embark on yet another exegesis of these well-known texts. I content myself at this stage with five general observations. First, there are cases in which one party can accurately be said to have assumed responsibility for what is said or done to another, the paradigm situation being a relationship having all the indicia of contract save consideration. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* would, but for the express disclaimer, have been such a case. *White v Jones* and *Henderson v Merrett Syndicates Ltd*, although the relationship was more remote, can be seen as analogous. Thus, like Colman J (whose methodology was commended by Paul Mitchell and Charles Mitchell, 'Negligence Liability for Pure Economic Loss' (2005) 121 LQR 194, 199), I think it is correct to regard an assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further inquiry. If answered negatively, further consideration is called for.

[5] Secondly, however, it is clear that the assumption of responsibility test is to be applied objectively (see *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181) and is not answered by consideration of what the defendant thought or intended. Thus Lord Griffiths said in *Smith v Eric S Bush* [1989] 2 All ER 514 at 534, [1990] 1 AC 831 at 862, that—

> 'The phrase "assumption of responsibility" can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts on the advice.'

Lord Oliver of Aylmerton, in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 589, [1990] 2 AC 605 at 637, thought 'voluntary assumption of responsibility'— a

> 'a convenient phrase but it is clear that it was not intended to be a test for the existence of the duty for, on analysis, it means no more than that the act of the defendant in making the statement or tendering the advice was voluntary and that the law attributes to it an assumption of responsibility if the statement or advice is inaccurate and is acted on. It tells us nothing about the circumstances from which such attribution arises.' b

In similar vein, Lord Slynn of Hadley in *Phelps v London Borough of Hillingdon* [2000] 4 All ER 504 at 518, [2001] 2 AC 619 at 654, observed:

> 'It is sometimes said that there has to be an assumption of responsibility by the person concerned. That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility. It is, however, clear that the test is an objective one (*Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181). The phrase means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by the law.' c d

The problem here is, as I see it, that the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the threefold test. e

[6] Thirdly, the threefold test itself provides no straightforward answer to the vexed question whether or not, in a novel situation, a party owes a duty of care. In *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 574, [1990] 2 AC 605 at 618, Lord Bridge, having set out the ingredients of the threefold test, acknowledged as much: f

> 'But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.' g h

Lord Roskill made the same point in the same case ([1990] 1 All ER 568 at 581–582, [1990] 2 AC 605 at 628): j

> 'I agree with your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or, in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as "foreseeability", "proximity", "neighbourhood", "just and reasonable",

a "fairness", "voluntary acceptance of risk", or "voluntary assumption of responsibility" will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care b exists and, if so, what is the scope and extent of that duty. If this conclusion involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care, as my noble and learned friend Lord Bridge, suggests, I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty.'

c

[7] Fourthly, I incline to agree with the view expressed by the Messrs Mitchell in their article cited above ('Negligence Liability for Pure Economic Loss' (2005) 121 LQR 194, 199) that the incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation. The closer the facts of the case in issue to d those of a case in which a duty of care has been held to exist, the readier a court will be, on the approach of Brennan J adopted in *Caparo Industries plc v Dickman*, to find that there has been an assumption of responsibility or that the proximity and policy conditions of the threefold test are satisfied. The converse is also true.

[8] Fifthly, it seems to me that the outcomes (or majority outcomes) of the e leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and f factual situation as a whole.

FREEZING INJUNCTIONS

[9] The jurisdiction to grant Mareva injunctions, to give freezing injunctions their original and better-known name, was developed by judicial decision from the g late 1970s onwards. It was recognised in s 37(3) of the Supreme Court Act 1981, and is now governed by CPR 25.1(f) as an order which may be made—

> '(i) restraining a party from removing from the jurisdiction assets located there; or (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not . . .'

h

A standard form of injunction (which may be modified to meet the needs of the particular case) is annexed to the practice direction on interim injunctions (CPR 25 PD). The prescribed standard form contains a penal notice:

> 'IF YOU [ ] DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN j CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.
>
> ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE RESPONDENT TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.'

The first of these warnings is addressed to the subject of the order, the second to any party (such as a bank) who knows of it. The form provides that anyone served with or notified of the order may apply to the court to vary or discharge it on notice to the applicant's solicitor. The effect of the order as it affects parties other than the applicant and the subject of the order is again stated (para 16):

> 'It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be imprisoned, fined or have their assets seized.'

The form records an undertaking by the applicant (see para (7) of Sch B) to pay the reasonable costs of any person other than the subject of the order—

> 'which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondent's assets and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make.'

In the present case, the second sentence of the penal notice (addressed to notified parties) was not included, but the effect of the notice was stated as in the standard form (subject to an immaterial change of wording) and both the notice concerning variation or discharge and the commissioners' undertaking as to costs of notified parties followed the text quoted.

[10] It is very well established that the purpose of a freezing injunction is to restrain a defendant or prospective defendant from disposing of or dealing with assets so as to defeat, wholly or in part, a likely judgment against it. The purpose is not to give a claimant security for his claim or give him any proprietary interest in the assets restrained: *Gangway Ltd v Caledonian Park Investments (Jersey) Ltd* [2001] 2 Lloyd's Rep 715 at 717 (para 14) per Colman J. The ownership of the assets does not change. All that changes is the right to deal with them.

[11] The court will punish a party who breaches one of its orders if the breach is sufficiently serious and the required standard of knowledge and intention is sufficiently proved. This rule applies to freezing injunctions, as the prescribed form and the notices given to the bank in this case make clear. The leading authority on Mareva injunctions leaves no room for doubt. In *Z Ltd v A* [1982] 1 All ER 556 at 562, [1982] QB 558 at 572, Lord Denning MR said:

> 'Every person who has knowledge of [the order] must do what he reasonably can to preserve the asset. He must not assist in any way in the disposal of it. Otherwise he is guilty of a contempt of court.'

He repeated this point (see [1982] 1 All ER 556 at 563, 564, [1982] QB 558 at 573–574, 575). Eveleigh LJ devoted his judgment in the case wholly to the requirements of contempt in this context. That the power to punish for contempt is not a mere paper tiger is well illustrated by the judgment of Colman J in *Z Bank v D1* [1994] 1 Lloyd's Rep 656.

[12] There was discussion in argument whether the relationship of the commissioners and the bank as a notified party, was adverse or antagonistic, like that of opposing parties to litigation. The commissioners contended that it was not. The bank carried on banking business, and it is now a routine feature of such business that freezing injunctions are notified to it and are given effect. The substantial relief the commissioners were seeking was against the bank's

customers, not it. The bank answered that this analysis did not fully reflect the reality of the situation.

[13] In 1981 Robert Goff J observed that 'the banks in this country have received numerous notices of [Mareva] injunctions which have been granted' (*Searose Ltd v Seatrain (UK) Ltd* [1981] 1 All ER 806 at 807, [1981] 1 WLR 894 at 895), and there is no reason to think that the pace has slackened since. Thus receiving notice of such injunctions is, literally, an everyday event. And the commissioners are right that they were not claiming substantive relief against the bank as a claimant seeks it against a defendant. But I think the bank is right to say that that is not the whole story, for three main reasons. First, the effect of notification of the order is to override the ordinary contractual duties which govern the relationship of banker and customer. This is not something of which a bank can complain or of which the bank does complain. A bank's relationship with its customers is subject to the law of the land, which provides for the grant of freezing injunctions. But the effect is none the less to oblige the bank to act in a way which but for the order would be a gross breach of contract. Such a situation must necessarily be very unwelcome to any bank which values its relationship with its customer. Secondly, the order exposes the bank to the risk that its employees may be imprisoned, the bank fined and its assets sequestrated. Of course, this is only a risk if the bank breaches the order in a sufficiently culpable way. But it is not a risk which exists independently of the order, and not a risk to which anyone would wish to be exposed. Thirdly, I think that the notice informing a bank of its right to set aside or discharge the order, addressed to both the customer and to the notified party, recognises its potentially prejudicial nature. If an order were neutral in its effect on the notified party, there would be no need to inform it of its right to vary or discharge it. While, therefore, the relationship of the commissioners and the bank was not, on notification of the order, that of hostile litigating parties, I think the bank is right to describe the relationship as adverse.

[14] I do not think that the notion of assumption of responsibility, even on an objective approach, can aptly be applied to the situation which arose between the commissioners and the bank on notification to it of the orders. Of course it was bound by law to comply. But it had no choice. It did not assume any responsibility towards the commissioners as the giver of references in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (but for the disclaimer) and *Spring v Guardian Assurance plc*, the valuers in *Smith v Eric S Bush*, the solicitors in *White v Jones* and the agents in *Henderson v Merrett Syndicates Ltd* may plausibly be said to have done towards the recipient or subject of the references, the purchasers, the beneficiaries and the Lloyd's Names. Save for the notification of the order (and treating as irrelevant the letters written by the bank: see [3], above) nothing crossed the line between the comissioners and the bank (see *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577 at 582, [1998] 1 WLR 830 at 835). Nor do I think that the commissioners can be said in any meaningful sense to have relied on the bank. The commissioners, having obtained their orders and notified them to the bank, were no doubt confident that the bank would act promptly and effectively to comply. But reliance in the law is usually taken to mean that if A had not relied on B he would have acted differently. Here the commissioners could not have acted differently, since they had availed themselves of the only remedy which the law provided. Mr Sales suggested, although only as a fall-back argument, that the relationship between the commissioners and the bank was, in Lord Shaw's words adopted by Lord Devlin in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 at 610, [1964] AC

465 at 529, 'equivalent to contract'. But the essence of any contract is voluntariness, and the bank's position was wholly involuntary.

[15] It is common ground that the foreseeability element of the threefold test is satisfied here. The bank obviously appreciated that, since risk of dissipation has to be shown to obtain a freezing injunction, the commissioners were liable to suffer loss if the injunction were not given effect. It was not contended otherwise. The concept of proximity in the context of pure economic loss is notoriously elusive. But it seems to me that the parties were proximate only in the sense that one served a court order on the other and that other appreciated the risk of loss to the first party if it was not obeyed. I think it is the third, policy, ingredient of the threefold test which must be determinative.

[16] In urging that a duty of care should be imposed on the bank the commissioners submitted that the orders were made by the court and notified to the bank to protect their interests; that recognition of a duty would in practical terms impose no new or burdensome obligation on the bank; that the rule of public policy which has first claim on the loyalty of the law is that wrongs should be remedied (see *X (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353 at 380, [1995] 2 AC 633 at 663, 749); that, since there are no facts here which would found a claim for effective redress in contempt, the commissioners will otherwise be left without any remedy; that a duty of care to the commissioners would not be inconsistent with the bank's duty to the court; and that there would, in such a case, be no indeterminacy as to those to whom the duty would be owed. These are formidable arguments and I am not surprised that the Court of Appeal accepted them. But I have difficulty in doing so, for six main and closely associated reasons.

[17] First, as already shown, the Mareva jurisdiction has developed as one exercised by court order enforceable only by the court's power to punish those who break its orders. The documentation issued by the court does not hint at the existence of any other remedy. This regime makes perfect sense on the assumption that the only duty owed by a notified party is to the court.

[18] Secondly, it cannot be suggested that the customer owes a duty to the party which obtains an order, since they are opposing parties in litigation and no duty is owed by a litigating party to its opponent (see *Digital Equipment Corp v Darkcrest Ltd* [1984] 3 All ER 381, [1984] Ch 512; *Business Computers International Ltd v Registrar of Companies* [1987] 3 All ER 465, [1988] Ch 229; *Al-Kandari v JR Brown & Co* [1988] 1 All ER 833, [1988] QB 665). It would be a strange and anomalous outcome if an action in negligence lay against a notified party who allowed the horse to escape from the stable but not against the owner who rode it out.

[19] It is clear, thirdly, that a duty of care in tort may co-exist with a similar duty in contract or a statutory duty, and I would accept in principle that a tortious duty of care to the commissioners could co-exist with a duty of compliance owed to the court. But I know of no instance in which a non-consensual court order, without more, has been held to give rise to a duty of care owed to the party obtaining the order, and one would have to ask whether a similar duty is owed by the subject of a search order, or a *Norwich Pharmacal* order (see *Norwich Pharmacal Co v Comrs of Customs and Excise* [1973] 2 All ER 943, [1974] AC 133), or a witness summons, in any case where economic loss is a foreseeable consequence of breach. It would seem that the commissioners' argument involves a radical innovation.

[20] Fourthly, it is a notable feature of this appeal that the commissioners adduce no comparative jurisprudence to support their argument. The House was referred to no material from any Commonwealth jurisdiction to show recognition

of a duty such as that for which the commissioners contend. One learned author has ventilated the suggestion that a third party with knowledge of a Mareva injunction may owe a duty of care to the party in whose favour the order is made (see Mark Hoyle *The Mareva Injunction and Related Orders* (3rd edn, 1997) pp 138–139), but the same author recognises (p 131) that there is no right to sue a contemnor for the contempt alone and acknowledges that there is no civil right to damages and no power for the court to award compensation to the other party for the contemnor's actions, citing *Re Hudson (decd), Hudson v Hudson* [1966] 1 All ER 110, [1966] Ch 209 and *Chapman v Honig* [1963] 2 All ER 513, [1963] 2 QB 502.

[21] Fifthly, the cases relied on by the commissioners as providing the closest analogy with the present case do not in my opinion, on examination, reveal any real similarity. The first case relied on is *Al-Kandari v JR Brown & Co.* A defendant husband had on a previous occasion kidnapped two children whose custody was the subject of proceedings before the English court. The plaintiff mother was anxious that the same thing should not happen again. To reassure her the husband deposited his passport (on which the children were entered) with his solicitor, who negligently allowed him to regain possession of the passport and again remove the children. The wife sued her husband's solicitor in negligence, and it was held at first instance ([1987] 2 All ER 302, [1987] QB 514) and on appeal that the solicitor owed the wife a duty of care. The judge found ([1987] 2 All ER 302 at 308, [1987] QB 514 at 523) that the solicitor had given the wife an implied undertaking. The Court of Appeal held that the solicitor had accepted responsibilities towards the wife ([1988] 1 All ER 833 at 836, 838, [1988] QB 665 at 672, 675) and had acted as an independent custodian of the passport subject to the joint directions of both parties as well as the court (see [1988] 1 All ER 833 at 839, 838, [1988] QB 665 at 676, 675). There was in that case a very clear and entirely voluntary assumption of responsibility by the solicitor towards the wife.

[22] The facts of the second case relied on, *Dean v Allin & Watts (a firm)* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249, are a little more complicated. An unsophisticated lender running the business of a car mechanic wanted to lend money to borrowers on the security of real property owned by an associate of the borrowers. The borrowers instructed the defendant solicitors to give effect to this transaction. The solicitors knew that the lender had no solicitor of his own, and there was a meeting between the solicitors and the lender. The solicitors' instructions from the borrower were to provide the lender with effective security, which was for his benefit and was fundamental to the transaction (see the judgment of Lightman J giving the leading judgment in the Court of Appeal: [2001] 2 Lloyd's Rep 249 at [40]). There was, as the solicitors at all times knew, an identity of interest between borrower and lender. In this situation there was, again, a voluntary assumption of responsibility by the solicitors towards the lender and the trial judge's decision that no duty arose was, I respectfully think, rightly reversed. But I do not think this authority bears any close analogy with the present case.

[23] Lastly, it seems to me in the final analysis unjust and unreasonable that the bank should, on being notified of an order which it had no opportunity to resist, become exposed to a liability which was in this case for a few million pounds only, but might in another case be for very much more. For this exposure it had not been in any way rewarded, its only protection being the commissioners' undertaking to make good (if ordered to do so) any loss which the order might cause it, protection scarcely consistent with a duty of care owed to the commissioners but in any event valueless in a situation such as this.

[24] I would allow the appeal and dismiss the commissioners' claim with costs in the House and below.

LORD HOFFMANN.

[25] My Lords, the question in this case is whether a bank served with a freezing order (ci-devant Mareva injunction) upon a customer's account owes a duty to the claimant to take reasonable care to ensure that no payments are made out of the account. The Court of Appeal held that it did (see [2004] EWCA Civ 1555, [2005] 3 All ER 852, [2005] 1 WLR 2082) but in my opinion it does not.

[26] The claimants are the Commissioners for Revenue and Customs, who, in one of their former incarnations as the Commissioners of Customs and Excise, were owed a total of over £6m of value added tax by two companies called Brightstar Systems Ltd (Brightstar) and Doveblue Ltd (Doveblue). How these debts were allowed to accumulate is unknown, but the commissioners, apprehensive that the companies might remove their assets from the jurisdiction, applied for freezing orders against Brightstar on 26 January 2001 and against Doveblue on 30 January 2001. In both cases the orders restrained the companies from dealing with their assets and in particular with specified accounts with Barclays Bank plc (Barclays).

[27] The Brightstar order was served on Barclays by fax at 12.33 pm on 29 January. At 2.30 pm Brightstar made an application by fax to transfer £1,240,570 out of the account and although Barclays had taken routine steps to freeze the account, by an 'operator error' the payment was authorised and made. The Doveblue order was served on Barclays by fax at 11.38 am on 30 January but a payment of £1,064,289 out of the account was authorised at 2.00 pm, before the arrangements to freeze the account had taken effect. In both cases, the money paid out of the accounts has not been recovered and the judgments subsequently obtained by the commissioners remain unsatisfied.

[28] On these facts, alleged by the commissioners and assumed to be true, a preliminary issue in the nature of a demurrer was tried by Colman J. Barclays submitted that the action was bound to fail because they owed the commissioners no duty of care. The judge agreed but the Court of Appeal reversed his decision and allowed the action to proceed. Barclays appeal to your Lordships' House.

[29] A freezing order is an injunction made against the putative debtor to which the bank is not a party. But the existence of the injunction may have an effect upon third parties in two ways. First, it is a contempt of court to aid and abet a breach of an injunction by the party against whom the order was made. Secondly, it is an independent contempt of court to do an act which deliberately interferes with the course of justice by frustrating the purpose for which the order was made: see *A-G v Times Newspapers Ltd* [1991] 2 All ER 398, [1992] 1 AC 191 and *A-G v Punch Ltd* [2002] UKHL 50, [2003] 1 All ER 289, [2003] 1 AC 1046 for the general principle and *Z Ltd v A* [1982] 1 All ER 556 at 566–567, [1982] QB 558 at 578 for an explanation by Eveleigh LJ of its application to Mareva injunctions. The purpose of serving the bank with the order is therefore to give the bank notice that payment out of the account will frustrate its purpose and, if done deliberately, will be a contempt of court. However, as Lord Hope of Craighead said in *A-G v Punch Ltd* [2003] 1 All ER 289 at [87], [2003] 1 AC 1046, for the third party to be liable for contempt—

> 'it has . . . to be shown there was an intention on his part to interfere with or impede the administration of justice. This is an essential ingredient, and it has to be established to the criminal standard of proof.'

a **[30]** In the present case, there is no suggestion that anyone at Barclays intended deliberately to flout the order. The allegation is that they failed to take reasonable care to ensure that money was not paid out of the account.

[31] How does one determine whether a duty of care is owed? In cases of pure economic loss such as this, it is not sufficient that the bank ought reasonably to have foreseen that unless they had proper systems in place and their employees took b reasonable care to give effect to any freezing orders which came along, the beneficiaries of those orders might suffer loss. In the case of personal or physical injury, reasonable foreseeability of harm is usually enough, in accordance with the principle in *Donoghue v Stevenson* [1932] AC 562, [1932] All ER Rep 1, to generate a duty of care. In the case of economic loss, something more is needed.

c **[32]** The Court of Appeal applied what it called the 'threefold test' proposed by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 573–574, [1990] 2 AC 605 at 617–618:

> '... in addition to foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the d party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.'

e **[33]** Longmore LJ held that this test was satisfied (see [2005] 3 All ER 852, [2005] 1 WLR 2082). Foreseeability was conceded; service of the order created proximity (even though the bank 'may not be particularly willing to have a relationship to the commissioners': see [30]) and it was 'eminently fair, reasonable and just' that a bank should take care not to allow a defendant to flout the order (see [31]). The order placed a burden on the bank but provided for the bank to be paid its reasonable f charges for compliance. Peter Gibson LJ agreed (at [63]): 'Practical justice requires the recognition of such a duty'. So did Lindsay J.

[34] Mr Brindle QC, who appeared for Barclays, said that this was the wrong approach. One should ask whether the bank had assumed responsibility for monitoring the account. As authority for applying this test, he relied upon g Lord Goff of Chieveley's analysis in *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506 at 520–521, [1995] 2 AC 145 at 180–181. In this case, he said, the bank never assumed responsibility. If anything, it had responsibility thrust upon it.

h **[35]** There is a tendency, which has been remarked upon by many judges, for phrases like 'proximate', 'fair, just and reasonable' and 'assumption of responsibility' to be used as slogans rather than practical guides to whether a duty should exist or not. These phrases are often illuminating but discrimination is needed to identify the factual situations in which they provide useful guidance. For example, in a case in which A provides information to C which he knows will be j relied upon by D, it is useful to ask whether A assumed responsibility to D (see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465; *Smith v Eric S Bush (a firm), Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831). Likewise, in a case in which A provides information on behalf of B to C for the purpose of being relied upon by C, it is useful to ask whether A assumed responsibility to C for the information or was only discharging his duty to B (see *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830).

Or in a case in which A provided information to B for the purpose of enabling him to make one kind of decision, it may be useful to ask whether he assumed responsibility for its use for a different kind of decision (see *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605). In these cases in which the loss has been caused by the claimant's reliance on information provided by the defendant, it is critical to decide whether the defendant (rather than someone else) assumed responsibility for the accuracy of the information to the claimant (rather than to someone else) or for its use by the claimant for one purpose (rather than another). The answer does not depend upon what the defendant intended but, as in the case of contractual liability, upon what would reasonably be inferred from his conduct against the background of all the circumstances of the case. The purpose of the inquiry is to establish whether there was, in relation to the loss in question, the necessary relationship (or 'proximity') between the parties and, as Lord Goff of Chieveley pointed out in *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181, the existence of that relationship and the foreseeability of economic loss will make it unnecessary to undertake any further inquiry into whether it would be fair, just and reasonable to impose liability. In truth, the case is one in which, but for the alleged absence of the necessary relationship, there would be no dispute that a duty to take care existed and the relationship is what makes it fair, just and reasonable to impose the duty.

[36] It is equally true to say that a sufficient relationship will be held to exist when it is fair, just and reasonable to do so. Because the question of whether a defendant has assumed responsibility is a legal inference to be drawn from his conduct against the background of all the circumstances of the case, it is by no means a simple question of fact. Questions of fairness and policy will enter into the decision and it may be more useful to try to identify these questions than simply to bandy terms like 'assumption of responsibility' and 'fair, just and reasonable'. In *Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1990] 3 All ER 330 at 333–335, sub nom *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295 at 300–303 I tried to identify some of these considerations in order to encourage the evolution of lower-level principles which could be more useful than the high abstractions commonly used in such debates.

[37] In *Henderson v Merrett Syndicates Ltd* itself, the House used the concept of assumption of responsibility in a situation which did not involve reliance upon information but where, once again, the issue was whether the necessary relationship between claimant and defendant existed. The issues in that case were whether the managing agents of a Lloyd's syndicate owed a duty of care in respect of their underwriting to Names with whom they had no contractual relationship and whether they owed a separate duty in tort to Names with whom they did have a contractual relationship. In fact, the arguments in *Henderson v Merrett Syndicates Ltd* were a re-run of *Donoghue v Stevenson* in a claim for economic loss. In that case, as it seems to me, the use of the concept of assumption of responsibility, while perfectly legitimate, was less illuminating. The question was not whether the defendant had assumed responsibility for the accuracy of a particular statement but a much more general responsibility for the consequences of their conduct of the underwriting. To say that the managing agents assumed a responsibility to the Names to take care not to accept unreasonable risks is little different from saying that a manufacturer of ginger beer assumes a responsibility to consumers to take care to keep snails out of his bottles.

[38] Even in this context, however, the notion of assumption of responsibility serves a different, weaker, but nevertheless useful purpose in drawing attention to

the fact that a duty of care is ordinarily generated by something which the defendant has decided to *do*: giving a reference, supplying a report, managing a syndicate, making ginger beer. It does not much matter why he decided to do it; it may be that he thought it would be profitable or it may be that he was providing a service pursuant to some statutory duty, as in *Phelps v London Borough of Hillingdon, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor)* [2000] 4 All ER 504, [2001] 2 AC 619 and *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 223. In the present case, however, the duty is not alleged to arise from anything which the bank was doing. It is true that the bank was carrying on the business of banking, handling money on behalf of its customers. But that is not alleged to have been either necessary or sufficient to generate the duty in this case. Not necessary, because if such a duty is created by notice of the freezing order, it must apply to anyone who has possession or control of the defendant's assets: the garage holding his car, the stockbroker nominee company holding his shares, his grandmother holding a drawer-full of his bank notes. On being given notice of the order, they would all be under an obligation to take reasonable care to ensure that the defendant did not get his hands on the assets. Not sufficient, because there is no suggestion that, apart from the freezing order, the bank in carrying on its ordinary business would be under any duty to protect the position of the commissioners.

[39] There is, in my opinion, a compelling analogy with the general principle that, for the reasons which I discussed in *Stovin v Wise* [1996] 3 All ER 801 at 818–820, [1996] AC 923 at 943–944, the law of negligence does not impose liability for mere omissions. It is true that the complaint is that the bank did something: it paid away the money. But the payment is alleged to be the breach of the duty and not the conduct which generated the duty. The duty was generated ab extra, by service of the order. The question of whether the order can have generated a duty of care is comparable with the question of whether a statutory duty can generate a common law duty of care. The answer is that it cannot (see *Gorringe v Calderdale Metropolitan BC* [2004] UKHL 15, [2004] 2 All ER 326, [2004] 1 WLR 1057). The statute either creates a statutory duty or it does not. (That is not to say, as I have already mentioned, that conduct undertaken pursuant to a statutory duty cannot generate a duty of care in the same way as the same conduct undertaken voluntarily.) But you cannot derive a common law duty of care directly from a statutory duty. Likewise, as it seems to me, you cannot derive one from an order of court. The order carries its own remedies and its reach does not extend any further.

[40] Colman J relied upon the fact that the advisers of one party to litigation owe no duty to the other party and for this purpose treated a party's bank as being in much the same position as his lawyers (see [2004] EWHC 122 (Comm), [2004] 2 All ER 789, [2004] 1 WLR 2027). For my part I prefer to place no particular weight upon this factor. The freezing order suspended the bank's duty to its client and compliance would therefore have created no conflict of interest. The Court of Appeal relied upon the fact that the order provided for payment to the bank of its reasonable costs incurred as a result of this order. I do not regard this as a material factor either. It is one thing to have to do some paper work and another to be put on risk for millions of pounds.

[41] I would therefore allow the appeal and restore the judgment of Colman J.

LORD RODGER OF EARLSFERRY.

[42] My Lords, the presumed facts giving rise to this appeal are of the simplest. In January 2001 the Commissioners of Customs and Excise intended to raise

proceedings for payment of very large sums which they alleged that two companies, Brightstar Systems Ltd (Brightstar) and Doveblue Ltd (Doveblue), owed them in respect of value added tax (VAT). On 26 January the commissioners obtained a freezing order (familiarly known as a Mareva injunction) against Brightstar. The order was in the usual terms, prohibiting Brightstar from removing from England and Wales or in any way disposing of or dealing with or diminishing any of its assets in England and Wales, including, in particular, any money in account number 70845302 at Barclays Bank plc (Barclays). The limit was £1,800,000 (though it was subsequently increased). The commissioners undertook to pay any reasonable costs which the bank incurred as a result of the order. At about 12.33 pm on 29 January the commissioners notified Barclays of the order. Despite this, at about 2.30 pm on the same day, due to an error, Barclays authorised payments totalling £1,240,570 to be made out of the Brightstar account. In their proceedings against Brightstar the commissioners obtained judgment in default for £2,285,788·98, but Brightstar have paid nothing. In the present action the commissioners seek damages for the loss which they claim to have suffered as a result of Barclays' negligence in authorising the payments after being notified of the order.

[43] On 30 January 2001 the commissioners obtained a similar freezing order against Doveblue with a limit of £3,928,130. It referred in particular to money in account numbered 10902284 at Barclays Bank, Hounslow. The commissioners notified Barclays of the order at 11.38 am on 30 January but, again due to an error, at about 2 pm Barclays allowed £1,064,289 to be paid out of the Doveblue account. In due course the commissioners obtained judgment in default against Doveblue for £3,944,095·85, none of which has been paid by Doveblue. The commissioners again seek damages for the loss which they claim they suffered as a result of Barclays' negligence.

[44] The preliminary issue in the case is whether, on these assumed facts, Barclays owed a duty of care to the commissioners. Colman J held that they did not (see [2004] EWHC 122 (Comm), [2004] 2 All ER 789), but the Court of Appeal held that they did (see [2004] EWCA Civ 1555, [2005] 3 All ER 852).

[45] The assumed facts do not make any reference to the time when the freezing orders were actually served on Brightstar and Doveblue. More particularly, they do not spell out whether the orders were served on the companies after Barclays were notified. It would, however, be usual for the bank to be notified first, in order to minimise the risk that, once made aware of the orders, the companies would try to dispose of the funds in their accounts. I consider the position on that basis.

[46] In opening the appeal on behalf of Barclays, Mr Brindle QC focused on the fact that at the relevant time both Brightstar and Doveblue were customers of Barclays. The commissioners had obtained freezing orders against Barclays' customers and soon they would serve those orders on the bank's customers and commence adversarial proceedings to recover the VAT from them. The commissioners were therefore the adversaries of Barclays' customers and in that fight Barclays were, in effect, on their customers' side. As the companies' bankers, Barclays were in a roughly similar position to the companies' solicitors or counsel and, like them, they did not owe a duty of care to those on the other side.

[47] I do not find the analogy compelling. When parties embark on contested court proceedings, even under the rules of procedure in force today, they are entitled to treat the other side as opponents whom they wish to vanquish. So they do not owe them a duty of care (see *Business Computers International Ltd v Registrar of Companies* [1987] 3 All ER 465, [1988] Ch 229). Equally, when the parties employ

solicitors and counsel to act for them in the proceedings, in general, those representatives owe no duty of care to the other side (see *Al-Kandari v JR Brown & Co* [1988] 1 All ER 833 at 838–839, [1988] QB 665 at 675 per Bingham LJ). But, as the narrative of events shows, Barclays did not represent their customers in their dispute with the commissioners. In reality, they were no more on the companies' side in that dispute than the companies' butchers, bakers or candlestick-makers.

[48] Mr Brindle next argued that no one owed a duty of care to avoid causing financial harm to another unless he had voluntarily undertaken responsibility towards that other person. Here Barclays had not undertaken any responsibility to the commissioners for the way in which they would freeze the companies' accounts. They had just been required to act due to the notification of the order. Mr Sales argued in reply that assumption of responsibility was not the only criterion for holding that someone owed a duty of care. It was just one factor to be taken into account. The correct approach was to adopt the so-called 'threefold test' and to ask whether the loss was reasonably foreseeable, whether the parties were in a relationship of proximity and whether it would be fair, just and reasonable that the defendant should owe a duty of care to the claimant. It is common ground that in this case the loss was reasonably foreseeable.

[49] There is no doubt that some passages in speeches in your Lordships' House provide support for the view that voluntary assumption of responsibility is *the* touchstone of liability for pure economic loss. In the first and most famous case, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 at 610, [1964] AC 465 at 528–529, Lord Devlin held that the categories of special relationships which might give rise to a duty of care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty—

> 'but include also relationships which in the words of Lord Shaw in [*Nocton v Lord Ashburton* [1914] AC 932, [1914–15] All ER Rep 45] are "equivalent to contract" that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.'

He then continued in what was to become a famous passage ([1963] 2 All ER 575 at 610–611, [1964] AC 465 at 529):

> 'I have had the advantage of reading all the opinions prepared by your lordships and of studying the terms which your lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act on information or advice and so creates a duty of care towards them. I do not understand any of your lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction.'

Much of Lord Devlin's concern was to avoid the risk that people would be held liable for remarks made in a social or other informal context. Hence the emphasis on liability arising because the defendant himself assumes responsibility for what he says. None of the other members of the House analysed the basis of liability in quite this way, but nevertheless, to begin with at least, Lord Devlin's analysis was to prove influential. It fell out of favour, however, as a result of the criticisms of Lord Griffiths ('unlikely to be a helpful or realistic test in most cases') and

Lord Jauncey in *Smith v Eric S Bush (a firm), Harris v Wyre Forest DC* [1989] 2 All ER 514 at 536, 540, [1990] 1 AC 831 at 864–865, 870, and of Lord Roskill and Lord Oliver of Aylmerton in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 582, 589, [1990] 2 AC 605 at 628, 637. But, in a trio of cases a few years later its fortunes revived when it found a powerful supporter in Lord Goff of Chieveley.

[50] First, at the beginning of July 1994, in *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296, where counsel for the plaintiff had not put his case on the footing of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* and the other members of the majority were proposing to allow the appeal on a broader basis, Lord Goff set out the reasoning, based on a *Hedley Byrne* assumption of responsibility, which he preferred. Lord Lowry agreed with his interpretation ([1994] 3 All ER 129 at 152, [1995] 2 AC 296 at 325). Next, towards the end of that same month, in *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506 at 518, [1995] 2 AC 145 at 178 Lord Goff returned to the point and identified voluntary assumption of responsibility as 'the governing principle'. He sought to defuse the criticisms of Lord Griffiths and others by saying ([1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181) that, 'at least in cases such as the present', in which there is no problem in keeping the number of persons owed a duty of care within reasonable bounds, 'there seems to be no reason why recourse should not be had to the concept . . .' Where a case fell within the *Hedley Byrne* principle, 'there should be no need to embark upon any further inquiry whether it is "fair, just and reasonable"'. Finally, in February 1995, in *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207, where the plaintiff was an intended beneficiary under a will which the deceased's solicitors had negligently failed to prepare before his death, Lord Goff acknowledged ([1995] 1 All ER 691 at 710, [1995] 2 AC 207 at 268) that the *Hedley Byrne* principle could not 'in the absence of special circumstances, give rise on ordinary principles to an assumption of responsibility by the testator's solicitor towards an intended beneficiary'. Nevertheless, in his opinion, the House—

> 'should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor.'

[51] Part of the function of appeal courts is to try to assist judges and practitioners by boiling down a mass of case law and distilling some shorter statement of the applicable law. The temptation to try to identify some compact underlying rule which can then be applied to solve all future cases is obvious. Mr Brindle submitted that in this area the House had identified such a rule in the need to find that the defendant had voluntarily assumed responsibility. But the unhappy experience with the rule so elegantly formulated by Lord Wilberforce in *Anns v London Borough of Merton* [1977] 2 All ER 492 at 498–499, [1978] AC 728 at 751–752, suggests that appellate judges should follow the philosopher's advice to 'Seek simplicity, and distrust it'.

[52] Therefore it is not surprising that there are cases in the books—notably *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 223, approved by Lord Slynn of Hadley in *Spring v Guardian Assurance plc* [1994] 3

All ER 129 at 158–159, [1995] 2 AC 296 at 332—which do not readily yield to analysis in terms of a voluntary assumption of responsibility, but where liability has none the less been held to exist. I see no reason to treat these cases as exceptions to some over-arching rule that there must be a voluntary assumption of responsibility before the law recognises a duty of care. Such a rule would inevitably lead to the concept of voluntary assumption of responsibility being stretched beyond its natural limits—which would in the long run undermine the very real value of the concept as a criterion of liability in the many cases where it is an appropriate guide. In any event, as the words which I have quoted from his speech in *Henderson v Merrett Syndicates Ltd* make clear, Lord Goff himself recognised that, although it may be decisive in many situations, the presence or absence of a voluntary assumption of responsibility does not necessarily provide the answer in all cases. Indeed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* Lord Reid saw it as only one possible basis, the other being where the defendant has 'accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require' (see [1963] 2 All ER 575 at 583, [1964] AC 465 at 486). So I would reject Mr Brindle's submission on this point.

[53] In the absence of any single touchstone, the House finds itself in the familiar position, envisaged by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 574, [1990] 2 AC 605 at 618, where a court faced with a novel situation must apply the threefold test, while recognising that—

> 'the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.'

[54] For his part, Mr Sales was, of course, anxious to portray Barclays as being in a relationship with the commissioners which would give rise to a duty of care on the part of the bank if the threefold test were applied. The commissioners notified Barclays of the freezing order. This alerted them to the existence of the proceedings in which the commissioners were claiming large amounts of VAT from the companies. They knew that the commissioners had felt it necessary to protect their position by obtaining a freezing order. Barclays could easily foresee that, if they did not duly freeze the accounts and the companies transferred the funds, the commissioners might well be unable to enforce any judgment against them. So Barclays would realise that the commissioners were relying on them to freeze the accounts. In these circumstances Barclays owed a duty of care to the commissioners.

[55] Essentially, Mr Sales was simply describing the consequences which he said flowed from the notification of the freezing order. This can be seen by supposing that, before applying for any order, the commissioners had approached Barclays, had told them about their claims for VAT, had explained the risk that the companies might defeat those claims by transferring the funds in their accounts and had asked for Barclays' help. Knowing all that, the bank would have been under no obligation to help the commissioners. For one thing, you do not come under a duty in tort to prevent someone causing me financial harm just because I tell you what is likely to happen to me if you do not take steps to prevent it. In addition, of course, Barclays would have been contractually bound to transfer the funds if their customers so instructed and even if they knew that this was likely to cause the

commissioners financial harm. So they could have done nothing to help, even if they had wanted to.

[56] The position changed when Barclays were notified of the freezing order. In *Z Ltd v A* [1982] 1 All ER 556 at 566, [1982] QB 558 at 578 Eveleigh LJ stated the consequences which ensue when there are acts or omissions which are contrary to the terms of an injunction:

> '(1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he wilfully assists the person to whom it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction.'

Eveleigh LJ went on to deal with the argument that the liability of a third party arose because he was treated as aiding and abetting the defendant (ie as an accessory) and that, since the defendant could himself not be in breach unless he had notice, it followed that there was no offence to which the third party could be an accessory:

> 'In my opinion this argument misunderstands the true nature of the liability of the third party. He is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted.' (See [1982] 1 All ER 556 at 566–567, [1982] QB 558 at 578.)

For Lord Denning MR ([1982] 1 All ER 556 at 563, [1982] QB 558 at 574), the juristic principle was:

> 'As soon as the bank is given notice of the Mareva injunction, it must freeze the defendant's bank account. It must not allow any drawings to be made on it, neither by cheques drawn before the injunction nor by those drawn after it. The reason is because, if it allowed any such drawings, it would be obstructing the course of justice, as prescribed by the court which granted the injunction, and it would be guilty of a contempt of court.'

[57] In *A-G v Times Newspapers Ltd* [1991] 2 All ER 398, [1992] 1 AC 191, the House applied Eveleigh LJ's analysis of the position of a third party. Lord Oliver of Aylmerton noted ([1991] 2 All ER 398 at 417, [1992] 1 AC 191 at 222) that:

> 'Once the conclusion is reached that the fact that the alleged contemnor is not party to or personally bound by the court's order then, given the intention on his part to interfere with or obstruct the course of justice, the sole remaining question is whether what he has done has that effect in the particular circumstances of the case.'

According to the speeches in *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745, [1979] AC 440, the gravamen of the offence of contempt of court would be that the contemnor's act 'frustrates, thwarts, or subverts the purpose of the court's order and thereby interferes with the due administration of justice in the particular action'

(see [1991] 2 All ER 398 at 418, [1992] 1 AC 191 at 223). Lord Oliver added ([1991] 2 All ER 398 at 419, [1992] 1 AC 191 at 223):

> '"Purpose", in this context, refers, of course, not to the litigant's purpose in obtaining the order or in fighting the action but to the purpose which, in seeking to administer justice between the parties in the particular litigation of which it had become seized, the court was intending to fulfil.'

[58] In *A-G v Punch Ltd* [2002] UKHL 50 at [39], [2003] 1 All ER 289 at [39], [2003] 1 AC 1046, Lord Nicholls of Birkenhead quoted this passage with approval and went on (at [43]) to explain the position of a third party in this way:

> 'When proceedings come before a court the plaintiff typically asserts that he has a legal right which has been or is about to be infringed by the defendant. The claim having come before the court, it is then for the court, not the parties to the proceedings or third parties, to determine the way justice is best administered in the proceedings. It is for the court to decide whether the plaintiff's asserted right needs and should have any, and if so what, interim protection. If the court orders that pending the trial the defendant shall not do certain acts the court thereby determines the manner in which, in this respect, the proceedings shall be conducted. This is the court's determination on what interim protection is needed and is appropriate. Third parties are required to respect this determination, as expressed in the court's order. The reason why the court grants interim protection is to protect the plaintiff's asserted right. But the manner in which this protection is afforded depends upon the terms of the interlocutory injunction. The purpose the court seeks to achieve by granting the interlocutory injunction is that, pending a decision by the court on the claims in the proceedings, the restrained acts shall not be done. Third parties are in contempt of court if they wilfully interfere with the administration of justice by thwarting the achievement of *this* purpose in *those* proceedings.' (My emphasis.)

[59] As these authorities show, when the court granted the commissioners' application for a freezing order, its purpose was to protect the commissioners by preventing the companies from parting with their assets pending the conclusion of the commissioners' action for the payment of the VAT. Unlike, say, an arrestment on the dependence in Scots law, the freezing orders were directed at the two companies, not at the bank. But, if the bank had deliberately ignored the orders and set about assisting the companies to transfer their assets, that would have thwarted the court's purpose in granting the orders and the bank would have been in contempt of court, even if the companies themselves had still been unaware of the relevant order. So Barclays had to freeze the companies' assets, not out of any consideration for the commissioners but because to do otherwise would thwart the purpose of the court and obstruct the course of justice.

[60] The courts make quite extensive use of freezing orders. So, in practice, banks like Barclays can be expected to have in place a system for freezing accounts when they are notified of an order—and to take care when they have to operate the system. But, of itself, this does not mean that if they fail to take care they are liable to the applicant who obtained the order. For instance, as I pointed out in *Brooks v Metropolitan Police Comr* [2005] UKHL 24 at [38], [2005] 2 All ER 489 at [38], [2005] 1 WLR 1495, a prosecutor is under a professional and ethical duty to take care in preparing and presenting the case against a defendant whom he is prosecuting. If he fails to take the necessary care, any conviction may be unsafe and he himself may

be subject to some disciplinary sanction. Nevertheless, the prosecutor does not assume a responsibility to the defendant to act carefully and owes him no duty of care in the law of tort (see *Elguzouli-Daf v Metropolitan Police Comr, McBrearty v Ministry of Defence* [1995] 1 All ER 833 at 842, [1995] QB 335 at 349 per Steyn LJ).

[61] In most cases the third party will be a bank or similar institution. But sometimes a private individual who happens, for example, to be looking after the addressee's car will be startled to receive notification of a freezing order. This puts him in essentially the same position as a bank which is notified of an order. Usually, he will do his best to respect the order and to hold on to the car. Should the law add to his burdens, however, by exposing him to an uninsured liability in damages if he fails to take the care which is ultimately considered to be reasonable and the addressee makes off with the car?

[62] Punishment for contempt of court is the remedy which the law provides for the addressee's failure to comply with an injunction such as a freezing order. Liability is strict and so he may be guilty of contempt even where he did not deliberately flout the order, the degree of his fault being relevant in determining the appropriate punishment (see *A-G v Times Newspapers Ltd* [1991] 2 All ER 398 at 415, [1992] 1 AC 191 at 217 per Lord Oliver of Aylmerton).

[63] By contrast, a third party who is notified of an injunction is guilty of contempt of court only if he knowingly takes a step which will frustrate the court's purpose in granting the order. So a bank will be in contempt only if it knowingly fails to freeze a customer's account and pays away sums in the account after being notified of an order. Mr Sales argued that this was not a sufficient sanction: the law of tort could usefully supplement the law of contempt by imposing on the bank a duty of care in favour of the party who obtained the freezing order. I would reject that argument.

[64] The policy of the law is that a third party, such as a bank, which is notified of a freezing order, must not knowingly undermine the court's purpose in granting the order. If this is all that the court which makes the order can demand, it would be inconsistent to hold that, by reason of the selfsame notification, the applicant could simultaneously demand a higher standard of performance from the bank—and then claim damages for the bank's failure to achieve it. Notification imposes a duty on the bank to respect the order of the court; it does not of itself generate a duty of care to the applicant. And here the commissioners can point to nothing more than the order and Barclays' negligent failure to respond to it.

[65] Mr Sales submitted that, as the bank must know, the applicant relies on it to comply with the order—and this means that the third party must take reasonable care for the applicant's interests. In my view, that is to stretch the concept of reliance too far. If a party wishes to freeze his opponent's bank account, he cannot do so without the intervention of the court. Having obtained a freezing order and notified the bank, the applicant can expect that any responsible bank will respect the order. But he does not rely on the bank doing so. Rather, like anyone else who obtains a court order, he relies on the court being able to enforce its orders. So the applicant relies on the court ensuring that the bank does not flout its order and punishing the bank for contempt if it does. That is, after all, the assistance which the law provides to someone who shows that his opponent's assets should be frozen. In any such proceedings the applicant and the bank are very much at arm's length, even though the applicant has to reimburse the bank's costs. There is nothing which could be regarded as a voluntary assumption of responsibility by the bank for the way in which it would go about freezing the companies' accounts. Similarly, there is nothing which involves the bank in entering into any kind of

relationship with the applicant that requires it to exercise such care as the circumstances require. Indeed the bank and the applicant are about as far from being in a relationship 'equivalent to contract' as they could be. The bank has to act, but merely because the court order compels it to do so—ultimately on pain of punishment. It gets its reasonable costs, but makes no profit out of performing its duty. Moreover, its duty to respect the order and to act accordingly does not arise out of any relationship with the applicant. If anything, it arises out of the bank's relationship with its customers under which it holds funds that it may be instructed to transfer. Clearly, this relationship—which may well be damaged by the bank having to freeze the funds—cannot give rise to a duty of care to the applicant.

[66] Having regard to all these circumstances, in my view, not only is there not the necessary proximity between the applicant and a third party, such as a bank, who is notified of a freezing order, but it would not be fair, just and reasonable to hold that the third party owes a duty of care to the applicant.

[67] For these reasons I would hold that in this case Barclays did not owe a duty of care to the commissioners. I would accordingly allow the appeal and dismiss the claim.

LORD WALKER OF GESTINGTHORPE.

[68] My Lords, I have had the great advantage of reading in draft the opinions of all your Lordships. Not without some hesitation, I agree with their conclusion that this appeal should be allowed. I will explain briefly what are the points on which I have no hesitation in concurring in my Lords' views, and what are the points on which I have found it more difficult to concur.

[69] Your Lordships are, I think, largely at one as to what I might call the basic approach to the problem. The development of the tort of negligence since the seminal case of *Donoghue v Stevenson* [1932] AC 562, [1932] All ER Rep 1 has not been one of steady advance along a broad front. It has been a much more confused series of engagements with salients and beachheads, and retreats as well as advances. It has sometimes been only long after the event that it has been possible to assess the true significance of some clash of arms. That may be the case with the decision of this House in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, as has been suggested in an important article, criticising what she calls the 'pockets of case law' approach, by Professor Jane Stapleton ('Duty of Care and Economic Loss: a Wider Agenda' (1991) 107 LQR 249, especially pp 259–263). The whole article, although published 15 years ago (that is, soon after the revision or displacement of *Anns v London Borough of Merton* [1977] 2 All ER 492, [1978] AC 728) contains much that is still very relevant.

[70] The complicating factors are not limited to the distinction between pure economic loss and personal injury or physical damage to property. Other factors are the interface with breach of statutory duty and the position of public authorities, especially local authorities in discharging their statutory functions in relation to social services, education and highways; special rules relating to defective premises, product liability and marine transport; the distinction (elusive though it sometimes is) between acts and omissions; and the recognition of the need for particular caution in imposing duties of care in tort (other than lawyers' duties to their own clients) in the context of hostile litigation.

[71] Arguably the last 15 years have seen some modest progress in the direction recommended by Professor Stapleton. The increasingly clear recognition that the threefold test (first stated by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 573–574, [1990] 2 AC 605 at 617–618) does not

provide an easy answer to all our problems, but only a set of fairly blunt tools, is to my mind progress of a sort. I respectfully agree with the observation of Kirby J in *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 684, (1999) 198 CLR 180 at 284 (para 283):

> 'As against the approach which I favour, it has been said that the three identified elements are mere "labels". So indeed they are ... Labels are commonly used by lawyers. They help steer the mind through the task in hand.'

(It would be an unnecessary distraction to go into the more recent jurisprudence in the High Court of Australia, noted by Christian Witting, 'The Three-Stage Test Abandoned in Australia—or Not?' (2002) 118 LQR 214.)

[72] This House had indeed, in *Caparo Industries plc v Dickman* itself, recognised both that the elements of the threefold test are labels, and that their usefulness is limited: see the observations of Lord Bridge ([1990] 1 All ER 568 at 574, [1990] 2 AC 605 at 618) and Lord Roskill ([1990] 1 All ER 568 at 581–582, [1990] 2 AC 605 at 628), both quoted in [6] of the opinion of my noble and learned friend Lord Bingham of Cornhill.

[73] I would add a footnote in relation to the notion of 'voluntary assumption of responsibility'. So far as the modern law is concerned, this expression seems to be traceable mainly to the speeches of Lord Reid and Lord Devlin in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 at 583, [1964] AC 465 at 486 ('held to have accepted some responsibility') and [1963] 2 All ER 575 at 611, [1964] AC 465 at 529 ('a voluntary undertaking to assume responsibility'). Earlier in his speech Lord Devlin had referred ([1963] 2 All ER 575 at 608, [1964] AC 465 at 526) to early authority going back as far as *Coggs v Bernard* (1703) 2 Ld Raym 909, 91 ER 25, the case of the broken cask of brandy, in which the motion in arrest of judgment had relied on the fact ((1703) 2 Ld Raym 909 at 912) that the defendant 'is neither laid to be a common porter, nor that he is to have any reward for his labour' (see also 91 ER 25 at 25). This quotation reflects the fact that there are (at any rate for a lawyer) two threads of meaning in the word 'voluntary': without compulsion and without remuneration. A common carrier would have been under an obligation to undertake the task of moving the brandy cask, and would have been remunerated. The old cases show liability being imposed *despite* the defendant's conduct having been (in one or both senses) voluntary. As the law has developed (and in the field of pure economic loss) liability is imposed *because of* the voluntary assumption of responsibility. But in the modern context the word 'voluntary' is being used, it seems to me, with the connotation of 'conscious', 'considered' or 'deliberate'. That appears, for instance, in *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207, both in the speech of Lord Browne-Wilkinson ([1995] 1 All ER 691 at 716, [1995] 2 AC 207 at 274) and in the dissenting speech of Lord Mustill ([1995] 1 All ER 691 at 729, [1995] 2 AC 207 at 286–287). That is particularly important in considering whether the defendant has undertaken responsibility for economic loss towards anyone other than the person or persons with whom he is in an obviously proximate relationship. In such cases the voluntary assumption of responsibility towards others, judged objectively, may provide the necessary proximity.

[74] In this case the appellant bank has not, in any meaningful sense, made a voluntary assumption of responsibility. It has by the freezing order had responsibility thrust upon it. But in any case it is not proximity that is the respondents' problem in this case. The duty of care for which the respondents contended successfully in the Court of Appeal, and which they seek to maintain in this House, is not a duty leading to 'liability in an indeterminate amount for an

indeterminate time to an indeterminate class'(in the very well-known words of Cardozo CJ in *Ultramares Corp v Touche* (1931) 174 NE 441 at 444). It would be a liability in a known maximum sum (in respect of a precisely identified account), for a brief period, to a single known body corporate. The respondents' problem is whether it is fair, just and reasonable to impose on a bank a novel and substantial liability (on top of its potential liability for contempt of court) if it carelessly fails to comply with a freezing order.

[75] That is the point on which I have found this appeal more difficult than the rest of your Lordships. If this issue affected only banks, I would be slow to conclude that there could never be liability for carelessly failing to comply with a freezing order. Banks are already subject to strict regulation and potential sanctions in connection with money-laundering and similar activities. They are enjoined to know their customers. They become liable for breach of fiduciary duty if they shut their eyes to dishonest dealings by their customers. VAT (and PAYE) collected on behalf of HM Revenue and Customs by trading companies is not trust money, but banks cannot be unaware that VAT (and PAYE) collected in this way is often not properly accounted for, through fraud or mismanagement. There is a public interest in banks responding with particular care, promptness and vigilance to any freezing order obtained by HM Revenue and Customs.

[76] I am also rather disinclined to put much weight on the litigation context. A bank whose customer is a party to litigation may occasionally be joined as a party to the litigation, either for the purposes of a freezing order or in the pursuit of a proprietary remedy. But that is unusual, and it did not happen in this case. The bank's duty to its customer was overridden and suspended by the freezing order. Its position was a neutral position.

[77] However, Mr Sales, appearing for the commissioners, realistically acknowledged that if in these circumstances a duty of care is to be imposed on a bank, it must also be imposed on any other person affected by notice of a freezing order. In many cases that would produce unfair, unjust and unreasonable results. I too would allow this appeal and make the order which Lord Bingham proposes.

LORD MANCE.

[78] My Lords, the short question on this appeal is whether a bank served with notice of a non-proprietary freezing order (in yesterday's terms a Mareva injunction) owes a duty of care to the claimants who obtained the order against defendants in civil proceedings. The bank is Barclays Bank plc, the claimants are the Commissioners of Customs and Excise and the defendants are two companies, Brightstar Systems Ltd (Brightstar) and Doveblue Ltd (Doveblue), who have allegedly defaulted in payment of large sums of value added tax (VAT). The order against Brightstar was made on 26 January 2001 in the sum of £1,800,000 and notice of it was served on the bank by fax at about 12.33 pm on 29 January 2001. The order against Doveblue was made on 30 January 2001 in the sum of £3,928,130 and notice of it was served on the bank by fax at about 11.38 am on that day. The effect of each order was to suspend the bank's mandate in respect of any payment instructions from its customers which would reduce such customers' assets within the jurisdiction to below those sums: cf *Z Ltd v A* [1982] 1 All ER 556 at 563, [1982] QB 558 at 574 per Lord Denning MR and [1982] 1 All ER 556 at 572–573, [1982] QB 558 at 586 per Kerr LJ.

[79] In the case of each order about two hours after the bank received such notice, the relevant defendant used the bank's Faxpay system to give direct payment instructions to the bank's payment centre, as distinct from the branch

where the relevant accounts (No 70845302 in the case of Brightstar and No 10902284 in the case of Doveblue) were held. The instructions were for payments totalling £1,240,570 (Brightstar) and £1,064,289 (Doveblue). The instructions were on their face in breach of the freezing orders, but the bank in each case met them. For the purposes of the present preliminary issues, it is assumed that the bank failed to act with reasonable competence. The commissioners, unable to recover the full outstanding VAT in any other way, claim damages from the bank in the sums thus paid out.

[80] The orders were in standard Commercial Court form. They prohibited the defendant companies from removing, disposing of, dealing with or diminishing the value of any of their assets in England and Wales up to the values frozen and included 'the following assets in particular', specifying the above-numbered accounts with the bank. They provided:

> **'Variation of [sic] discharge of this Order**
>
> The Defendant (or anyone notified of this Order) may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person), but anyone wishing to do so must first inform the Claimants' legal representatives.
>
> Parties other than the Claimants and Defendant
>
> **1. Effect of this Order:-**
>
> It is a Contempt of Court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be sent to prison, fined or have his assets seized.
>
> **2. Set off by Banks:-**
>
> This injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the Defendant before it was notified of this Order.
>
> **3. Withdrawals by the Defendant:-**
>
> No bank need enquire as to the application or proposed application of any money withdrawn by the Defendant if the withdrawal appears to be permitted by this Order.'

The orders further recited that the judge had 'accepted the undertakings set out in Schedule B at the end of this Order', which provided:

> '**Schedule B**
>
> Undertakings given to the Court by the Claimants . . .
>
> (7) The Claimants will pay the reasonable costs of anyone other than the Defendant which have been incurred as a result of this Order including the costs of ascertaining whether that person holds any of the Defendant's assets and if the Court later finds that this Order has caused such person loss, and decides that such person should be compensated for that loss, the Claimants will comply with any Order the Court may make.'

[81] The covering sheets to the faxes notifying of the orders to the bank show that the relevant officer acting for the commissioners knew and had already spoken to the bank's legal adviser to whom such notices were directed. The first notice relating to Brightstar requested that the attached freezing order be 'put into effect with immediate effect', while the second relating to Doveblue said 'Many thanks for your assistance in this matter'. However, neither in the pleadings nor in argument has anything been sought to be made of the informal preceding

conversations. What is relied upon, as a fall-back and in relation to the Brightstar claim only, is the bank's response by letter dated 29 January 2001 written by its Retail Financial Services—Legal department. This said inter alia 'We confirm that the Bank will abide by the terms of the Order', drew attention to the costs which it would incur so doing and to its entitlement under the order to reimbursement and set out on the reverse an explanation of their nature and concluded:

> 'Almost all of the time expended on service of an Order is by staff of Managerial status and has been carefully costed. Our minimum costs for dealing with this Freezing Order are in excess of £150, but we are prepared to round our costs down to this amount.'

It is clear that this letter was not received by the commissioners before the bank's error in making the payment out of Brightstar's account, so that the commissioners cannot have relied on it. But it may have been sent before the error and, if so, Mr Philip Sales for the commissioners suggests that the bank might by the time of the error be regarded as having assumed responsibility for the task and/or towards the commissioners.

[82] The conceptual basis on which courts decide whether a duty of care exists in particular circumstances has been repeatedly examined. Three broad approaches have been suggested, involving consideration (a) whether there has been an assumption of responsibility, (b) whether a threefold test of foreseeability, proximity and 'fairness, justice and reasonableness' has been satisfied or (c) whether the alleged duty would be 'incremental' to previous cases. Mr Michael Brindle QC for the bank argues that in cases of economic loss the only relevant question is whether there has been an 'assumption of responsibility'. Mr Philip Sales for the commissioners submits that the primary approach should be through the threefold test of foreseeability, proximity and 'fairness, justice and reasonableness' and that assumption of responsibility and incrementalism are no more than potentially relevant factors under that test.

[83] All three approaches may often (though not inevitably) lead to the same result. Assumption of responsibility is on any view a core area of liability for economic loss. But all three tests operate at a high level of abstraction. What matters is how and by reference to what lower-level factors are interpreted in practice, see eg *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 573–574, [1990] 2 AC 605 at 617–618 per Lord Bridge of Harwich and [1990] 1 All ER 568 at 585, [1990] 2 AC 605 at 633 per Lord Oliver of Aylmerton.

[84] As to incrementalism, I note that the House's support for this approach in *Caparo Industries plc v Dickman* was given with reference to a passage in Brennan J's judgment in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–44, (1985) 157 CLR 424 at 481, where he was rejecting the House's approach in *Anns v London Borough of Merton* [1977] 2 All ER 492, [1978] AC 728, from which the House itself resiled a year after *Caparo Industries plc v Dickman* in *Murphy v Brentwood DC* [1990] 2 All ER 908, [1991] 1 AC 398. Brennan J said of *Anns v London Borough of Merton*:

> 'I am unable to accept that approach. It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed".'

Incrementalism was therefore viewed as a corollary of the rejection, now uncontroversial, of any generalised liability for negligently caused economic loss, rather than as necessarily inconsistent with the development of novel categories of negligence. Having said that, caution and analogical reasoning are generally valuable accompaniments to judicial activity, and this is particularly true in the present area.

[85] The concept of assumption of responsibility derives from the fountain of most modern economic claims, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465. The concept appears most clearly in the speech of Lord Devlin ([1963] 2 All ER 575 at 610, [1964] AC 465 at 528–529), who founded himself on the proposition that a duty of care might arise in relationships 'which . . . are "equivalent to contract" that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract'. Lord Devlin went on to emphasise ([1963] 2 All ER 575 at 611, [1964] AC 465 at 529) that, in the light of the bank's disclaimer in that case, the claim failed because: 'Responsibility can attach only to the single act, ie, the giving of the reference, and only if the doing of that act implied a voluntary undertaking to assume responsibility.' Where there has been an assumption of responsibility in the core sense considered in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, questions of 'foreseeability', 'proximity' and 'fairness, justice and reasonableness' tend to answer themselves (cf *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181 per Lord Goff of Chieveley).

[86] In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* the concept was one of assumption of responsibility by the defendant towards the claimant. Lord Devlin's contractual analogy also indicates, and Mr Brindle accepts, that whether there has been an assumption of responsibility is to be assessed objectively: see *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181 per Lord Goff, with whose speech all other members of the House agreed. Similarly, an assumption of responsibility may arise from the provision not merely of information or advice, but also of services: see [1994] 3 All ER 506 at 520, [1995] 2 AC 145 at 180 per Lord Goff.

[87] However, it has been said on a number of occasions that it is artificial or unhelpful to insist on fitting all claims for breach of a duty of care to avoid economic loss within the conception of assumption of responsibility, and there are several cases involving economic loss where the threefold test and incrementalism have been preferred.

[88] Thus in *Smith v Eric S Bush (a firm), Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831 valuers engaged by the mortgagee council were held to owe a duty of care to house buyers, despite an express disclaimer stating that their report was 'intended solely for the information of' that council and advising the house buyers to obtain independent advice. Apart from the Unfair Contract Terms Act 1977 the disclaimer would have negatived any duty of care, in the same way as the disclaimer in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. But, since the disclaimer was unreasonable and so void under the 1977 Act, the valuer was held to owe a duty of care to the buyers. Lord Templeman explained this on the basis that the valuer had 'assumed responsibility' to both mortgagee and purchaser, knowing that the latter has paid the fee and would probably rely on the report (see [1989] 2 All ER 514 at 522–523, [1990] 1 AC 831 at 847). But Lord Griffiths thought ([1989] 2 All ER 514 at 534, [1990] 1 AC 831 at 862) that assumption of

responsibility was not 'a helpful or realistic test for liability', and explained its use in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* by reference to the disclaimer which there existed. He went on to say that:

> 'The phrase "assumption of responsibility" can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts on the advice.'

Lord Jauncey of Tullichettle took a similar view ([1989] 2 All ER 514 at 541, [1990] 1 AC 831 at 871). Lords Keith and Brandon agreed with both Lord Templeman and Lord Griffiths (see [1989] 2 All ER 514 at 517, [1990] 1 AC 831 at 840D-F).

[89] In *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605, Lord Bridge of Harwich found it unnecessary to address any difference between an approach based on assumption of responsibility and the threefold test (see [1990] 1 All ER 568 at 577–578, [1990] 2 AC 605 at 623). But Lord Roskill echoed Lord Griffiths's words in *Smith v Eric S Bush* (see [1990] 1 All ER 568 at 582, [1990] 2 AC 605 at 628) and Lord Oliver of Aylmerton said of 'the voluntary assumption of responsibility' that:

> 'This is a convenient phrase but it is clear that it was not intended to be a test for the existence of the duty for, on analysis, it means no more than that the act of the defendant in making the statement or tendering the advice was voluntary and that the law attributes to it an assumption of responsibility if the statement or advice is inaccurate and is acted on. It tells us nothing about the circumstances from which such attribution arises.' (See [1990] 1 All ER 568 at 589, [1990] 2 AC 605 at 637.)

Earlier in his speech ([1990] 1 All ER 568 at 585, [1990] 2 AC 605 at 633), Lord Oliver had also expressed doubt about the value of the threefold test, saying that:

> '. . . although the cases in which the courts have imposed or withheld liability are capable of an approximate categorisation, one looks in vain for some common denominator by which the existence of the essential relationship can be tested. Indeed, it is difficult to resist a conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some cases the degree of foreseeability is such that it is from that alone that the requisite proximity can be deduced, whilst in others the absence of that essential relationship can most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible. "Proximity" is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists.'

Lord Jauncey took as his approach the threefold test (see [1990] 1 All ER 568 at 602, [1990] 2 AC 605 at 655). The House also expressed its support for Brennan J's preference in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–44, (1985) 157 CLR 424 at 481 for development of novel categories of negligence incrementally.

[90] In *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296, the issue was whether a company giving a reference owed a duty of care to the subject of the reference, its former employee, who by virtue of the content of reference had not been appointed to the new post which he was seeking elsewhere. While Lord Goff would have decided in favour of such a duty on the ground of assumption

of responsibility, all three other members of the majority proceeded (as Lord Goff recognised: [1994] 3 All ER 129 at 143–144, [1995] 2 AC 296 at 316) on a broader basis, applying the threefold test of foreseeability, proximity and fairness, justice and reasonableness (see [1994] 3 All ER 129 at 152, [1995] 2 AC 296 at 325 per Lord Lowry, [1994] 3 All ER 129 at 159–160, 161, 162–163, [1995] 2 AC 296 at 333, 334, 336 per Lord Slynn of Hadley and [1994] 3 All ER 129 at 168, [1995] 2 AC 296 at 342 per Lord Woolf).

[91] In *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207 the general approach was revisited. Lord Goff referred ([1995] 1 All ER 691 at 700, [1995] 2 AC 207 at 257) to assumption of responsibility as the test which 'as a general rule' determined whether there could be liability for purely financial loss, but he recognised that the testator's solicitor could not be said actually to have assumed responsibility towards a disappointed beneficiary ([1995] 1 All ER 691 at 704, 710, [1995] 2 AC 207 at 262, 268). It was only because there would otherwise be a lacuna in the law leading to injustice that he concluded that the House—

> 'should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor.'

[92] Lord Browne-Wilkinson addressed ([1995] 1 All ER 691 at 715–716, [1995] 2 AC 207 at 273–274) the doubts expressed by Lord Griffiths in *Smith v Eric S Bush* [1989] 2 All ER 514, [1990] 1 AC 831 and Lord Roskill in *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605 by explaining assumption of responsibility as 'assumption of responsibility for the task, not the assumption of legal responsibility'. He said:

> 'If the responsibility for the task is assumed by the defendant he thereby creates a special relationship between himself and the plaintiff in relation to which the law (not the defendant) attaches a duty to carry out carefully the task so assumed.'

On this basis he explained *Smith v Eric S Bush* and *Caparo Industries plc v Dickman* as cases where there had been 'a conscious assumption of responsibility for the task' (see [1995] 1 All ER 691 at 716, [1995] 2 AC 207 at 274), and said that, although the categories of cases of special relationship were not closed, the only two hitherto identified were:

> '(1) where there [was] a fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice. In both these categories the special relationship is created by the defendant voluntarily assuming to act in the matter by involving himself in the plaintiff's affairs or by choosing to speak.' (See [1995] 1 All ER 691 at 716–717, [1995] 2 AC 207 at 274.)

He recognised that neither of these categories covered the circumstances in *White v Jones* (see [1995] 1 All ER 691 at 717, [1995] 2 AC 207 at 275). But he considered a duty of care in *White v Jones* to be justified because 'the law in this area has not ossified', because Lord Devlin in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* had

himself envisaged that there might be other sets of circumstances in which it would be appropriate to find a special relationship giving rise to a duty of care, and because the case fell within Lord Bridge's statement in *Caparo Industries plc v Dickman* that novel categories of negligence could be developed 'incrementally and by analogy with established categories'. A duty owed by the negligent solicitor to the disappointed beneficiary was closely analogous with existing categories of special relationship (see [1995] 1 All ER 691 at 717, [1995] 2 AC 207 at 275).

[93] This review of authority confirms that there is no single common denominator, even in cases of economic loss, by which liability may be determined. The threefold test of foreseeability, proximity and fairness, justice and reasonableness provides a convenient general framework although it operates at so high a level of abstraction. Assumption of responsibility is particularly useful as a concept in the two core categories of case identified by Lord Browne-Wilkinson in *White v Jones* [1995] 1 All ER 691 at 716–717, [1995] 2 AC 207 at 274, when it may effectively subsume all aspects of the threefold approach. But if all that is meant by voluntary assumption of responsibility is the voluntary assumption of responsibility for a task, rather than of liability towards the defendant, then questions of foreseeability, proximity and fairness, reasonableness and justice may be very relevant. In *White v Jones* itself there was no doubt that the solicitor had voluntarily undertaken responsibility for a task, but it was the very fact that he had done so for the testator, not the disappointed beneficiary, that gave rise to the stark division of opinion in the House. Incrementalism operates as an important cross-check on any other approach.

[94] The present cannot be regarded as a case of assumption of responsibility. The involuntary nature of the bank's involvement with the commissioners makes it impossible to regard the situation as one 'akin to contract'; it is also difficult in any meaningful sense to speak of the bank as having voluntarily assumed responsibility even for the task in relation to which it was allegedly negligent, let alone responsibility towards the commissioners for the task. In a very general sense any bank, indeed anyone carrying on any activity during the course of which they might have cause to hold the monies or possessions of another, might be said to accept the risk that a third party might obtain a freezing order in respect of such monies or possessions. But that is to assign to the concept of voluntary assumption of responsibility so wide a meaning as to deprive it of effective utility. Further, I do not consider that it can make any difference to the above analysis in the case of Brightstar if the bank's letter of 29 January 2001 was posted before the bank's error. The letter was itself written simply to reflect and acknowledge the legal obligation which the freezing order imposed on the bank. To analyse the situation (as Lord Denning MR did in *Z Ltd v A* [1982] 1 All ER 556 at 564, [1982] QB 558 at 575) in terms of a request to freeze the account in consideration of payment of the relevant expenses is in my opinion artificial.

[95] Mr Brindle thus submits that no duty of care on the bank can be recognised because the bank did not voluntarily undertake responsibility even for the task which it is now alleged negligently to have executed. But Mr Sales can point to cases where a duty of care has been recognised even though the defendant cannot realistically be said to have voluntarily undertaken the relevant task. Instances may be found in *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 223, *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296 and *Phelps v London Borough of Hillingdon* [2000] 4 All ER 504, [2001] 2 AC 619. Mr Brindle questions the correctness of the first of these decisions, but submits that

none of them points towards the recognition of a duty on the present facts. First, it is convenient to summarise their effect.

[96] In *Ministry of Housing and Local Government v Sharp* Mr Sharp was the local land registrar charged by statute with keeping the local registry, and where requested searching it and issuing a certificate setting forth the result. A clerk was seconded by Hemel Hempstead Rural District Council to assist Mr Sharp with this work. The clerk negligently issued an inaccurate certificate to a prospective purchaser of land, omitting any reference to a claim to reimbursement of compensation which the Ministry had against the seller. The effect was to extinguish the right which the Ministry would otherwise have had to pursue its claim against the purchaser. It was conceded that, if the clerk was liable in negligence to the Ministry, then the council was vicariously liable for its clerk. The Court of Appeal held that the clerk was so liable. Lord Denning MR did not agree that a duty of care could only arise when there was a voluntary assumption of responsibility (see [1970] 1 All ER 1009 at 1018–1019, [1970] 2 QB 223 at 268). Salmon LJ said ([1970] 1 All ER 1009 at 1027–1028, [1970] 2 QB 223 at 279):

> 'It has been argued . . . that since the council did not voluntarily make the search or prepare the certificate for their clerk's signature they did not voluntarily assume responsibility for the accuracy of the certificate and, accordingly, owed no duty of care to the Minister. I do not accept that, in all cases, the obligation to take reasonable care necessarily depends upon a voluntary assumption of responsibility.'

He added that he was anyway far from satisfied that the council did not voluntarily assume responsibility in circumstances where they had chosen to discharge 'this somewhat pedestrian task' through their clerk, so that their registrar 'might be left free to carry out other far more difficult and important functions on their behalf'. Cross LJ saw 'no sufficient reason why in an appropriate case the liability should not extend to cases in which the defendant is obliged to make the statement which proves to be false' (see [1970] 1 All ER 1009 at 1038, [1970] 2 QB 223 at 291).

[97] In *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296 the company acting as referee was obliged to give a reference (which the company considering whether to engage its subject was also obliged to seek). The obligation arose under the rules of the relevant self-regulatory body, Lautro (the Life Assurance and Unit Trust Regulatory Organisation), set up under the Financial Services Act 1986. No member of the House saw such obligations as an obstacle to the recognition of a duty of care (see especially [1994] 3 All ER 129 at 148, [1995] 2 AC 296 at 321 per Lord Goff of Chieveley and [1994] 3 All ER 129 at 153, [1995] 2 AC 296 at 327 per Lord Lowry). The main focus was on whether the existence of a potential defence of qualified privilege in any action for defamation was a bar to the recognition of a duty of care, which the House also held was not the case.

[98] In *Phelps v London Borough of Hillingdon* [2000] 4 All ER 504, [2001] 2 AC 619 the House was concerned with claims arising in the statutory context of education authorities operating to a considerable extent under the Education Acts. The primary issue was whether the authorities' employees responsible for diagnosing special needs could owe a duty of care to those pupils affected by their diagnoses or failures to diagnose or treat properly. It was not suggested that the statutory duties themselves gave rise to any claim for breach of statutory duty, and the authorities argued that their employees' only duty of care was owed to the authorities. The House held that duties of care existed, even though the failures complained of took

place in the course of purported fulfilment of the authorities' statutory duties, and of the employees' duties in that regard to the authorities. Further, Lord Slynn of Hadley did not accept that an authority could never owe a direct duty to pupils affected by its own (as opposed to one of its employees') failures to take care in the exercise of its powers relating to children with special needs (see [2000] 4 All ER 504 at 522, [2001] 2 AC 619 at 658), while Lord Clyde ([2000] 4 All ER 504 at 538, [2001] 2 AC 619 at 676) was 'certainly not prepared to deny the possibility that such a duty may exist'. Although there were allegations of damage amounting to physical loss in the cases before the House, the House did not draw any clear distinction between physical and economic loss and Lord Clyde ([2000] 4 All ER 504 at 533, [2001] 2 AC 619 at 670) expressly said that 'The loss claimed may be purely of an economic character'.

[99] Before considering further the relevance of these cases to the present, it is convenient to look more closely at factors which may assist to determine whether or not a duty of care should be recognised. Starting with the broad framework of the threefold test, no issue arises regarding foreseeability. The rationale of a non-proprietary freezing order is the risk of dissipation of assets, so the loss to the bank if the order was breached by the defendants or not implemented by the bank is exactly what is foreseen and foreseeable. Proximity is a vaguer notion, which may take in aspects which can also be considered under the head of fairness, justice and reasonableness. In legal, financial and practical terms, the freezing orders once notified to the bank created a most proximate relationship between the commissioners and the bank. The orders were specifically directed to Brightstar's and Doveblue's accounts, the commissioners gave direct notice of them to the bank, and the commissioners were obviously likely to be heavily dependent on the bank's observance of such orders if they were to hope to satisfy any judgments they might obtain against Brightstar and Doveblue.

[100] The key question therefore is whether it is therefore fair, just and reasonable to recognise a duty? Here, in particular, it is necessary to descend to a level of greater particularity. What are the factors which can be identified as relevant? Foremost among those which have militated against the recognition of a duty of care in respect of economic loss in the past has been the fear of the indeterminacy of any resulting liability. This arises both when economic loss is liable to have what the respondents (citing Jane Stapleton in 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 LQR 249, 255) call a 'ripple' effect, creating a chain or network of potential claimants and when it is likely to give rise to individual claims in indeterminate amounts. But neither of those aspects of the 'floodgates' objection has any weight in circumstances such as the present. The freezing orders define both the potential claimants and the maximum amounts of any claim (although situations are conceivable in which it could take a third party given notice of such an order a little time to ascertain what assets belonging to the claimant he was actually holding). The fact that a bank served with a freezing order has, prior to notice of its making, no idea which of its customers may attract such an order seems to me an irrelevance. The bank's duty only arises and is only to comply once it has notice of the order. In practice, of course a reputable and well-organised bank will have machinery in place to meet all the contingencies and requirements which may be expected commonly to arise in banking life. But that does not militate for or against recognition of any duty of care which it would otherwise be appropriate to recognise.

[101] A second potentially relevant factor is the availability of adequate alternative protection for the commissioners. Here the position is again not

unfavourable for the commissioners' case that a duty of care should be recognised. The bank, once notified of the freezing orders was informed by para 1 under the heading 'Effect of this Order' that it was liable to contempt proceedings, if it knowingly assisted in or permitted a breach of their terms. The bank was obliged to do its best to implement the order, and no reputable bank could or should do anything but take the notification of a freezing order extremely seriously. But contempt requires proof to a standard commensurate with the seriousness of the offence, and the sanctions available to the court are not directed primarily at compensation, but at the imposition of a penalty. It is true that, with sensible ingenuity, a sanction can sometimes be tailored in such a way as to encourage the restoration of an asset which has been improperly released from a freezing order or perhaps even compensation: see eg the order made by Colman J in *Z Bank v D1* [1994] 1 Lloyd's Rep 656 at 668. But a civil remedy for breach of a duty of care would be a much more satisfactory and complete protection than potential contempt proceedings for a claimant like the commissioners.

[102] A third factor is the availability of insurance. There is no obvious likelihood that the commissioners could have obtained insurance against the risk of negligence by the bank. In contrast, one would, as Mr Brindle accepts, expect any exposure of the bank under any duty of care to be covered by a banker's blanket policy, the terms of which are typically of extreme width. If the recognition of a duty of care involves any risk which the bank's insurers have not yet taken into account, any additional premium could either be a basis for increasing the conventional sum (in 2001 £150) which the bank charges those obtaining freezing orders against it, or be factored more generally into the bank's profit and interest margins. However third parties other than banks may be notified of a freezing order, eg individuals or businesses holding a defendant's assets or moneys. It is not so obvious that they will have or could obtain insurance to cover the risk of negligent release to the defendant of such assets or monies. A distinction might, possibly, be advanced between third parties like banks whose business it is to look after monies and who could be expected to have procedures and insurance in place to meet the requirements and cover the risks of a freezing order and others of whom this would or could not necessarily be expected. But this would, I think, prove a difficult distinction both to justify in principle and to draw and apply.

[103] A fourth factor to be considered is whether the suggested duty of care to the claimants would be inconsistent with the bank's or the defendants' duty to the court. Clearly it would not. It would complement and if anything reinforce performance of that duty, as Colman J recognised in his judgment (see [2004] EWHC 122 (Comm) at [63], [2004] 2 All ER 789 at [63], [2004] 1 WLR 2027).

[104] Fifthly, the suggested duty of care would be equally consistent with the bank's duty to the defendants as its customers, bearing in mind that each freezing order revoked the bank's mandate to make payments pursuant to the relevant defendant's instructions to the extent necessary to ensure compliance with its terms.

[105] Sixthly (and associated with the previous two points), the nature of a freezing order means that a duty could without difficulty be recognised, although it would amount to a duty to take care to avoid a disposition which would itself involve an intentional contempt of court by the bank's customer.

[106] A seventh factor which weighed heavily and proved decisive with Colman J was that the bank was in his view in a similar position to an adverse party or an adverse party's legal representative in civil proceedings. An adverse party owes no duty of care in the commencement of proceedings: cf *Business Computers International Ltd v Registrar of Companies* [1987] 3 All ER 465, [1988] Ch 229, where a

petitioner had negligently caused the plaintiff to be put into liquidation by serving a petition for the plaintiff's winding up at the wrong address. This decision was approved in *Al-Kandari v JR Brown & Co* [1988] 1 All ER 833 at 838, [1988] QB 665 at 675, where Bingham LJ (as he was) went on to say: 'In the ordinary course of adversarial litigation a solicitor does not owe a duty of care to his client's adversary.'

[107] Starting from this point, Mr Brindle pointed out that a solicitor might well hold client money which might be caught by a freezing order of which he was given notice, and submitted that, if such a solicitor could not owe a duty of care to the claimant, no more could or should the bank in the present case. But that submission assumes what it has to prove—it assimilates the role of a defendant's solicitor to whom a freezing order is notified with his adversarial role on behalf of his client. In some (albeit rare) circumstances one party's solicitor may at the same time occupy a separate, non-partisan role giving rise to a duty of care to [the] other party. The decision in *Al-Kandari v JR Brown & Co* demonstrates this. The solicitors there agreed to hold the defendant's passport to the order of the court. As Lord Donaldson of Lymington MR said ([1988] 1 All ER 833 at 836, [1988] QB 665 at 672):

> 'In voluntarily agreeing to hold the passport to the order of the court, the solicitors had stepped outside their role as solicitors for their client and accepted responsibilities towards both their client and the plaintiff and the children.'

Bingham LJ (as my Lord then was) said ([1988] 1 All ER 833 at 838, [1988] QB 665 at 675): 'If the client intends to confer a benefit on a third party, the solicitor may owe a duty to the third party to take reasonable care to see that effect is given to the client's intentions.' He went on ([1988] 1 All ER 833 at 839, [1988] QB 665 at 676):

> 'In so holding the passport the [solicitors] were not acting as solicitors and agents of Mr Al-Kandari, their client, but as independent custodians subject to the directions of the court and the joint directions of the parties.'

The first passage quoted from Bingham LJ's judgment refers to circumstances like those in *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207. In *Dean v Allin & Watts (a firm)* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249, on which Mr Sales relied, the Court of Appeal took the view that such circumstances existed in the context of a property transaction where one party's solicitor was instructed and endeavouring to put security in place to enable a transaction to proceed in both parties' interests.

[108] Mr Brindle points out that third parties such as banks may not only be affected by notification of freezing orders, but may themselves actually be joined as co-defendants or sued in separate proceedings for relief (usually by way of disclosure, but in appropriate circumstances also by way of freezing order) which is essentially ancillary to a freezing order against the main defendant, the bank's customer: see eg *A v C* [1980] 2 All ER 347 at 352, [1981] QB 956n at 961, *TSB Private Bank International SA v Chabra* [1992] 2 All ER 245, [1992] 1 WLR 231 and *Mercantile Group (Europe) AG v Aiyela* [1994] 1 All ER 110, [1994] QB 366. (They may also be, and not uncommonly are, sued for disclosure of information about apparent wrong-doing in which they have innocently become involved: *Norwich Pharmacal Co v Comrs of Customs and Excise* [1973] 2 All ER 943, [1974] AC 133.) Apart from the relative rarity of the cases in which banks are joined as defendants to obtain freezing orders against them in respect of assets of the main defendant, I do not consider that their ancillary role as defendants in such cases would of itself be a reason for refusing to recognise a duty of care, if it were otherwise appropriate to do so.

[109] This brings me back to what is in my opinion the determinative factor in this case, that is the absence of any real voluntary aspect to the involvement of a third party such as the bank in relation to a claimant's freezing order such as the present. *Al-Kandari v JR Brown & Co* is a quite different case to the present, since the specific task was there voluntarily undertaken. In *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207 and *Dean v Allin & Watts (a firm)* [2001] 2 Lloyd's Rep 249 the solicitors also acted voluntarily on their clients' instructions, although the scope of their resulting duty was extended to third parties for whose benefit they so acted. In *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296 the relevant regulatory regime did no more than impose an obligation to obtain and give a reference of a familiar type which a former employer would commonly give, irrespective of any compulsion. It would have been incongruous if a duty of care was owed, when such a reference was not given under compulsion, but was absent just because it was. Further, if the reference had been unduly favourable, the recipient's reliance on it would have introduced an element bringing the situation close to that in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, and it would have been strange if a duty were not also owed to the subject of an unduly unfavourable reference (cf [1994] 3 All ER 129 at 148, [1995] 2 AC 296 at 321 per Lord Goff). *Phelps v London Borough of Hillingdon* [2000] 4 All ER 504, [2001] 2 AC 619 is similarly a case where, although the defendant council and its employees were operating in the context of public statutory duties, they were none the less providing services which could equally well be and are provided in the private sector, and it would have been surprising if a similar duty of care were not owed by those providing to them to that owed in the private sector (see [2000] 4 All ER 504 at 533–534, [2001] 2 AC 619 at 670–671 per Lord Clyde).

[110] The closest case to the present on which Mr Sales can rely is *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 223. But the statutory scheme there was aimed at protecting persons in respect of property purchases and, so far as necessary for that purpose, overriding other proprietary interests. Again, it would have been incongruous if a person relying on such a certificate to his detriment could have a claim because of the closeness of the situation to *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, but the Minister whose cause of action for reimbursement was extinguished had none (cf [1970] 1 All ER 1009 at 1018–1019, [1970] 2 QB 223 at 268 per Lord Denning and [1970] 1 All ER 1009 at 1027–1028, [1970] 2 QB 223 at 278 per Salmon LJ). I do not accept Mr Brindle's submission that *Ministry of Housing and Local Government v Sharp* was wrongly decided. It was referred to without disapproval in the speeches of both Lord Templeman and Lord Griffiths in *Smith v Eric S Bush* [1989] 2 All ER 514 at 522, 534, [1990] 1 AC 831 at 846, 862. The result reached was eminently fair, just and reasonable. The role of land registrar was established as a public service to keep accurate records and provide reliable information. The information was to enable buyers to be secure in the property rights they acquired but concomitantly to override other property interests in the public interest in order to achieve this, even though such security and overriding occurred through negligence of the registrar or a clerk fulfilling his function. It would be unjust if no compensation could be obtained for the adverse consequences on property rights of negligence of an official performing such a service in the public interest.

[111] There is no analogy between any of these cases and the present. The recognition of a duty of care in the present case would not be closely incremental upon any existing duty. Here, the bank has not been entrusted by statute or otherwise with the provision of any public service. It has simply been notified of an

order made by the court in favour of a claimant, and warned that it will be liable for contempt if it knowingly assists or permits a breach of that order. In a case of contempt, the court has control of the situation and a discretion which enables it to match the appropriate penalty to the seriousness of the particular contempt. It may be said that, if the court can revoke the bank's contractual mandate from its customer and can impose on the bank a potential liability for contempt in a case of knowingly assistance in or permission of a breach, the court may also go further and impose a duty on the bank towards the claimant to take care to avoid any disposition of the defendants' frozen assets contrary to the freezing order. But that would be to impose a liability on an involuntary third party which would be outside the court's control, and which might be measured in very large sums, even for quite venial fault. The amounts caught by a freezing order can be very large, even though one would usually expect a third party notified of such an order to be able to ascertain quite quickly, from the order itself and from its own records, how much is actually caught by such an order. Nor does it seem to me that such a liability is required to maintain standards or ensure good practice. In practice, banks must and will try to do their best to ensure compliance with freezing orders, while their clients are, as this case shows, likely to try to evade them. Problems are, as here, most likely to arise at the very outset of such orders, when assets have not been fully ascertained or all possible avenues of evasion have not been closed.

[112] A further subsidiary consideration is that the commissioners, at least in a case such as the present, cannot be said to have relied to their detriment on anything said or done by the bank. All that has happened is that the defendants have succeeded in abstracting assets which the commissioners hoped to have frozen. In addition, if a duty of care were owed by a bank in this type of situation, it would be difficult to avoid the conclusion that other third parties, even private individuals, would also owe a duty of care, on receiving notification of a freezing order in respect of a defendant's assets which they happened to be holding. In the case of physical assets, questions could arise as to how far that would impose duties similar to those incurred by bailees to preserve or guard such assets (although I would accept that, if such duties were owed, it might be possible to limit them in extent to those owed to the defendant).

[113] Despite the consistency of many of the factors in play with the recognition of a duty of care, I would therefore answer the question whether it is fair, just and reasonable to impose such a duty on the bank in the negative. The common law has, it seems to me, developed a system offering very significant protection for claimants, together with very considerable incentives, backed by ample sanctions, for banks and other third parties to do their best to comply. Having imposed such an obligation on a third party, I do not consider that it should go further by imposing a duty on the third party towards a claimant to take care to prevent abstractions committed by the defendant in breach of a freezing order. This would not be analogous with or incremental to any previous development of the law. The position as it is without any such duty of care seems to me to represent a fair and normally effective balance between the respective interests involved.

[114] I would therefore allow the appeal, and restore the order made by Colman J.

Appeal allowed.

Celia Fox Barrister.

Vibixa Ltd v Komori UK Ltd and others
Polestar Jowetts Ltd v Komori UK Ltd and others

[2006] EWCA Civ 536

COURT OF APPEAL, CIVIL DIVISION

SIR ANTHONY CLARKE MR, BROOKE AND ARDEN LJJ

14, 15 FEBRUARY, 9 MAY 2006

Statutory instrument – Power to make instrument – Preamble – General enabling words in preamble – Interpretation and effect of general enabling words – Whether general enabling words could be interpreted as referring to enabling power not expressly invoked – Health and Safety at Work etc Act 1974, ss 15(1), 47(2) – Supply of Machinery (Safety) Regulations 1992, SI 1992/3073.

The claimants sought in their respective claims to recover damages for damage to property and loss of profit which they had suffered as a result of fires in their premises. Nobody's health or safety had been put at risk by any of the fires. The claimants alleged that the fires had been caused by defective machinery supplied by the defendants. They claimed damages for breach of duty in contract and tort, and for breach of statutory duty under the Health and Safety at Work etc Act 1974. They relied on s 47(2)[a] of the Act, which provided that breach of a duty imposed by health and safety regulations made by the Secretary of State pursuant to s 15(1)[b] should, so far as it caused damage, be actionable except in so far as the regulations provided otherwise, claiming that the defendants had been in breach of the Supply of Machinery (Safety) Regulations 1992, SI 1992/3073. The claimants contended that the 1992 regulations were health and safety regulations for the purposes of s 47(2) of the 1974 Act. The preamble[c] to the regulations expressly stated that they were made by the Secretary of State pursuant to s 2(2) of the European Communities Act 1972 (because they were designed to implement Council Directive (EEC) 89/392 (on the approximation of laws relating to machinery)) 'in the exercise of powers conferred on him by that section and all of his other enabling powers'. The claimants argued that the regulations were also made pursuant to s 15(1) of the 1974 Act. The defendants applied to strike out the claims under the Act. The judge held that the regulations had not been made pursuant to s 15(1) and struck out those claims. The claimants appealed.

Held – General enabling words in the preamble to a statutory instrument, such as 'and all of his other enabling powers' in the preamble to the 1992 regulations, might be interpreted as referring to an enabling power, not expressly invoked, in situations such as (i) where, in order for the statutory instrument to have effect, the maker of the instrument had necessarily to have invoked that power, or (ii) where the operative provisions of the statutory instrument made it clear that

a Section 47 is set out in the Appendix, below

b Section 15 is set out in the Appendix, below

c The preamble, so far as material, is set out at [6], below

its maker had to have invoked that power, or (iii) where it was necessary to adopt that interpretation in order to make the statutory instrument conform to Community law or if that interpretation would make the statutory instrument compatible with the rights conferred by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1988). However, the general enabling words would not be interpreted as including an enabling power simply because the maker of the statutory instrument could have used that power. None of those situations applied in the case of the 1992 regulations. Moreover, it was not an objective of Directive (EEC) 89/392 to provide remedies for purchasers of machinery against suppliers of defective machinery, and therefore there was no need for the general enabling words in the 1992 regulations to be interpreted as referring to s 15(1) of the 1974 Act for that purpose. The general enabling words in the preamble to the 1992 regulations accordingly did not invoke the enabling power contained in s 15(1) of the 1974 Act, and the judge had been right to strike out the claims made under the Act. Accordingly, the appeals would be dismissed (see [13], [24]–[26], [38], [40], [41], below).

Buck v A-G [1965] 1 All ER 882 considered.

Notes

For the interpretation of subordinate legislation, see 44(1) *Halsbury's Laws* (reissue) para 1522.

For the Health and Safety at Work etc Act 1974, ss 15, 47, see 20 *Halsbury Statutes* (4th edn) (2005 reissue) 122, 164.

For the Supply of Machinery (Safety) Regulations 1992, SI 1992/3073, see 9 *Halsbury's Statutory Instruments* (2006 reissue) 159.

Cases referred to in judgment

Buck v A-G [1965] 1 All ER 882, [1965] Ch 745, [1965] 2 WLR 1033, CA.

EC Commission v Germany Case C-131/88 [1991] ECR I-825, ECJ.

Marleasing SA v La Comercial Internacional de Alimentacion SA Case C-106/89 [1990] ECR I-4135, ECJ.

R (on the application of Junttan Oy) v Bristol Magistrates' Court [2003] UKHL 55, [2004] 2 All ER 555.

Revenue and Customs Comrs v IDT Card Services Ireland Ltd [2006] EWCA Civ 29, [2006] All ER (D) 220 (Jan).

Three Rivers DC v Bank of England [2000] 3 All ER 1, [2003] 2 AC 1, [2000] 2 WLR 1220, HL.

Appeals

The claimants, Vibixa Ltd and Polestar Jowetts Ltd, appealed against the order of Field J on 26 July 2005 ([2005] EWHC 1674 (QB), [2005] All ER (D) 480 (Jul)) striking out their respective claims against the defendants, Komori UK Ltd and Spectral Technology Ltd, in so far as they were made under the Health and Safety at Work etc Act 1974. A third defendant in the action, Bryland Fire Protection Ltd, took no part in the appeals. The facts are set out in the judgment of the court.

Lord Neill of Bladen QC and *Andrew Moran* (instructed by *Kennedys*) for the claimants.

Michael Kent QC and *Andrew Rigney* (instructed by *Barlow Lyde & Gilbert*) for the first defendant.

Nicholas Baldock (instructed by *Hextalls*) for the second defendant.

Cur adv vult

9 May 2006. The following judgment of the court was delivered.

ARDEN LJ (giving the judgment of the court at the invitation of Sir Anthony Clarke MR).

[1] These appeals concern important questions of statutory interpretation. In particular, they are about the effect of some general words appearing in the preamble to a statutory instrument (SI). Those words are italicised in the quotation from the preamble set out at [7], below. General words of this kind are in common use in subordinate legislation. In the instant appeals, the relevant subordinate legislation is the Supply of Machinery (Safety) Regulations 1992, SI 1992/3073 (the machinery regulations).

[2] There is also an important question about the scope of the power to make health and safety regulations under s 15(1) of the Health and Safety at Work etc Act 1974. The appendix to this judgment sets out ss 1, 2, 15 and 47 of, and Sch 3 to, the 1974 Act.

[3] Before defining the legal issues for determination with more particularity, and setting out our conclusions and reasoning on them, we must place these issues in the context of the proceedings in which they arise.

BACKGROUND

[4] These are appeals against the order of Field J dated 26 July 2005 ([2005] EWHC 1674 (QB), [2005] All ER (D) 480 (Jul)). The judge's order struck out part of the cases of the appellants Polestar Jowetts Ltd (Polestar) and Vibixa Ltd (Vibixa) in their respective actions against the respondents, Komori UK Ltd (Komori) and Spectral Technology Ltd (Spectral). There is a third defendant in the action, Bryland Fire Protection Ltd. This party has played no part in these appeals. There has been no trial, and the correctness of the judge's conclusions depends on points of law.

[5] Polestar and Vibixa seek to recover damages for damage to property and loss of profit which the appellants suffered as a result of fires in their premises. They allege that the fires were caused by a defective type of printing machinery containing a dryer supplied by the two respondents to this appeal. Fires destroyed all three presses between June 1999 and October 2002 and also did other significant damage, although nobody's health or safety were put at risk by any of the fires. These claims were brought to recover damages for the ensuing losses. By their amended claim forms the claimants claimed damages for breach of duty in contract and tort and for breach of statutory duty under the 1974 Act. The appellants rely on s 47(2) of the 1974 Act, and contend that the machinery regulations are health and safety regulations for the purposes of that section. The respondents applied to strike out the claims under the 1974 Act. Their case is that the Secretary of State cannot make health and safety regulations so as to give rise to a claim for damages to property. The only issue that arises for our decision on these appeals is whether the judge was right to strike out their claims in so far as the claimants relied on breaches of statutory duty.

[6] Field J held that the machinery regulations were not made under s 15(1) of the 1974 Act and he accordingly struck out the appellants' claims made under the 1974 Act.

THE POWERS UNDER WHICH THE MACHINERY REGULATIONS WERE MADE

[7] The preamble to the machinery regulations states as follows:

> 'The Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures relating to the design and construction of, and to the placing on the market and putting into service of, machinery, in exercise of the powers conferred on him by that section *and of all his other enabling powers*, hereby makes the following Regulations . . .' (My emphasis.)

[8] The machinery regulations were thus expressly made by the Secretary of State for Trade and Industry pursuant to s 2(2) of the European Communities Act 1972. Section 2(2) of the 1972 Act is thus an enabling power for the purpose of the machinery regulations. It was invoked because the regulations are designed to implement Council Directive (EEC) 89/392 (on the approximation of the laws of the member states relating to machinery) (OJ 1989 L183 p 9) (the machinery directive).

[9] As already stated, the dispute between the parties is whether the machinery regulations were also made pursuant to s 15(1) of the 1974 Act. There is no express reference to s 15(1) of the 1974 Act in the preamble to the machinery regulations. The appellants rely on the additional words appearing in the preamble, that is the words 'and of all his other enabling powers'. If the machinery regulations were made under s 15(1) of the 1974 Act, then, as outlined above, the appellants contend that they have a cause of action against the respondents for damages for damage to property and loss of profits on the grounds of breach of statutory duty under s 47(1) the 1974 Act.

[10] We use the expression 'general enabling words' to refer to general words such as 'and of all his other enabling powers', when used in the preamble to a statutory instrument. We use the expression 'enabling power' to cover both a specific power to make regulations (here s 2(2) of the 1972 Act), such as may be expressly referred to in the preamble to a statutory instrument, and in addition general enabling words (if used).

[11] General enabling words are often used when an SI is made. Thus the issue on these appeals has wide implications. Do general enabling words cover, as the appellants say, all the powers that might have been invoked to make the SI or are they apt to denote only the powers that must necessarily be utilised if the SI is to take effect according to the terms in which it is enacted?

[12] There is a further issue, namely whether s 15(1) of the 1974 Act enables health and safety regulations to be made which protect not simply the health and welfare of employees or others at or around the employer's premises, but also the employer in the event that plant or machinery to which such regulations apply turn out to be defective, causing property damage instead of, or in addition to, personal injuries to employees.

SUMMARY OF THE COURT'S CONCLUSIONS

[13] For the reasons given below, our conclusions are as follows:

(1) *General enabling words*

General enabling words in the preamble to a statutory instrument may be interpreted as referring to an enabling power, not expressly invoked, in situations such as the following: (i) where, in order for the SI to have effect, the maker of the instrument must necessarily have invoked that power; or (ii) where the operative provisions of the SI make it clear that its maker must have invoked that power; or (iii) where it is necessary to adopt that interpretation in order to make the SI conform to community law or if that interpretation would make the SI compatible with the rights conferred by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). However the general enabling words will not be interpreted as including an enabling power simply because the maker of the SI could have used that power.

(2) *Effect of the general enabling words in the machinery regulations*

The general enabling words in the preamble to the machinery regulations did not invoke the enabling power contained in s 15(1) of the 1974 Act.

(3) *Health and safety regulations and property damage*

In any event, health and safety regulations made under s 15(1) of the 1974 Act cannot form the basis of a claim by the purchaser of machinery in respect of property damage or consequent loss of profits.

THE MACHINERY REGULATIONS

[14] The machinery regulations came into force on 1 January 1993. Although they are printed under the heading 'Health and Safety', nothing turns on this. The preamble to the machinery regulations makes it clear that the principal purpose of the machinery regulations is to regulate the design and sale of machinery. Thus, for example, the regulations provide for machinery which meets the requirements of the machinery directive to be certified by the addition of the words 'CE'.

[15] Regulation 3 of the machinery regulations provides that they apply to 'relevant machinery'. Relevant machinery (subject to defined exclusions) means all machinery within the meaning of reg 4, which itself provides a very broad definition of 'machinery'. Regulation 11 provides that no person shall supply relevant machinery unless the requirements of reg 12 are complied with. Regulation 12 provides that relevant machinery must satisfy 'the relevant essential health and safety requirements'. These can be found in Sch 3 to the machinery regulations. This lays down a number of requirements, including a requirement that machinery must be designed and constructed to avoid all risk of fire or overheating posed by the machinery. The opening words of Sch 3, however, qualify the effect of reg 12 and in particular state that where, having regard to the state of the art, it is not possible to meet the objectives set by the requirements, the relevant machinery must so far as possible be designed and constructed with the purpose of approaching those objectives.

[16] Regulation 12 also requires that the relevant machinery is in fact 'safe'. The word 'safe' is defined (in reg 2) to mean that there is no risk of its causing death or injury to persons 'or, where appropriate, to domestic animals or damage to property'. The words quoted come from the machinery directive and the machinery regulations have rightly been drafted on the basis that the meaning of

those words should be resolved by judicial interpretation rather than by definition in the regulations.

(1) *General enabling words*

[17] In para [13](1), above, we stated our conclusion that general enabling words in the preamble to a statutory instrument may be interpreted as referring to an enabling power, not expressly invoked, in situations such as the following: (i) where, in order for the SI to have effect, the maker of the instrument must necessarily have invoked that power; or (ii) where the operative provisions of the SI make it clear that its maker must have invoked that power; or (iii) where it is necessary to adopt that interpretation in order to make the SI conform to community law or if that interpretation would make the SI compatible with the rights conferred by the convention. However, the general enabling words will not be interpreted as including an enabling power simply because the maker of the SI could have used that power. In this part of the judgment we set out our reasons for our conclusion.

[18] The appellants' case is that these words must have content and operative effect and that the court must interpret them on the premise that they are intended to have some effect. We agree that when interpreting a statute the court has to work on the basis that, unless otherwise stated, Parliament intended to change the law in some way. However this does not extend to the preamble of a statutory instrument which is clearly not intended to change the law but merely to recite the authority to make the instrument and any step (such as consultation) which the maker of the instrument must undertake before making the instrument. Moreover, if the appellants are right, the result would be that when a question arose as to the effect of a statutory instrument the court would have to conduct an inquiry across the statute book to see whether there was some unexpressed enabling power that could have been invoked by the person making the statutory instrument.

[19] In our judgment, this could lead the court to make an impermissible journey across the dividing line between the interpretation of legislation, which is the constitutional role of the courts, and the making of legislation, which is the role of Parliament. This could occur in a case such as the present where the conclusion that the general enabling words include a reference to an enabling power will automatically trigger certain other consequences under other legislation, such as the imposition of criminal liability and civil liability for a contravention of duties imposed by the statutory instrument. The presence of the general enabling words does not without more evince an intention on the part of Parliament that this should be the effect of the statutory instrument. In addition the imposition of criminal liability in this non-transparent way would be likely to violate the rights conferred by art 7 of the convention. But it is not necessary for us to go into that last point as the appellants do not rely on any criminal provision in this case.

[20] There are, however, situations in which the court might rely on the general enabling words. One such situation is where it is necessary to do so to invoke an enabling power which has not been specified and which is essential to the validity of the SI. This was the position in *Buck v A-G* [1965] 1 All ER 882, [1965] Ch 745, which concerned an order in council. There is no material difference for this purpose between an order in council made under a statutory power and a statutory instrument made under such a power. In the *Buck* case the order was invalid if made solely under the enabling power under which it was

expressed to have been made. There were, however, general enabling words in the order in council similar to those in the present case. Wilberforce J held that as a result of those general enabling words the order was in fact made under a power conferred by the British Settlements Act 1887 even though that order did not expressly refer to that power. As a result the order was valid. On appeal, this court accepted the reasoning of Wilberforce J and upheld his order.

[21] *Buck v A-G* was a case where an order would have failed altogether if the general enabling words had not been present. But the same point could arise where an instrument would otherwise be invalid in part. There is a further possibility, that is where the SI is expressed to be made under a particular enabling power and is valid on that basis, but the operative provisions of the statutory instrument make it clear that the maker of the instrument must have intended also to use another enabling power which has not been specified but which would result in some further consequence. If in such a case it is clear that the omission of the specific reference to that further power must have been an oversight, it is likely that the court would hold that such power was within the general enabling words.

[22] It follows that, until the contrary is shown, the court must proceed on the basis that the preamble to an SI sets out all the statutory enabling powers that are necessary for its validity. (We restrict our observations to statutory enabling powers as we accept that it may be necessary to use general enabling words where the royal prerogative is being invoked but this is not the usual situation). We would not wish to encourage the use of general enabling words in lieu of specific references to specific statutory enabling powers. Reliance on general enabling words is inconsistent with the objective of clear and accessible legislative drafting, and it may mislead Parliament into believing that it is enacting an instrument with different effect from that which it actually has. In addition, reliance on general enabling words may lead to great uncertainty as to the effect of the statutory instrument. There would also logically be doubt as to the applicability of the presumption in s 11 of the Interpretation Act 1978 (namely that expressions in an SI have the meaning they bear in the primary legislation under which the SI is made).

[23] We accept, however, Lord Neill QC's submission that the test of whether an enabling power is within the general enabling words is to be assessed objectively from the terms of the instrument and other matters relevant to the interpretation of the instrument. The test is not what power did the maker of the instrument intend to exercise. We should also make it clear that we accept also that an SI can and often will be made pursuant to several enabling powers.

[24] We thus conclude that an enabling power which has not been specifically mentioned should not be treated as included in general enabling words in an SI merely because the SI could have been made under that power. On the other hand the court can rely on general enabling words where the SI would otherwise fail or it is clear from the operative provisions of the statutory instrument that the maker of the SI must have intended to use an unspecified enabling power. The courts may also interpret the general enabling words as referring to a specific enabling power (not expressed) where that interpretation is required under the *Marleasing* principle (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 [1990] ECR I-4135, referred to at [32], below) or where that interpretation is necessary to make the SI compatible with convention rights under s 3 of the 1998 Act.

[25] The proposition which we have formulated here (and at [13](1), above) should not be treated as exclusive. The purpose of stating that proposition is to explain why we have rejected the appellants' submission. That proposition is also subject to the qualification that, although general enabling words should normally be interpreted as including an unexpressed enabling power in the situations that we have envisaged in the preceding paragraph, in a particular case the court may not be able to adopt that interpretation because (and these are the opposite of situations considered in the preceding paragraph), our domestic law would not then conform with community law, or because, under s 3 of the 1998 Act, the general enabling words must be given some other interpretation to make the SI compatible with convention rights under s 3 of the 1998 Act.

[26] It follows from our conclusion on this part of these appeals that we would not agree with the simple statement taken from *Craies on Legislation* (8th edn, 2004) pp 112–113 that 'the preamble has no legal effect'. These words must be read with the remainder of the sentence in which they appear, which contemplates that the validity of an SI may depend on general enabling words. In our judgment the general enabling words may have effect, as explained at [17], above. In addition, as explained below, the narrative accompanying the identification of any specified enabling power may provide an indication as to the aims of the SI, and the preamble may thus have effect in the sense of being a legitimate aid to interpretation. There may also be other occasions when, and purposes for which, the preamble has legal effect.

(2) *Effect of the general enabling words in the machinery regulations*

[27] At [13](2), above we stated our conclusion that the general enabling words in the preamble to the machinery regulations did not invoke the general enabling power contained in s 15(1) of the 1974 Act. In this part of our judgment we set out our reasons for that conclusion.

[28] We turn now to apply the conclusion reached at [24], above, about the interpretation of general enabling words. The appellants do not say that the machinery regulations have no effect unless the general enabling words are interpreted as including a reference to s 15(1) of the 1974 Act. Further they do not contend that there is anything in the express terms of the machinery regulations which leads to the conclusion that they must have been made under s 15(1) of the 1974 Act. Nor is there any question of the enabling power in s 15(1) of the 1974 Act having to be invoked in order that the machinery regulations may be interpreted in a manner which is compatible with convention rights.

[29] Thus, to succeed on this appeal, the appellants must persuade the court that unless the enabling power is interpreted as referring to s 15(1) the United Kingdom will have failed properly to implement the machinery directive in domestic law. This means that they must show that the machinery directive required member states to provide express statutory remedies for purchasers of defective machinery in order properly to implement the machinery directive. The appellants have also submitted on the hearing of this appeal that the machinery directive gave purchasers of defective machinery a directly effective right as a matter of community law to sue the suppliers of defective machinery. This submission does not add anything to the case just summarised because, if the purchaser has a directly effective right to a remedy against the supplier, it is not necessary for the appellants to rely on the machinery regulations at all.

[30] As with other directives, the United Kingdom was obliged under arts 5 and 189 (now arts 10 and 24) of the EC Treaty to take all appropriate measures to

implement the machinery directive, although it was free to choose the form and methods of implementation. Thus the United Kingdom was free to introduce the requirements of the directive into domestic law by SI. Section 2(2) authorises any designated minister (which term includes the Secretary of State for Trade and Industry, on whose behalf the machinery regulations were made) to make regulations for the purpose of implementing any community obligation of the United Kingdom and thus conferred power to implement the machinery directive in domestic law by what became the machinery regulations. So if the machinery directive required purchasers to be given an express right of action against suppliers of defective machinery this could have been done by exercising the powers under s 2(2) of the 1972 Act. But that would have meant setting out the right in some detail.

[31] The appellants say that this could equally well be done, and was done, by invoking s 15(1) of the 1974 Act, by making the regulations which are referred to in that subsection as 'health and safety regulations'. The statutory right of action conferred by s 47(2) of the 1974 Act was then automatically triggered. We have set out ss 15(1) and 47(2) of the 1974 Act in the appendix to this judgment for ease of reference. We shall have to consider the 1974 Act in more detail below. At this stage we will proceed on the basis that this latter step in the argument (viz the availability of s 15(1) of the 1974 Act) is correct.

[32] It is common ground that under the *Marleasing* principle, or principle of conforming interpretation, the domestic court of a member state must interpret its national law so far as possible in the light of the wording and purpose of the directive in question (see *Revenue and Customs Comrs v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29, [2006] All ER (D) 220 (Jan), cited by Lord Neill). There is no reason why this principle cannot be applied to the interpretation of general enabling words.

[33] This part of the appellants' argument is itself put in two ways: first, the machinery directive requires a remedy to be given to persons to whom machinery is supplied, and secondly, appropriate measures to implement the directive were taken only if purchasers of defective machinery were given an express statutory right of action against suppliers. By 'defective', we mean machinery which fails to comply with the detailed requirements of the machinery directive.

[34] Under the first way the appellants put their case, it is necessary to examine the machinery directive. The long title is unhelpful: it merely states that the directive is 'on the approximation of the laws of the Member States relating to machinery'. The directive states that it is adopted under art 100a of the Treaty of Rome. This provides for the Council of Ministers, acting on a proposal from the European Commission, to adopt measures to promote the internal market, and for the Commission to make proposals concerning health, safety, environmental protection and consumer protection. The directive begins with some 22 recitals which emphasise that the directive is about the design and construction of machinery and that one of its purposes is to improve safety levels and reduce the risk of accidents. Article 3 requires machinery to comply with the essential health and safety requirements set out in annex 1. So far as material this annex is in the same terms as Sch 3 to the machinery regulations, which is described at [15], above.

[35] There are only two references to property in the machinery directive. The first appears in the first recital which states that member states—

'are responsible for ensuring the health and safety on their territory of their people and, where appropriate, of domestic animals and goods and, in particular, of workers notably in relation to the risks arising out of the use of machinery . . .'

The fact that domestic animals and goods are mentioned in the context of health and welfare suggests that the references to domestic animals and property were added at a late stage in the negotiation of the directive. The second reference to property is in art 2 of the machinery directive, which requires member states to take steps to ensure that machinery is put on to the market or into service 'only if it does not endanger the health or safety of persons and, where appropriate, domestic animals or property'. The English text therefore refers once to 'goods' and once to 'property'. In the French version of the machinery directive, the same expression is used in both places, namely 'biens'. This is a very general word which could mean all property or, dependent on the context, some property only. We accept that the goods or property referred to in the machinery directive are goods or property that might otherwise be or is damaged by the defective machinery. However, in our judgment, it is impossible to deduce from those two references that one of the objectives of the machinery directive is to protect purchasers of machinery from the financial consequences to them of defective machinery. In both places, property is relevant only where it is 'appropriate': that immediately suggests that property of the kind within the purview of the directive is only a certain kind of property (in the first reference it has indeed been described only as 'goods'). It is difficult to see why the words 'if appropriate' should be included if all purchasers were entitled to claim for loss caused by damage to their property and that it was merely a question of fact whether such damage occurred. Moreover, in the first recital, goods are mentioned in between persons in general and workers: that suggests that the type of property in contemplation is connected with the persons protected. That, we accept, need not be the case in relation to 'domestic animals'. A milking machine may injure both the cows and the milkman but the cows may well not belong to him. However, the very reference to domestic animals which are themselves a form of property confirms the view that only limited forms of property are included.

[36] Furthermore, there is no reference in the machinery directive to financial losses. A machine that is defective may cause no damage to property at all, but it may cause substantial financial loss in the form of claims from injured employees and loss of profits due to business interruption or the need to acquire new machinery. If the directive intended that the interests of purchasers should also be protected, it would in our judgment have mentioned not simply damage to property but other forms of loss as well. The point was made in argument that the imposition of liability for defective machinery on suppliers in favour of purchasers of machinery might indirectly promote the protection of employees since it might also make suppliers more careful. The machinery directive might have taken that approach but in our judgment it did not do so.

[37] The more likely interpretation, as it seems to us, is that the directive covers the personal property of the persons injured, whether they are workers or others, such as people walking past, or visiting, a factory when for example a fire occurs due to the defective machinery. It would thus be an objective of the machinery directive to provide protection from damage to such property, but damage to other property is outside the directive. Lord Neill pointed out that

annex 1 imposed an obligation on employers to minimise any explosion which may occur so that 'it does not endanger the surroundings'. However the reference here to 'surroundings' is not inconsistent with the objective of protecting workers and others since they may be present 'in the surroundings' when the explosion occurs.

[38] Accordingly we do not consider that it is an objective of the directive to provide remedies for purchasers of machinery against suppliers of defective machinery, and therefore there is no need for the general enabling words in the machinery regulations to be interpreted as referring to s 15(1) of the 1974 Act for that purpose. In any event, domestic law already provides for a number of remedies for purchasers of defective machinery against suppliers of defective machinery. If the machinery directive required remedies to be provided by domestic law in respect of damage to property suffered by purchasers of defective machinery, there would have been a question as to whether the existing remedies were sufficient to meet the United Kingdom's obligations to implement the machinery directive. There is no provision in the machinery directive which stipulates the basis on which any such liability should be imposed. We can see that if there had been such a provision it may very well have been necessary for Parliament to create new statutory remedies so as to be sure there was no failure to implement the directive fully.

[39] It is also clear that the imposition of civil liability is not the only way in which the standards imposed by the machinery directive could be enforced. Such standards are capable of being enforced through inspection of premises, industry guidance, prohibition notices, improvement notices and criminal sanctions. A member state has in general a choice as to the manner in which it implements a directive. Some of these sanctions are adopted in the machinery regulations. Since we have concluded that it was not an objective of the machinery directive to provide protection to the purchasers of defective machinery, the question whether this package of alternative measures would have sufficiently met any such objective does not arise. Our provisional view is that it would not do so.

[40] In putting the case the second way, the appellants relied on a series of cases, such as *EC Commission v Germany* Case C-131/88 [1991] ECR I-825, which Lord Neill called 'the German environmental cases'. They are considered by Lord Hope of Craighead in his speech in *Three Rivers DC v Bank of England* [2000] 3 All ER 1, [2003] 2 AC 1. As Lord Hope said ([2000] 3 All ER 1 at 24–25, [2003] 2 AC 1 at 210), the German environmental cases demonstrate that the question whether provisions in a directive create rights and obligations for individuals depends in each case on the subject matter of the directive, on the context and on the nature and purpose of the provisions which are in issue. Thus our answer to the submission based on these cases is the same as to the last submission, namely that there is nothing in the machinery directive which creates any rights in favour of purchasers of defective machinery or which requires the member state to give remedies to purchasers of machinery for property damage as part of its implementation of the machinery directive. Therefore it cannot be said that the general enabling words have to be read as including a reference to s 15(1) of the 1974 Act.

[41] For these reasons also, we conclude that the general enabling words in the machinery regulations do not invoke the enabling power in s 15(1) of the 1974 Act. That conclusion is reinforced by examination of another SI (the Provision and Use of Work Equipment Regulations 1992, SI 1992/2932, referred to at [43], below, as PUWER) giving employees the right to sue their

employer for breaches of the machinery regulations under s 47(2) of the 1974 Act, and by a number of textual indications in the machinery regulations that they were not made in exercise of that power.

[42] As to the rights conferred on employees, the history of the matter is that on 12 June 1989, shortly before it adopted the machinery directive, the Council of Ministers adopted a directive (Council Directive (EEC) 89/391 (OJ 1989 L183 p 1) (the framework directive)) on the introduction of measures to encourage improvements in the safety and health of workers. This directive was made under art 118a of the EC Treaty. Under this article the Council is required to adopt by means of directives minimum requirements for encouraging improvements to the level of protection for the safety and health of workers. The framework directive sets out general principles on health and safety and anticipates the introduction of further community measures (see art 1(3)). The framework directive was implemented in domestic law by the Management of Health and Safety at Work Regulations 1992, SI 1992/2051, made on behalf of the Secretary of State for Employment in pursuance of (among other enabling powers) s 15(1) of the 1974 Act.

[43] According to *Redgrave's Health and Safety* (4th edn, 2002) p 318, the framework directive has led to the adoption of six 'daughter' directives on health and safety. Those have been implemented by the United Kingdom by various sets of regulations made in 1992 on behalf of the Secretary of State for Employment utilising expressly her enabling power under s 15(1) of the 1974 Act among other specified enabling powers. These regulations include the Provision and Use of Work Equipment Regulations 1992 (known as 'PUWER').

[44] Significantly, reg 10 of PUWER provided that employers must ensure that work equipment (which is defined to include machinery) complies with (among other enactments) the machinery regulations. PUWER was made on 17 November 1992. Regulation 10 therefore imposed a duty on the employer. Because of the operation of ss 15(1) and 47(2) of the 1974 Act, this means that PUWER imposed liability for machinery which does not comply with the machinery directive on to the employer. It shows that the question whether breach of the machinery regulations should give rise to an express statutory remedy was considered by the government and the conclusion was that the liability should be imposed on the employer. The purchaser will normally be the employer and he is given no express right to seek indemnity from the supplier of the machinery or to make a claim against him for his own losses. This legislative scheme is thus inconsistent with a legislative policy of the kind asserted by the appellants, namely a policy which protects the purchaser against loss incurred through the supply of defective machinery.

[45] There are also a number of textual indications in the machinery regulations that they were not made under s 15(1) of the 1974 Act. First, the preamble to the machinery regulations states that the Secretary of State is the minister designated for the purposes of s 2(2) of the 1972 Act 'in relation to measures relating to the design and construction of, and to the placing on the market and putting into service of, machinery'. That wording does not indicate any intention to create remedies for the supply of defective machinery. Secondly, under s 50(3) of the 1974 Act, a minister must consult the Health and Safety Commission before making health and safety regulations. There is no clear evidence that that statutory consultation took place in relation to the machinery regulations, but the textual point is that the preamble to the machinery regulations does not refer to such consultation whereas the

preamble to PUWER recites that consultation took place in accordance with s 50(3) (by implication on the content of PUWER). This is normal practice where statutory consultation is a condition to the exercise of an enabling power (see the Cabinet Office 'Statutory Instrument Practice' (3rd edn, June 2003) pp 18–19 (para 2.4.6)). The appellants do not submit that any lack of consultation would render the machinery regulations ultra vires the 1974 Act to the extent that they were health and safety regulations; they assert that the court can infer that the statutory consultation took place. We do not need to go into the evidence supporting this submission because the significant point for present purposes is the machinery regulations proceed on the basis that no such consultation needed to be mentioned.

[46] Thirdly, Sch 6 of the machinery regulations applies (in part) rather than disapplies s 33 of the 1974 Act (offences) to the machinery regulations and does so with the exclusion of that part of s 33 which criminalises a breach of health and safety regulations. Regulation 29 in turn creates a new offence for contravention of reg 11, which would not have been necessary if the regulations were health and safety regulations and s 33 of the 1974 Act applied. The machinery regulations thus on their face proceed on the basis that they are not health and safety regulations for the purposes of the 1974 Act. Fourthly, s 33 of the 1974 Act has been carefully amended by Sch 6 of the machinery regulations in its application to those regulations so that the penalties are reduced from those applying to breaches of health and safety regulations under the 1974 Act and made consistent with the more limited penalties that can be imposed by regulations made under s 2(2) of the 1972 Act.

[47] An employer whose employees are injured by defective machinery and who thereby comes under a liability to his own employees or who suffers other loss as a result of the supply of machinery which does not comply with the machinery regulations has already rights under the common law against the supplier of the machinery, particularly where negligence occurred. Moreover he is able to take additional rights against the supplier by contract. In these circumstances the view may have been taken that there was no need to extend an employer's rights so as to enable him to seek redress for breaches of the machinery directive in an action for breach of statutory duty. For whatever reason, such rights were not in our judgment so extended through the mechanism relied on by the appellants, namely making the machinery regulations health and safety regulations for the purposes of s 15(1) of the 1974 Act.

(3) *Health and safety regulations and property damage*

[48] In [13](3), above we stated our conclusion that health and safety regulations made under s 15(1) of the 1974 Act cannot form the basis of a claim by the purchaser of machinery in respect of property damage or consequent loss of profit. This issue does not need to be determined in the light of our earlier conclusions, but as it was fully argued we wish to explain our reasons for reaching this conclusion.

[49] It is potentially a very important question whether health and safety regulations can be made pursuant to s 15(1) of the 1974 Act so as to confer a right of action on the employer for property damage. We would record that we have not had the benefit of any submissions from the Health and Safety Commission or the Health and Safety Executive on it. We are not here concerned with incidental property damage suffered by a person who suffers personal injury as a

result of a breach of the 1974 Act or health and safety regulations made under it. Such damage is likely to be within the scope of the duty which it is common ground is owed to him under health and safety regulations.

[50] The appellants' argument is in substance as follows. Section 47(6) of the 1974 Act defines damage in terms that is wide enough to include damage to property. The power to make regulations is very wide and the duties imposed by the 1974 Act extend to such matters as the control of emissions which could cause damage to property of the employer. Moreover regulations have been made under s 15(1) which provide for the protection of property from damage. In this connection, the appellants refer by way of example to the Placing on the Market and Supervision of Transfers of Explosives Regulations 1993, SI 1993/2714. For the reasons given below, in our judgment health and safety regulations cannot be made for the purpose of protecting an employer against damage to property or financial loss which he incurs as a result of a matter which is the subject of health and safety regulations.

[51] There is little or nothing in the 1974 Act to point to the conclusion that the Act is intended to protect the employer from damage to his property. The long title supports the view that the provisions of Pt 1 of the 1974 Act are to promote the health, safety and welfare of people at work. There is no reference in the long title to the recovery of compensation for property damage. There is a reference to the control of dangerous substances and of emissions into the atmosphere. Such substances and emissions could cause damage to the employer's property as well as personal injury to workers, but in the context of the 1974 Act in our judgment the provisions dealing with those matters are for the purposes of promoting health and safety of workers.

[52] Within the body of the 1974 Act, s 1 contains a statement of the purposes of the Act, which are then defined as 'general purposes', and s 2 sets out the general duties of employers. We have set these sections out also in the appendix below. In our judgment, these purposes are all for the promotion of the health, safety and welfare of employees, and they do not extend to the protection of the property or economic interests of the employer. We make the same point about the references to the control of dangerous substances and emissions in s 1 as we have made about these references in the long title. Likewise, although s 1(3) of the 1974 Act seemingly extends relevant risks for the purposes of s 1(1)(b) to those attributable to the manner in which an undertaking is conducted and plant, the risks still have to fall within s 1(1)(b), ie be risks to health and safety.

[53] Sections 3–7 of the 1974 Act also set out general duties of the employer and others. Breach of these duties does not result in civil liability in damages (s 15(1)). Again, these sections in our judgment concern only the health, safety and welfare of employees and others. There is no reference to property damage of the employer. Duties are also imposed on those who control premises but again nothing is said about damage to that property. Reference is made to the control of substances and emissions, but the observations already made in relation to these matters apply here too. Sections 8 and 9 prohibit persons from misusing equipment provided in compliance with health and safety requirements, and an employer from charging an employee for (for example) the provision of any such equipment. Sections 10–14 deal with the establishment and functions of the Health and Safety Commission and the Health and Safety Executive. Then by s 15(1) the Secretary of State has to make health and safety regulations 'for any of the general purposes of this Part'. If he does so and there is a breach, these regulations are actionable to the extent provided in s 47(2) of the 1974 Act. As we have explained the general

purposes of the 1974 Act are those set out in s 1 and they do not include protection of the employer's property interests.

[54] Although 'damage' as defined in s 47(6) of the Act is not limited to personal injury or death, health and safety regulations can only be made for the general purposes of the 1974 Act, which are those contained in s 1 of that Act. Section 15(2) enables regulations to be made under s 15(1) for any of the purposes in Sch 3 (set out in part in the appendix hereto). But the regulations must still be for the general purposes of the Act (see s 15(2)). As we have concluded that such purposes do not include the protection of the employer's property, health and safety regulations made under s 15(1) cannot in our judgment form the basis of a claim by an employer for damages for loss which he has suffered because of damage to his property or financial loss, even though that damage or loss was caused by breach of a health or safety regulation. Moreover, the contrary conclusion would radically change the scope of liability in s 47. It is unlikely that Parliament would have done that without specific mention.

[55] The 1993 regulations (see [50], above) provide that explosives must be designed, manufactured and supplied so as 'to prevent damage to property and the environment' (see para 1 of Sch 1). But, as the respondents point out, these regulations were made both under s 15(1) of the 1974 Act and s 2(2) of the 1972 Act. Therefore if the community instrument designed to be implemented by these regulations required there to be a remedy for damage to property (not incidental to damage to the person) there was power to make the regulations under the 1972 Act. At all events, those regulations can have no effect on the interpretation of the 1974 Act.

[56] For all these reasons, we accept the respondents' submission that health and safety regulations cannot be made for the purpose of protecting an employer against damage to property or financial loss which he incurs as a result of a matter which is the subject of health and safety regulations. They therefore cannot form the basis of a claim for the recovery of such loss or damage.

MISCELLANEOUS POINTS

[57] The respondents have submitted that the allocation of ministerial responsibilities for the 1974 Act as between ministers supports their interpretation of the machinery regulations as not being health and safety regulations. In the light of our conclusions above, it is not necessary to express a view on this argument.

[58] Reference has been made to a number of other regulations under the 1974 Act, including the Biocidal Products Regulations 2001, SI 2001/880. These regulations support the respondents' case as they proceed on the basis that references to danger or danger to health and safety, in the 1974 Act in its application to those regulations have to be expressly extended if they are to cover danger to the environment (see para 2(3) of Sch 11). In our judgment these regulations cannot materially assist the argument on either side as the court cannot interpret the 1974 Act by reference to these regulations.

[59] The appellants also relied on the decision of the House of Lords in *R (on the application of Junttan Oy) v Bristol Magistrates' Court* [2003] UKHL 55, [2004] 2 All ER 555. In this case, the improper use of machinery had resulted in the death of an employee. The House of Lords held that the employer could be prosecuted either under the 1974 Act or under the machinery regulations. We reject the appellants' submission that this means that the machinery regulations constitute health and safety regulations under the 1974 Act. There is no reason why criminal sanctions cannot be imposed by two parallel but separate statutory regimes. The appellants

cannot point to any passage in the speeches of the majority of the House as supporting the submission which we have rejected.

[60] An issue was raised as to whether if the machinery regulations were indeed health and safety regulations the Secretary of State had complied with his obligation under s 50 of the 1974 Act to consult the Health and Safety Commission. For this purpose it would have to be shown that the purpose for which they were being consulted was the making of health and safety regulations and not for some other purpose. While it seems clear that the Department of Trade and Industry consulted the Health and Safety Executive before making the machinery regulations, it is not clear whether the Commission was also consulted or if it was consulted whether the consultation was the statutory consultation to which s 50 applies. In the light of our above conclusions, it is not necessary to decide this point.

DISPOSITION

[61] For the reasons given above, we dismiss these appeals. The judge was right to strike out the appellants' claims based on breach of statutory duty.

Appeals dismissed.

Kate O'Hanlon Barrister.

APPENDIX

RELEVANT PROVISIONS OF THE HEALTH AND SAFETY AT WORK ETC ACT 1974 (SHOWING AMENDMENTS TO DATE)

'**1.** *Preliminary.*—(1) The provisions of this Part shall have effect with a view to—(a) securing the health, safety and welfare of persons at work; (b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work; (c) controlling the keeping and use of explosive or highly flammable or otherwise dangerous substances, and generally preventing the unlawful acquisition, possession and use of such substances . . .

(2) The provisions of this Part relating to the making of health and safety regulations . . . and the preparation and approval of codes of practice shall in particular have effect with a view to enabling the enactments specified in the third column of Schedule 1 and the regulations, orders and other instruments in force under those enactments to be progressively replaced by a system of regulations and approved codes of practice operating in combination with the other provisions of this Part and designed to maintain or improve the standards of health, safety and welfare established by or under those enactments.

(3) For the purposes of this Part risks arising out of or in connection with the activities of persons at work shall be treated as including risks attributable to the manner of conducting an undertaking, the plant or substances used for the purpose of an undertaking and the condition of premises so used or any part of them.

(4) References in this Part to the general purposes of this Part are references to the purposes mentioned in subsection (1) above.

2. *General duties of employers to their employees.*—(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health; (b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances; (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees; (d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks; (e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work . . .

15. *Health and safety regulations.*—(1) Subject to the provisions of section 50, the Secretary of State . . . shall have power to make regulations under this section for any of the general purposes of this Part (and regulations so made are in this Part referred to as "health and safety regulations").

(2) Without prejudice to the generality of the preceding subsection, health and safety regulations may for any of the general purposes of this Part make provision for any of the purposes mentioned in Schedule 3 . . .

47. *Civil liability.*—(1) Nothing in this Part shall be construed—(a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by sections 2 to 7 or any contravention of section 8; or (b) as affecting the extent (if any) to which breach of a duty imposed by any of the existing statutory provisions is actionable; or (c) as affecting the operation of section 12 of the Nuclear Installations Act 1965 (right to compensation by virtue of certain provisions of that Act).

(2) Breach of a duty imposed by health and safety regulations . . . shall, so far as it causes damage, be actionable except is so far as the regulations provide otherwise . . .

(6) In this section "damage" includes the death of, or injury to, any person (including any disease and any impairment of a person's physical or mental condition) . . .

SCHEDULE 3

Subject-Matter Of Health And Safety Regulations

1.—(1) Regulating or prohibiting—(a) the manufacture, supply or use of any plant; (b) the manufacture, supply, keeping or use of any substance; (c) the carrying on of any process or the carrying out of any operation.

(2) Imposing requirements with respect to the design, construction, guarding, siting, installation, commissioning, examination, repair, maintenance, alteration, adjustment, dismantling, testing or inspection of any plant . . .'

C plc v P (Secretary of State for the Home Office and another intervening)

[2006] EWHC 1226 (Ch)

CHANCERY DIVISION

EVANS-LOMBE J

24 MARCH, 11, 12 APRIL, 26 MAY 2006

Practice – Pre-trial or post judgment relief – Search order – Privilege against self-incrimination – Material constituting freestanding evidence which had not been created by respondent to search order under compulsion – Whether privileged at common law – Whether court having power to modify application of common law privilege – Human Rights Act 1998, Sch 1.

A search order was made in an action in which C plc made claims against P for breach of confidence and copyright infringement. P indicated that he intended to rely on his privilege against self-incrimination in respect of any material which the search disclosed and, subject to that indication, permitted the search to take place. In the course of the search a number of computers and their associated electronic equipment were disclosed which the order required P to permit to be 'imaged' by W, the independent computer specialist appointed by the order. As P had invoked his privilege against self-incrimination the computers were placed in the custody of the supervising solicitor who passed them to W for the purpose of imaging the contents. W uncovered images of children. It was an offence to be found in possession of such material. W applied to the court for directions as to what he should do with the material. The court considered, inter alia, whether the common law privilege against self-incrimination extended to material which constituted freestanding evidence not brought into existence under compulsion by the person claiming privilege and which could have come to public notice otherwise than as the result of the exercise of some statutory power to require disclosure enforceable by a court. It then considered the effect of the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

Held – The circumstances of the instant case were such that the court could modify the application of the common law privilege against self-incrimination so as to exclude from its ambit material constituting freestanding evidence which had not been created by the respondent to the search order under compulsion. The right of the public under the convention to be protected from the effect of criminal activity, when balanced against P's right to the common law privilege against self-incrimination, which would otherwise operate to prevent the court from directing that the offending material be passed to the police, required the court to modify the respondent's right so as to enable the material to be so transferred. The instant case fell within the partial exception to the rule that, in the effective implementation of the convention, it was by adherence to the rules of precedent that the domestic courts should set the domestic standard. The exceptional circumstances included the fundamental alteration of the legislative circumstances by the enactment of the 1998 Act. Accordingly, W would be

directed to pass the relevant materials to the police authority (see [54], [56], [80]–[82], [84], below).

Dicta of Lord Bingham of Cornhill in *Lambeth London BC v Kay, Leeds City Council v Price* [2006] 4 All ER 128 at [45] applied.

A-G's Ref (No 7 of 2000) [2001] 1 WLR 1879 considered.

Rank Film Distributors Ltd v Video Information Centre (a firm) [1981] 2 All ER 76, *AT & T Istel Ltd v Tully* [1992] 3 All ER 523 and *Den Norske Bank ASA v Antonatos* [1998] 3 All ER 74 not followed.

Notes

For privilege against self-incrimination, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1160, and for incrimination of witnesses, see 17(1) *Halsbury's Laws* (4th edn reissue) para 959.

Cases referred to in judgment

A v UK (1998) 5 BHRC 137, ECt HR.

A-G's Ref (No 7 of 2000) [2001] EWCA Crim 888, [2001] 1 WLR 1879.

Arrows Ltd (No 4), Re, Hamilton v Naviede [1994] 3 All ER 814, [1995] 2 AC 75, [1994] 3 WLR 656, HL.

Ashingdane v UK (1985) 7 EHRR 528, [1985] ECHR 8225/78, ECt HR.

Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.

D v East Berkshire Community Health NHS Trust, K v Dewsbury Healthcare NHS Trust, K v Oldham NHS Trust [2005] UKHL 23, [2005] 2 All ER 443, [2005] 2 AC 373, [2005] 2 WLR 993; *affg* [2003] EWCA Civ 1151, [2003] 4 All ER 796, [2004] QB 558, [2004] 2 WLR 58.

Den Norske Bank ASA v Antonatos [1998] 3 All ER 74, [1999] QB 271, [1998] 3 WLR 711, CA.

Downie v Coe (1997) Times, 28 November, CA.

EC (a minor) (care proceedings: disclosure), Re [1996] 3 FCR 521, sub nom *Re C (a minor) (care proceedings: disclosure)* [1997] Fam 76, [1997] 2 WLR 322, CA.

Ferreira v Levin NO, Vryenhoek v Powell NO 1996 (1) SA 984, [1996] 3 LRC 527, SA Const Ct.

Istel (AT & T) Ltd v Tully [1992] 3 All ER 523, [1993] AC 45, [1992] 3 WLR 344, HL; *rvsg* [1992] 2 All ER 28, [1992] QB 315, [1992] 2 WLR 112, CA.

L v UK [2000] 2 FLR 322, ECt HR.

Lambeth London BC v Kay, Leeds City Council v Price [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 WLR 570.

O Ltd v Z [2005] EWHC 238 (Ch), [2005] All ER (D) 387 (Apr).

Orkem v EC Commission Case 374/87 [1991] 4 CMLR 502, [1989] ECR 3283, ECJ.

Osman v UK (1998) 5 BHRC 293, ECt HR.

R v Boyes (1861) 1 B & S 311, 121 ER 730.

R v Hertfordshire CC, ex p Green Environmental Industries Ltd [2000] 1 All ER 773, [2000] 2 AC 412, [2000] 2 WLR 373, HL.

R v Hundal, R v Dhaliwal [2004] EWCA Crim 389, [2004] 2 Cr App R 307.

R v Kearns [2002] EWCA Crim 748, [2002] 1 WLR 2815.

Rank Film Distributors Ltd v Video Information Centre (a firm) [1981] 2 All ER 76, [1982] AC 380, [1981] 2 WLR 668, HL.

Rio Tinto Zinc Corp v Westinghouse Electric Corp, RTZ Services Ltd v Westinghouse Electric Corp [1977] 3 All ER 717, [1978] AC 547, [1978] 2 WLR 81, CA; *affd* [1978] 1 All ER 434, [1978] AC 547, [1978] 2 WLR 81, HL.

Saunders v UK [1998] 1 BCLC 362, ECt HR.
Sporrong v Sweden (1983) 5 EHRR 35, [1982] ECHR 7151/75, ECt HR.
Thomson Newspapers Ltd v Director of Investigation and Research (1990) 54 CCC (3d) 417, Can SC.
Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd [1939] 2 All ER 613, [1939] 2 KB 395, CA.
Warman International Ltd v Envirotech Australia Pty Ltd (1986) 67 ALR 253, Aus FC.
X (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.
X v Netherlands (1986) 8 EHRR 235, ECt HR.
Z v UK (2001) 10 BHRC 384, ECt HR.

Application

C plc brought an action against P for breach of confidence and copyright infringement. C plc obtained a search order of premises in the occupation of P. The order provided that P had to enable the contents of certain computer memory storage devices to be imaged by an independent computer specialist, W. P notified the parties and the supervising solicitor appointed by the order that he would rely on his privilege against self-incrimination in respect of any material which the search disclosed. The computers and associated equipment were placed in the custody of the supervising solicitor who passed them to W. W discovered images which it was an offence to be found in possession of. W applied to the court for directions. An advocate to the court was appointed and the Attorney General and the Secretary of State for the Home Department appeared as interveners. C plc played no part in the proceedings but assisted through its representatives in the preparation of the statement of facts. W, who also assisted, played no active part in the proceedings but retained the material. The facts are set out in the judgment.

Anthony Peto and *Robert Weekes* (instructed by *Mischon de Reya*) for the applicants.
David Casement (instructed by *Pannone LLP*, Manchester) for P.
Nicholas Caddick (instructed by the *Treasury Solicitor*) as advocate to the court.
Richard Milne (instructed by the *Treasury Solicitor*) for the Secretary of State.
David Perry (instructed by the *Treasury Solicitor*) for the Attorney General.

Cur adv vult

26 May 2006. The following judgment was delivered.

EVANS-LOMBE J.

[1] The issue with which this judgment is concerned arises from an application in an action in which C plc makes claims against P for breach of confidence and copyright infringement. As will be seen, however, the resolution of that issue has no significant bearing on the resolution of that action but none the less must be determined and raises important points of principle and procedure. As a result of co-operation between the parties it has been possible to produce a statement of relevant facts, substantially agreed. To the extent that the parties have not been able to agree what actually occurred, which disagreements are identified in the text of the statement, I was satisfied that they did not affect the issues which I have to resolve and accordingly it was not necessary for me to embark on any fact-finding process.

[2] The relevant background facts may be briefly summarised in this way. On 10 October 2005 Peter Smith J made a search order in these proceedings, on the application of the claimants, of premises in the occupation of P. Later in this judgment I will set out the material provisions of the order which he made. Before the order was executed P obtained the advice of a solicitor who attended at the premises. That solicitor advised the parties and the supervising solicitor appointed pursuant to the order, that P would rely on his privilege against self-incrimination (PSI) in respect of any material which the search disclosed. Subject to that indication, however, P permitted the search to take place. In the course of the search a number of computers and their associated electronic equipment were disclosed which the order required P to permit to be 'imaged' so that information recorded on those computers which belonged to C plc could be identified. By reason of P's invoking the protection of his PSI in respect of material produced by the search, the computers were placed in the custody of the supervising solicitor who passed them to W, appointed by the order as independent computer expert, for the purpose of imaging their contents. In the course of doing so W uncovered highly objectionable images of children (the offending material) recorded on one of them. It is an offence to be found in possession of such material. W is a retired police officer who, in the course of his police service, was a computer expert who, from time to time, was concerned in prosecutions for such offences. Offences of this type are graded in seriousness by reference to numerals 1–5, 5 being the most serious. It was W's view that the offending material should be classified for seriousness as grade 4.

[3] The matter first came before me as applications judge on 2 February 2006 on the application of W, seeking directions from the court as to what he should do with the offending material which has been left in his possession. As a result of that hearing I made an order that W should retain it pending further order. I directed that P should be notified that I was considering whether I should direct that the offending material be passed to the police indicating, that if he objected to that course, I would give him an opportunity to make submissions to me as to why I should not do so. In due course P's solicitors gave notice that he wished to take advantage of that opportunity. Because of the important issues raised I sought the assistance of an advocate to the court through the good offices of the Attorney General. Mr Caddick was appointed for that purpose instructed by the Treasury Solicitor. The matter returned before me on 24 March at a hearing attended by solicitors and counsel for P and by Mr Caddick at which I gave directions for a full hearing. Those directions included an approach to the Home Office with a view to the full hearing being attended by a representative of the prosecuting authorities. In due course Mr Milne, instructed by the Treasury Solicitor, was appointed to appear for the Secretary of State at that hearing which took place on 11 and 12 April when Mr Casement appeared for P instructed by his solicitors. Prior to the hearings, C plc indicated that it wished to play no part in these proceedings, in the result of which it had no interest, but it has assisted, through its representatives, in the preparation of the statement of facts. W, who also assisted in the preparation of that statement, has played no active part in the proceedings but retains the offending material as a result of my order.

[4] It is important to emphasise at the outset that P does not accept that he was responsible for the presence of the offending material on one of the computers produced as a result of the search and asserts that he was at all material times unaware of its presence. He asserts that he has a good defence to any charges brought against him as a result.

[5] I return to the order of Peter Smith J of 10 October 2005 which set in train the events with which this application is concerned. That order, having made provision for the search and appointed the supervising solicitor and the independent computer specialist represented by W, under the heading 'restrictions on search', provided as follows:

> '9. The defendant is entitled to seek legal advice and to ask the court to vary or discharge this order. Whilst doing so he may ask the Supervising Solicitor to delay starting the search for up to two hours or such other longer period as the Supervising Solicitor may permit. However the defendant [P] must . . . (b) Not disturb or remove any listed items; and (c) Permit the Supervising Solicitor to enter but not start to search.
>
> 10. Before permitting entry to the premises by any person other than the Supervising Solicitor the defendant may, for a short time (not to exceed two hours unless the Supervising Solicitor agrees to a longer period) gather together any documents he believes may be privileged and hand them to the Supervising Solicitor for him to assess whether they are privileged as claimed. If the Supervising Solicitor decides that any of the documents may be privileged or is in any doubt as to their status he will exclude them from the search and retain them in his possession pending further order of the court.
>
> 11. If the defendant wishes to take legal advice and gather documents as permitted, he must first inform the Supervising Solicitor and keep him informed of the steps being taken.'

[6] Then under the heading 'Delivery up of articles/documents' the order continues:

> '15. The defendant must immediately (a) Hand over to the claimant's solicitors the claimant's computer, mobile phone and printer which are presently located at [left blank] *together with any necessary passwords and* (b) Hand over to the claimant's solicitors any of the listed items which are in his possession power custody or under his control, and (c) Enable the contents of any computers, mobile telephones, memory cards, USB drives, printers, PDAs or any other memory storage devices or any hard disc integral to any such device at any of the premises (other than those devices already referred to at (a) which are to be handed over to the claimant's solicitors aforesaid) to be imaged by the Independent Computer Specialist and must provide all such assistance (including the provision of passwords) as may be necessary to enable such imaging to be performed . . .'

[7] At schedule (e) the order specified undertakings to be given by the supervising solicitor to the court as follows:

> '(1) [undertakings with relation to service on the defendant] . . .
>
> (2) The Supervising Solicitor will offer to explain to the person served with the order its meaning and effect fairly and in everyday language and to inform him of his right to take legal advice (such advice to include an explanation that the defendant may be entitled to avail himself of legal professional privilege and to apply to vary or discharge this order as mentioned in paragraph 23 above.) The Supervising Solicitor will retain in the safekeeping of his firm all items retained by him as a result of this order until the court directs otherwise.

(4) [An undertaking to report to the parties and the court].'

[8] Schedule (f) of the order provides for undertakings to the court by the independent computer specialist as follows:

'(1) [an undertaking not to damage the defendant's computers in the course of imaging]

(2) The independent computer specialist will not publish or disclose the images made to any one other than the claimant without permission of the defendant or the court.

(3) The independent computer specialist will not disclose any materials obtained as a result of the search to any employees of the claimant other than Mr F save with the permission of (a) the Supervising Solicitor, or (b) the defendant, or (c) the Court.'

[9] The order contained the usual penal notice indicating the consequences of failure to comply with it and a notification that it was made without notice to the defendant who had a right to apply to the court to vary or discharge the order.

[10] On 23 February 2005 Lindsay J gave judgment in the case of *O Ltd v Z* [2005] EWHC 238 (Ch), [2005] All ER (D) 387 (Apr). The facts of that case mirror almost precisely the facts of the present case save in the following important respects: (i) Before the search commenced P's solicitors informed the supervising solicitor and the claimant's solicitor that P was relying on his PSI without reference to any particular document or electronic material which might be disclosed as a result of the search at the same time giving them a copy of the judgment in *O Ltd v Z*. He also informed them of P's intention to apply to the court for the determination of the extent to which he was entitled to exert his PSI and, in consequence, to vary the search order. Such an application was made on 12 October and was supported by a witness statement of P containing a statement of truth dated 14 October. None the less as in *O Ltd v Z* P permitted the search to proceed. (ii) The computers, on one of which the offending material was recorded with their associated electronic equipment, were delivered to the supervising solicitor for his retention, pending determination of P's right to PSI. (iii) The matter returned to the court on 20 October before Mann J when he made the following directions:

'3. The parties shall deal with the CDs DVDs and other electronic storage materials ("the Electronic Materials") retained pursuant to the order of the 10th October 2005 and listed in exhibit NCH1 to the report of Neil Clifford Howes "the Supervising Solicitor" in the manner set out in schedule 2 below or in such other manner as may be agreed between the parties.

4. Information contained in the Electronic Materials shall not be disclosed by the persons inspecting the same except as provided for in schedule 2 to any persons other than the court, the defendant and his professional legal advisors and the claimants professional legal advisors without the permission of the other party or of the court.

5. Nothing in the foregoing shall be considered to be an admission by the claimant that anything in the Electronic Materials is privileged or not relevant to this case or by the defendant that it is not privileged or relevant to this case, and the parties have permission to apply for further directions in relation to the manner in which the Electronic Materials may be dealt with without the need to show a change of circumstances.'

Schedule 2 to Mann J's order provided:

> '10. The Electronic Materials shall be retained in the custody of W save as set out below
>
> 11. W shall make a copy of each of the Electronic Materials which he shall retain pending further order of the court or agreement of the parties.'

There then follow provisions for meetings and agreements as to how the contents of the computers should be displayed and divided up with the intention of removing and passing to the claimant those contents to which he was entitled. (iv) In consequence of the order of Mann J the computers etc were passed to W for him to image them so that their contents could be analysed. (v) W imaged the computers in the course of which process the offending material emerged but that material and the computer recording it never thereafter left his possession and no copies of its contents and, in particular, of the offending material, have ever left his possession or been disclosed by him to any of the parties or any third party.

[11] In arriving at my conclusions in this case I have the benefit of the judgment of Lindsay J in *O Ltd v Z* in which, on substantially similar facts to the present case and where the issue was the same, he set out a comprehensive review of the relevant statutory provisions and the authorities. This relieves me of the task of attempting to do the same. Between [25] and [53] inclusive of that judgment Lindsay J sets out the relevant criminal legislation, the statutory provisions as to search orders and the authorities giving guidance on their use, arts 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and relevant authorities, and the cases which define the PSI in English common law and how that privilege is to be applied. I gratefully adopt these passages in Lindsay J's judgment. So that this judgment is comprehensible I repeat the following matters which Lindsay J sets out in much greater detail: (i) The jurisdiction to make a search order is provided by s 7 of the Civil Procedure Act 1997. Subsections (1) and (7) of that section are set out later in this judgment. Search orders are enforceable by proceedings for contempt. (ii) It has been, at all material times, an offence to possess images such as those comprising the offending material in this case. (iii) PSI is a common law right but is a right which, by contrast with legal professional privilege is not absolute in the sense that it is open to the legislature, by statute, to derogate from it. See *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2003] 1 AC 681. Statute may do so expressly or by implication. Whether any individual statute has that effect is a matter of statutory construction for the court before which the issue arises. See per Lord Hoffmann in *R v Hertfordshire CC, ex p Green Environmental Industries Ltd* [2000] 1 All ER 773, [2000] 2 AC 412. (iv) Where not so excluded the privilege confers an absolute protection on the party claiming it which a judge has no discretion to overrule. See per Lord Wilberforce in *Rank Film Distributors Ltd v Video Information Centre (a firm)* [1981] 2 All ER 76 at 80, 81, [1982] AC 380 at 441, where he says:

> 'However, it is only too clear (and I deliberately use the language of reluctance) that supply of the information and production of the documents sought would tend to expose the respondents to a charge of conspiracy to defraud ... A charge of conspiracy to defraud, so far from being as it sometimes is, a contrived addition to other charges, is here an appropriate

and exact description of what was being done . . . Unless some escape can be devised from this conclusion, the privilege must inevitably attach.' *a*

Lord Wilberforce continues ([1981] 2 All ER 76 at 81, [1982] AC 380 at 442):

'Counsel was at pains to make clear that he was not, in these submissions, attempting to negate or undermine the privilege against self-incrimination. This has been too long established in our law as a basic liberty of the subject (in other countries it has constitutional status) to be denied. It has received modern recognition in the Civil Evidence Act 1968, s 14, and in this House.' *b*

Then Lord Wilberforce stated ([1981] 2 All ER 76 at 82, [1982] AC 380 at 443) that the protection of PSI extended to material which might 'set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character'. (v) A judge in civil proceedings must give effect to the privilege in appropriate circumstances notwithstanding that in subsequent criminal proceedings the relevant material might be excluded, eg under s 78 of the Police and Criminal Evidence Act 1984. (vi) As the passage which I have quoted from Lord Wilberforce's judgment in the *Rank Film Distributors* case makes plain and from other authorities, the English common law right to PSI (domestic PSI) has hitherto been held to extend, beyond a right to refuse to answer questions tending to incriminate to which an answer would otherwise be compellable, but also to incriminating material of whatever nature, but of which documents and electronic records are good examples, the production of which would otherwise be compellable. Because no claim to PSI was made by the respondent to the search order in *O Ltd v Z* [2005] All ER (D) 387 (Apr) before the search started, in the course of which the offending material in that case was passed to the independent computer expert for imaging, Lindsay J was able to find that the suspect had lost his PSI and so he could direct the offending material to be handed over to the police. (See [53].) In that case a claim to PSI was made by the respondent but only after the offending material had been discovered by the computer expert and after the adjourned return date of the application for the search order (see [21], [22]).

[12] At [64] of his judgment Lindsay J having reviewed various authorities concludes:

'The better view of the authorities, taken as a whole and, again, as can be harsh on some facts, is that whether he knows of the privilege and whether or not it is mentioned or explained to him, he will be taken to have lost the privilege if he is not heard to claim it before (as the case might be) he answers the questions or produces the documents in issue.

[65] But that, in this case, raises the question: produces the documents to whom? The order here, as I have already mentioned (at [8](v), above), contemplated it being open to Z to gather together documents he believed to be privileged and for him to hand them to the supervising solicitor for him to assess whether they were privileged or not. If the supervising solicitor was in doubt, he was to exclude them from the search and retain them in his possession pending further order of the court. I have already referred also (at [11], above) to undertakings given by the expert. An argument can surely be raised that supply of documents to a supervising solicitor or to a person in the position of the expert should not represent a loss of privilege . . .'

[13] The judge, however, proceeded, on the authority, primarily, of the decision of the Court of Appeal in *Den Norske Bank ASA v Antonatos* [1998] 3 All ER 74, [1999] QB 271, to conclude ([2005] All ER (D) 387 (Apr) at [67]):

> '. . . I thus take myself to be bound to hold that delivery to the supervising solicitor of the offensive material without any prior claim to the privilege would have caused Z to lose the privilege against self-incrimination.
>
> [68] If, therefore, supply of a document to a supervising solicitor can represent a loss of the privilege, at any rate if it is not then expressly claimed then, if anything, supply to the expert was even more likely to cause a loss of the privilege as the expert was not described in the order as a repository for documents in respect of which privilege might be claimable and, for all that the expert gave undertakings, the expert's basic position was that of an expert whose services were to be paid for by the claimants and who, rightly, feared that either possessing the offensive material or handing it back to Z could involve the commission of a crime. The expert, even more than the supervising solicitor, who was at least contemplated by the order as a proper retainer of documents, was a person who was likely to wish to pass the material on to some other.
>
> [69] Let it be supposed, though, that I am not bound by the *Den Norske Bank ASA v Antonatos* view and that I was thus free to adopt the earlier reasoning of Wilcox J in *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 67 ALR 253 at 266 where he said, of a prospective production of documents under a subpoena:
>
> > "Production is to the court. Unless and until the content of the documents is made known to a person who is reasonably likely to use those documents for the purpose of a criminal prosecution, no self-incrimination can occur."'

Lindsay J points to the fact that in *Warman International Ltd v Envirotech Australia Pty Ltd*, as in the present case, a claim to PSI had been made before the subpoena was worked through.

[14] Then resuming later Lindsay J says this (at [69]):

> '. . . Indeed [counsel for the Home Office] does not need to go as far as to say and does not say that the privilege was necessarily lost on the supply of the offensive material to the expert; it was lost on the supply to the expert without any prior or simultaneous claim to the privilege being asserted.
>
> [70] . . . The privilege, I hold, was lost by way of an objective look at Z's behaviour; he handed the offensive material to the third party without claiming the privilege.'

I gratefully adopt Lindsay J's approach to the question of loss of PSI illustrated by the passages which I have quoted from his judgment in *O Ltd v Z*. In the present case, of course, a claim to PSI was made before the search even started.

[15] It was submitted to me that P had a choice whether to allow the search to proceed after his solicitor had notified those present that he was relying on PSI. Similarly he had a choice whether to comply with the directions order of Mann J. By permitting the search to proceed and by agreeing to an order the consequence of which was to hand over the relevant computer to W for imaging it is submitted that P lost his PSI protection. I cannot accept this submission. So long as the offending material remained in the possession of the court through its officers

bound by their undertakings to the court to keep it confidential, the protection of PSI was not lost. a

[16] The directions order of Mann J was made with the evident intention of providing a means whereby the contents of the various computer discs, produced as a result of the search, could be imaged and analysed in the possession of the computer expert without the suspect losing the benefit of PSI which he had claimed. It must be possible to preserve PSI in respect of part of the material b produced on a search which appears to have been what was sought to be achieved by this order.

[17] It seems to me that there is everything to be said for a system for the enforcement of search orders, in which the supervising solicitor and computer expert (if any) appointed by the court act as a neutral repository for documents in which the respondent to the order can place material in respect of which he c claims privilege without losing, in the case of PSI, the benefit of such privilege.

[18] I come to this conclusion in the absence of any authority directly on the point and notwithstanding, as was held in *Den Norske Bank ASA v Antonatos* by the Court of Appeal, that putting material in respect of which PSI was claimed in the hands of the supervising solicitor or computer expert would be no d protection against a demand to deliver up the material to the prosecuting authorities on warrant should they become aware of its existence. I do not read the passages cited in Lindsay J's judgment in *O Ltd v Z* [2005] All ER (D) 387 (Apr) at [67] from the judgments in *Den Norske Bank ASA v Antonatos* as a finding that delivery of potentially incriminating material to a supervising solicitor under a e search order, without more, is sufficient to result in the loss of PSI. In agreement with the submissions of Mr Casement for P, I take the view that delivery up of potentially privileged material in those circumstances amounts to a delivery up to the court under compulsion of the search order, through officers or agents of the court, who have undertaken to preserve the confidentiality of that material. It seems to me that to find otherwise would mean that the court's order which f invited P to gather together material, which he claimed to be privileged from production, and to hand it to the supervising solicitor for the purpose of adjudicating whether that was so, has operated as a trap by falling into which P has lost the benefit of his claim to PSI.

[19] It was submitted by Mr Caddick, as advocate to the court, that a suspect g might lose his privilege by disclosure to the judge of the incriminating material even though that judge was in the process of deciding whether the suspect was entitled to PSI in respect of it. He did this on the authority of a passage in the judgment of Lord Bingham of Cornhill in *Downie v Coe* (1997) Times, 28 November in turn citing a passage in the judgment of Lord Denning MR in h *Rio Tinto Zinc Corp v Westinghouse Electric Corp, RTZ Services Ltd v Westinghouse Electric Corp* [1977] 3 All ER 717 at 721, [1978] AC 547 at 574. I cannot accept this submission and do not think that the quotations have such effect.

[20] As appears from the judgment of Lindsay J in *O Ltd v Z* [2005] All ER (D) 387 (Apr) at [59], and authority there cited, a court is not bound without more, by a claim to PSI by a party to litigation (see inter alia *Triplex Safety Glass Co Ltd v* j *Lancegaye Safety Glass (1934) Ltd* [1939] 2 All ER 613 at 617, [1939] 2 KB 395 at 403). He must claim it by sworn evidence, see *Downie v Coe* itself, and that evidence must demonstrate a risk that the party's PSI will be infringed by his being compelled to answer a particular question or produce material relevant to the particular litigation in progress. It seems to me that it will be almost inevitable that the judge, in the course of deciding whether the claim to PSI is made out, will

acquire a good idea of the nature of the material sought to be disclosed and of the offence in respect of which that material may constitute evidence. It seems to me impracticable, and fundamentally unjust, that it should be possible to contend that, because the court's inquiry had proceeded beyond a certain point, the party whose claim to PSI was being inquired into should have lost its benefit. It must be borne in mind that a judge, conducting such an inquiry will usually do so sitting in camera and would be subject to the same duty to keep any information acquired confidential in the same way as any other of the court's officers. In my view Lord Bingham and Lord Denning in *Downie v Coe* and the *Rio Tinto* case, must have been speaking of the risk that the judge's investigation of the possibility of an offence might indirectly bring that possibility to the attention of the prosecuting authorities.

[21] In the present case it is accepted that 'an objective look' at P's behaviour shows that the offensive material has never passed out of the hands of either the supervising solicitor or the computer expert to any 'person who is reasonably likely to use those documents for the purpose of a criminal prosecution', within the words quoted from Wilcox J's judgment in *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 67 ALR 253 at 266, which, in my view, would include a person 'who was likely to wish to pass the material on to some other' (see *O Ltd v Z* [2005] All ER (D) 387 (Apr) at [68]).

[22] Mr Caddick also submitted to me that it was arguable that P had not effectively claimed PSI because the claim was made generally and not directed at particular material and because it was not supported by sworn evidence. I do not accept either of these submissions. I can see no reason why a claim to PSI should not be made in respect of all the material produced as a result of the execution of a search order and I can see considerable dangers in requiring a party claiming PSI to be specific as to where, amongst the material produced as a result of the order, the incriminating material is to be found. See per Lord Bingham in *Downie v Coe* (1997) Times, 28 November where he says:

> '... it is quite plain that the claimant does not have to give chapter and verse to show why disclosure or the answering of the question or interrogatory might incriminate him ... to require him to do that might expose him to the very peril which the privilege exists to protect him.'

In agreement with the submissions of Mr Casement it seems to me that the requirement is that the suspect give evidence upon oath, that he believes himself to be at risk of incrimination, when the matter is brought before a judge to determine whether that is in fact the case. In the present case P applied on the day of the search to vary the search order and gave a witness statement in support of that application, accompanied by a statement of truth two days later.

[23] For these reasons and subject to the point with which I will shortly deal, I would hold that P effectively claimed PSI in respect of the material to be produced as a result of the execution of the search order, before the search started, and an objective consideration of the events occurring after the execution of that order does not result in the conclusion that he lost the benefit of it.

THE INDEPENDENT EVIDENCE ARGUMENT (THE IEA)

[24] The point to which I now turn is directed, not to the existence of a right to PSI and its enforcement, but rather to what materials that right extends. In particular, whereas it is accepted that PSI applies to the oral statements of a suspect made under compulsion and to written material brought into existence

by him, under compulsion, which tends to incriminate him, does it extend to material which constitutes freestanding evidence not brought into existence by him under compulsion and which could have come to public notice otherwise than as the result of the exercise of some statutory power to require disclosure enforceable by a court? The offending material in the present case is a good example of material of the latter type. It is the Attorney General's submission that the IEA is available to me notwithstanding the earlier authorities such as *Rank Film Distributors Ltd v Video Information Centre (a firm)* [1981] 2 All ER 76, [1982] AC 380 because, after the coming into force of the 1998 Act on 2 October 2000, it is open to a court to 'modify' the ambit of the application of domestic PSI so that it does not apply to such material.

[25] To describe how this point emerged it is necessary to return to the history of the proceedings themselves. In his skeleton argument submitted for the purposes of the hearing on 11 and 12 April Mr Milne, for the Secretary of State, brought to my attention certain recent decisions, of the Court of Appeal in criminal cases, in which the issue was whether certain statutory powers to require a party to answer questions or produce documents, which subsequently came to be used in the prosecution of that party for an offence, constituted a breach of his right to a fair trial under art 6 of the convention. In the course of the hearing on 11 and 12 April I put to counsel, that since under art 6 jurisprudence it appeared that PSI did not apply to self-standing evidence not created by the respondent under compulsion, it could be successfully contended that PSI did not apply to such evidence where it was considering the application of domestic PSI where the point arose in the course of the disclosure of documents in a civil action where no charge had been brought against the respondent and, in consequence, art 6 was not engaged. Because counsel were not ready fully to deal with this point, at the close of submissions I stood over judgment to give them an opportunity to make written submissions on the point after further research of the authorities. During that intermission, having been alerted by the Treasury Solicitor, the Attorney General intervened in place of the Secretary of State and submitted, through Mr David Perry, his own written submissions in support of the conclusion the possibility of which I had suggested. Mr Perry subsequently extended those submissions at my instigation.

[26] The Attorney General's submissions were circulated by him to the other parties for their comments in particular those of Mr Casement for P. At the hearing on 11 and 12 April Mr Casement appeared for P on legal aid. Most unfortunately, shortly after the hearing, P lost his legal aid certificate and has indicated that, although he no longer qualifies for legal aid, he is unable to afford legal representation. Notwithstanding this Mr Casement, in the best traditions of the Bar, has supplemented the very helpful submissions he made at the hearing with further written submissions, pro-bono, commenting on those of the Attorney General. I am very grateful to him. It is to be hoped that, if this matter goes further, it may be possible, by some means, to make financial provision so that P can be legally represented at any appeal.

[27] The application of domestic PSI to disclosure of documents and other material evidence in civil proceedings has been much criticised in decisions of the courts up to and including the House of Lords see, inter alia, the passage from the judgment of Lord Wilberforce in the *Rank Film Distributors* case which I have quoted above. Those criticisms are well summarised by Mr Adrian Zuckerman in his textbook on *Civil Procedure* (2003) pp 580–581 starting at para 17.8 as follows:

'Although the law concerning intellectual property claims has been changed, as we shall presently see, the fact remains that the privilege against self-incrimination applies to documents and that it therefore tends to impede access to documents where the infringement of rights is of the most serious kind. Since the application of the privilege to civil litigation makes it difficult for victims of fraud and other crimes to obtain vindication, it is not surprising to find that the courts have expressed reservations about its operation in civil proceedings.

17.9 There are several reasons for suggesting that the application of the privilege to the disclosure procedure is anachronistic and should be revised. First, production and disclosure are testimonial obligations only in a technical sense, because the evidential significance of pre-existing documents does not turn on what the person producing or disclosing them now says but on what they say for themselves. Indeed, where documents incriminating a defendant can, for example, be obtained without the defendant's assistance, they are perfectly admissible. Second, the privilege's rationale has no application to disclosure proceedings. Lord Templeman placed the contemporary justification for the privilege against self-incrimination in [*AT & T Istel Ltd v Tully* [1992] 3 All ER 523, [1993] AC 45] on the basis that "it discourages ill-treatment of a suspect and second that it discourages the production of dubious confessions". He observed that these considerations are of no relevance to civil proceedings. In the same case Lord Griffiths said:

> "I can for myself see no argument in favour of the privilege against producing a document the contents of which may go to show that the holder has committed a criminal offence. The contents of the document will speak for itself and there is no risk of the false confession which underlies the privilege against having to answer, questions that may incriminate the speaker." . . .

17.11 The application of the privilege to civil search orders is even more difficult to justify because it verges on the absurd. Suppose that the defendant has been running a fraudulent business using fraudulent invoices and accounts. The documents would be immune from disclosure and from seizure under a civil search order because they may assist the defendant's conviction for fraud. Yet, in criminal proceedings, a criminal search order can be obtained to seize evidence of fraudulent practice. Against a criminal search order the defendant has no privilege against self-incrimination because the execution of a criminal search order authorises the police to enter, search and seize without the suspect's consent and, therefore, imposes no testimonial obligation on the suspect. It would therefore appear that while the defendant is immune from a civil search order, lest incriminating documents would be found which could later be used in criminal proceedings, he has no immunity in criminal proceedings from the forcible seizure of the same documents which, once in the hands of the police, would be admissible in evidence at the defendant's criminal trial.'

[28] Then at para 17.12 having pointed out that 'Human rights jurisprudence offers little support for the application of the privilege to disclosure obligations', Mr Zuckerman continues (p 582):

'. . . It seems that the ECtHR does not view the disclosure and production of documents as coming under the privilege against self-incrimination. This was recognised by the Court of Appeal in [*A-G's Ref (No 7 of 2000)* [2001] EWCA Crim 888, [2001] 1 WLR 1879], where it was held that a legitimate objection may be made to evidence that a defendant has been forced to create by the use of compulsory powers. But if the evidence was already in existence and the only effect of the use of the compulsory powers was to bring such evidence to the attention of the court, then its production is consistent with the right to fair trial, because the existence and quality of such evidence are independent of any order to produce it that is made against the will of the accused person. Therefore the production of such pre-existing and "independent" evidence could not render a trial unfair and so breach art 6.

17.13 The courts have periodically urged Parliament to limit the effect of the privilege against self-incrimination in civil litigation. Judges have suggested legislation removing the excuse of self-incrimination from disclosure in civil proceedings, while at the same time rendering inadmissible in criminal proceedings self-incriminating information produced in civil disclosure. Unfortunately, there has been no legislative response to these recommendations. It would not be difficult, however, for the courts themselves to step into the breach. It should be explicitly held that since production of documents no longer involves any real testimonial obligation, the privilege does not apply to pre-existing documents. Essentially, this is already the position following *A-G's Ref (No 7 of 2000)*, mentioned above, which has been reaffirmed in [*R v Kearns* [2002] EWCA Crim 748, [2002] 1 WLR 2815].'

[29] In *A-G's Ref (No 7 of 2000)* [2001] 1 WLR 1879 the issue referred to the Court of Appeal was:

'Does the use by the Crown in the prosecution of a bankrupt for an offence under Chapter VI of Part IX of the Insolvency Act 1986 ("the 1986 Act") of documents which (a) were delivered up to the Official Receiver ("OR") under compulsion (pursuant to the duty imposed on the bankrupt by section 291 of the 1986 Act, which is backed by the contempt sanction in section 291(6) of the 1986 Act) and (b) do not contain statements made by the bankrupt under compulsion violate the bankrupt's rights under article 6 of the European Convention on Human Rights . . . ?' (See [1].)

[30] In that case a bankrupt had been charged with an offence under s 362(1)(a) of the Insolvency Act 1986 with materially contributing to his insolvency by gambling. Evidence of his gambling was to be found in cheque stubs, bank statements, returned cheques and a betting file containing loose gambling statements by way of computer print-outs produced by Ladbrokes and a bookmaker's schedule of gambling transactions. The bankrupt had not contributed himself to any of these documents. He was required to produce these documents to the official receiver under the provisions of s 291 of the 1986 Act which carried with it the sanction of proceedings for contempt of court punishable with up to two years' imprisonment under sub-s (6) of that section. He handed them over. The bankrupt successfully applied to the trial charge for a ruling that the documents were inadmissible because their admission would give rise to a violation of art 6. The judge further ruled that their admission

would not be fair and excluded them under s 78 of the 1984 Act. In consequence the judge directed a verdict of not guilty to be entered. The Court of Appeal disapproved the order of the judge and returned a negative answer to the question which had been posed.

[31] The leading judgment of the Court of Appeal was given by Rose LJ. At [34] he cites two paragraphs (paras 68, 69) from the judgment of the European Court of Human Rights in *Saunders v UK* [1998] 1 BCLC 362. That case was concerned with the admissibility of evidence obtained from Mr Saunders under compulsory powers contained in the Companies Act 1985 relating to Department of Trade and Industry inquiries. The passages cited read as follows (at 378–379):

> '68. The court recalls that, although not specifically mentioned in art 6 of the convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under art 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of art 6 . . . The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in art 6(2) of the convention.
>
> 69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the contracting parties to the convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing . . .'

[32] Rose LJ cites (at [36]) the following passage from the judgment of the European Court of Human Rights in *L v UK* [2000] 2 FLR 322 at 331:

> 'As held in [*Saunders v UK*] . . . the right not to incriminate oneself is primarily concerned with respecting the will of the accused person to remain silent and does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers and which has an existence independent of the will of the accused (eg documents, breath, blood, urine and tissue samples).'

[33] At [37] Rose LJ notes that a case in the Supreme Court of Canada *Thomson Newspapers Ltd v Director of Investigation and Research* (1990) 54 CCC (3d) 417 was cited in *Saunders v UK* and he quotes extensively from the judgment of La Forest J (at 508–518) in that case. I set out below a passage from that quotation as follows:

> '". . . there is an important difference between the type of prejudice that will be suffered in the two cases. It is only when the testimony itself has to be relied on that the accused can be said to have been forced to actually *create* self-incriminatory evidence in his or her own trial. The compelled testimony is evidence that simply would not have existed independently of the exercise

of the power to compel it; it is in this sense evidence which could have been obtained *only* from the accused.

By contrast, evidence derived from compelled testimony is, *by definition*, evidence that existed independently of the compelled testimony. This follows logically from the fact that it was evidence which was found, identified or understood as a result of the 'clues' provided by the compelled testimony. Although such evidence may have gone undetected or unappreciated in the absence of the compelled clues, going undetected or unappreciated is not the same thing as non-existence. The mere fact that the derivative evidence existed independently of the compelled testimony means that it *could* have been found by some other means, however low the probability of such discovery may have been." [See 508–509.]

[38] Then he said [at 509]:

"the difference between evidence which the accused has been forced to *create* (the compelled testimony), and the independently existing evidence he or she has been forced to assist in locating, identifying or explaining (evidence derived from compelled testimony), will be readily discernible. I believe its significance will be equally apparent.

The fact that derivative evidence exists independently of the compelled testimony means, as I have explained, that it could also have been discovered independently of any reliance on the compelled testimony. It also means that its quality as evidence does not depend on its past connection with the compelled testimony. Its relevance to the issues with which the subsequent trial is concerned, as well as the weight it is accorded by the trier of fact, are matters that can be determined independently of any consideration of its connection with the testimony of the accused."

[39] He said [at 510]:

"What prejudice can an accused be said to suffer from being forced to confront evidence 'derived' from his or her compelled testimony, if that accused would have had to confront it even if the power to compel testimony had not been used against him or her? I do not think it can be said that the use of such evidence would be equivalent to forcing the accused to speak against himself or herself; once the derivative evidence is found or identified, its relevance and probative weight speak for themselves. The fact that such evidence was found through the evidence of the accused in no way strengthens the bearing that it, taken by itself, can have upon the questions before the trier of fact."

[40] La Forest J then said [at 518]:

"In my view, derivative evidence that could not have been found or appreciated except as a result of the compelled testimony under the Act should in the exercise of the trial judge's discretion be excluded since its admission would violate the principles of fundamental justice. As will be evident from what I have stated earlier, I do not think such exclusion should take place if the evidence would otherwise have been found and its relevance understood. There is nothing unfair in admitting relevant evidence of this kind . . .'"

The conclusion of the court in *A-G's Ref (No 7 of 2000)* [2001] 1 WLR 1879 is:

> '[57] In our judgment, the answer to the question posed by the Attorney General is "No". We say that for a number of reasons. First, there is no doubt, and indeed it is not disputed before this court, that the privilege against self-incrimination is not absolute and in English law Parliament has, for a variety of reasons, in a whole range of different statutory contexts, made inroads upon that privilege.
>
> [58] So far as the English courts are concerned, there is, as it seems to us, no doubt that the documents to which we have referred would be regarded as admissible as a matter of law, subject of course to the trial judge's discretion to exclude under section 78 of the Police and Criminal Evidence Act 1984.
>
> [59] The question which next arises is whether, in deference to the Strasbourg jurisprudence, this court should give a different answer to that which the English courts and the will of Parliament otherwise suggest. It seems to us that the distinction made in paragraphs 68 and 69 of the European Court of Human Rights's judgment in [*Saunders v UK*], between statements made and other material independent of the making of a statement, is not only one to which we should have regard, but is one which, as it seems to us, is jurisprudentially sound. We say this for the reasons advanced in the judgment of La Forest J in [*Thomson Newspapers Ltd v Director of Investigation and Research*] which, via reference to the South African constitutional court's decision in [*Ferreira v Levin* 1996 (1) SA 984, [1996] 3 LRC 527], was before the European Court in [*Saunders v UK*]. In our judgment, there is nothing in any of the speeches in [*Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2003] 1 AC 681] which contradicts this conclusion. The Privy Council were seeking to limit the scope of the privilege against self-incriminating statements and pre-existing documents revealed by compelled statements were outwith their consideration.'

[34] The effect of these quotations from La Forest J's judgment may be summarised thus: whereas a compelled statement is evidence that would not have existed independently of the exercise of the powers of compulsion, evidence which exists independently of the compelled statements could have been found by other means and its quality does not depend on its past connection with the compelled statement. Accordingly evidence of the latter type is in no sense 'testimonial' and PSI ought not to attach to it.

[35] In *R v Kearns* [2002] 1 WLR 2815 the Court of Appeal was considering a prosecution under s 354(3)(a) of the 1986 Act for failing without reasonable excuse to account for the loss of a sum of money being part of his property. It was argued at his trial that the subsection constituted a contravention of the appellant's right to a fair trial under art 6 because it forced the appellant to give information to the official receiver, and if he failed to do so an offence was automatically committed. The section thus breached the appellant's right amongst others against self-incrimination. The Court of Appeal dismissed the appeal.

[36] The leading judgment was given by Aikens J. At [48] and following he makes reference to the case of *A-G's Ref (No 7 of 2000)*. At [51] and [52] the judge analyses that decision, so far as relevant, in this way:

'. . . The court came to the conclusion that [*Saunders v UK* [1998] 1 BCLC 362 at 378–379 (paras 68, 69)], recognised a distinction between a statement of a defendant that had been made under compulsion and the production of pre-existing documents or other evidence under compulsory powers.

[52] The court concluded in [*A-G's Ref (No 7 of 2000)* [2001] 1 WLR 1879 at [59]] that this distinction was valid, jurisprudentially sound and should be followed. In the court's view legitimate objection might be made to evidence that a defendant had been forced to *create* by the use of compulsory powers. However if the evidence was already in existence and the only effect of the use of the compulsory powers was to bring such evidence to the attention of the court, then its production could not be so objectionable. That is because the existence and quality of such evidence are independent of any order to produce it that is made against the will of the accused person. Therefore the production of such pre-existing and "independent" evidence could not render a trial unfair and so breach article 6.'

[37] As part of the court's conclusions the judge continues (at [53](4)):

'There is a distinction between the compulsory production of documents or other material which have an existence independent of the will of the suspect or accused person and statements that he has had to make under compulsion. In the former case there is no infringement of the right to silence and the right not to incriminate oneself. In the latter case there could be, depending on the circumstances.'

[38] At [47] of his judgment Aikens J noted a passage from the speech of Lord Hoffmann in *R v Hertfordshire CC, ex p Green Environmental Industries Ltd* [2000] 1 All ER 773 at 783, [2000] 2 AC 412 at 425–426 where he points out and approves a distinction drawn by the European Court of Justice in the case of *Orkem v EC Commission* Case 374/87 [1991] 4 CMLR 502, [1989] ECR 3283, between questions backed by compulsion but directed to factual information only, the answers to which were admissible, and questions 'which were an attempt to force' Orkem to admit that it had taken part in price fixing, the answers to which were not.

[39] In *R v Hundal, R v Dhaliwal* [2004] EWCA Crim 389, [2004] 2 Cr App R 307 the Court of Appeal was considering a prosecution under s 11 of the Terrorism Act 2000 against two individuals who were said to be members of a proscribed organisation. Their car was searched at Dover under compulsory powers contained in para 2 of Sch 7 of the 2000 Act and incriminating material relevant to the charges was found. That material consisted of various documents, including an international Sikh Federation Membership card, a rubber stamp, headed notepaper, a 1996 diary, and a newspaper article relating to the International Sikh Youth Federation. The Court of Appeal dismissing the appeal and following *R v Kearns* and *Saunders v UK* [1998] 1 BCLC 362 approved the passage in the judgment of Aikens J in *R v Kearns* [2002] 1 WLR 2815 at [53] which I have quoted above.

[40] It has to be accepted, as submitted by Mr Casement that none of the cases of *A-G's Ref (No 7 of 2000)* [2001] 1 WLR 1879, *R v Kearns* or *R v Hundal* were directly concerned with the application of domestic PSI. They were each concerned with the admissibility in criminal proceedings of evidence gathered as a result of the exercise of compulsory powers granted by a statute the relevant provisions of which are to be construed as expressly or by implication derogating from the privilege. They were each concerned with whether the relevant

statutory provisions offended art 6 and the concept of PSI, which I will call 'European PSI', acknowledged as forming part of the rights comprised in art 6 but which appears to have a more limited application than domestic PSI. However it seems to me that in each case the court was concerned with the question of whether the statutory compulsory powers to gather evidence were proportionate to the social or economic problem with which the measure in question was intended to deal. In each case the fact that the court, following *Saunders v UK*, could hold that the privilege did not apply to material comprising self-standing evidence not brought into existence as a result of the exercise of compulsory powers, was an important factor in the decision of the court that the relevant legislation was human rights compliant.

[41] The decision of the Court of Appeal in *A-G's Ref (No 7 of 2000)* is much more broadly expressed than in the other two cases which are more narrowly focused on the compatibility of the statute giving compulsory powers to gather evidence, with art 6. At para 17.13 in the passage from his book which I have quoted above (*Civil Procedure* (2003) p 582) Mr Zuckerman appears to be expressing the view that this decision is authority for the proposition that domestic PSI does not apply to self-standing evidence. With respect I doubt that that can be the case in the light of the earlier decisions of the House of Lords in *Rank Film Distributors Ltd v Video Information Centre (a firm)* [1981] 2 All ER 76, [1982] AC 380 and in *AT & T Istel Ltd v Tully* [1992] 3 All ER 523, [1993] AC 45, a case which I will deal with in greater detail hereafter. The *Rank Film Distributors* case was cited in *A-G's Ref (No 7 of 2000)* but it was not mentioned in the judgments. The judgment does not chart a path as to how the authority of those cases, so far as the application of domestic PSI is concerned, can be avoided. The IEA was available to the Court of Appeal who gave judgment on 29 March 2001 but the point does not seem to have been taken.

[42] It was submitted by Mr Casement that it was a distinguishing feature of the ruling that PSI does not apply to self-standing evidence that the authorities in which it appears are confined to criminal cases where the relevant statute either expressly or by implication derogates from PSI. I am unable to accept this submission. I can see no logic in the contention that a civil court, in applying PSI to materials produced in the course of disclosure should give it a wider ambit than the criminal court which would try the case in which that material would be evidence. It is also inconsistent with those authorities in which it has been held that PSI does not apply in cases where the court can be satisfied that disclosure of the relevant material will not in any way worsen the position of the party compelled to disclose it (see *AT & T Istel Ltd v Tully*).

[43] In the absence of binding authority, and this area of the law is evidently replete with authority up to the highest level, I would adopt the approach of the Court of Appeal in *A-G's Ref (No 7 of 2000)* to the application of domestic PSI and so confine its application to testimonial evidence, oral and written, and exclude it from application to self-standing evidence not produced under compulsion. I would do so for the reasons set out in the judgment of Rose LJ in that case in turn based on the reasons given by La Forest J in the Canadian Supreme Court in *Thomson Newspapers Ltd v Director of Investigation and Research* (1990) 54 CCC (3d) 417.

[44] The question then becomes whether, in the present position of the authorities, I am able myself to direct that the offending material be passed by W to the police as I am urged to by Professor Zuckerman and by the written submissions of the Attorney General. Professor Zuckerman suggests that I am able to do this relying on the authority of *A-G's Ref (No 7 of 2000)* and *R v Kearns*.

I have already expressed my doubts that this is possible. I turn therefore to the Attorney General's submissions which, on this aspect of the case are to be found in the second set of written submissions, submitted by Mr Perry on behalf of the Attorney General. The effect of those submissions is summarised at para 2.2 as follows:

> '(i) Since the decisions of the House of Lords, such as [*AT & T Istel Ltd v Tully*], there have been three significant developments in English law. First, the enactment of the Human Rights Act 1998 ("the 1998 Act"). Secondly, the decision of the Privy Council in [*Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2003] 1 AC 681]. Thirdly, the decision of the Court of Appeal in [*A-G's Ref (No 7 of 2000)*]. The significance of these three matters is that the content of the privilege against self-incrimination has been subject to detailed scrutiny in the latter two cases, and in accordance with the decision in [*Saunders v UK*] it has been held that the privilege against self-incrimination in criminal proceedings does not apply to pre-existing documents. Since the privilege is an implied right under the Convention it is necessary to balance the rights and interests of others when considering the precise scope of its application. In this connection it is significant to note that the privilege against self-incrimination as guaranteed by Article 6 of the Convention applies as an implied right in both criminal and civil proceedings.
>
> (ii) The distinction that now exists between civil and criminal proceedings is, as Zuckerman notes, indefensible and absurd.
>
> (iii) The modification for which the Attorney General contends would conform to the requirements of the Convention in that it would properly strike a balance between the rights of the person asserting the privilege on the one hand and the rights and freedoms of others as guaranteed by the Convention, particularly the victims of crime, on the other. It would also reflect the point made by Zuckerman that the privilege as it applies to civil proceedings, properly understood, is a testimonial privilege which protected pre-existing documents because such documents were ordinarily produced pursuant to a subpoena duces tecum (literally, "under penalty, bring with you", viz. to court . . .), the point being that the witness was in jeopardy of a penalty for failing to comply if he failed to appear and bring the specified documents or records. The situation of a witness is quite distinct from that of a person found to be in possession of incriminating material.
>
> (iv) So far as the rights and freedoms of others are concerned, the position under the Convention is that positive obligations may be imposed on the state so as to protect the Convention rights of those who may be affected by criminal conduct.
>
> (v) Thus the modification to the privilege against self-incrimination for which the Attorney General contends would not infringe the rights of a potential defendant in criminal proceedings to a fair trial under Article 6 of the Convention and it would also properly take into account the rights and freedoms of others.'

As noted by Mr Casement in his comments on Mr Perry's first set of submissions, he starts by accepting that as the law stood up to the coming into force of the 1998 Act IEA was contrary to authority and, secondly, that, as illustrated by the passage from the judgment in *Saunders v UK* which I have set out at [31], above, domestic PSI had a wider ambit than European PSI in the sense that it

applied to any evidential material produced by a party to civil litigation under compulsion including self-standing evidence not the product of that party's intention. It is the fundamental submission of the Attorney General that it is now open to the court by its judgment to 'modify' the ambit of domestic PSI so as to make it accord with European PSI. It is open to the court to do this, indeed, as a public authority, it is under a duty to do this, because of a positive obligation on states as parties to the convention to have regard to the wider interest of the public, in particular, to the public's right to be protected by the state from the effects of crime by an efficient criminal justice system. Those public rights fall to be balanced by the court against the right of P to a fair trial under art 6 should the emergence of the offending material into public knowledge, including the knowledge of the police, lead to his prosecution. The result would be that domestic PSI would be limited so as to permit the court to direct that the offending material be handed over to the police and P be left to rely on s 78 of the 1984 Act to protect him from any perceived unfairness at trial.

[45] It seems clear from the authorities cited by Mr Perry that the convention, in appropriate circumstances, operates to impose on the authorities of signatory states a positive obligation to ensure, by appropriate measures, that the public are able to enjoy their convention rights freely and in safety. Thus in *Osman v UK* (1998) 5 BHRC 293 the European Court of Human Rights (ECtHR) was considering a case where one of two applicants was wounded in a shooting incident which resulted in the death of his father, the husband of the other applicant. They claimed compensation for the state's failure to protect the life of the second applicant and his father and to prevent harassment of their family under art 2 the right to life. The material part of the ECtHR's judgment reads as follows (at 321 (para 115)):

> '. . . the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions . . . [Article] 2 of the convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual . . .
>
> 116. . . . where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their abovementioned duty to prevent and suppress offences against the person, it must be established to [the court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk . . .'

[46] In *Z v UK* (2001) 10 BHRC 384 the ECtHR was considering a case where, over a number of years parents had ill-treated their four children and kept them in a state of utter degradation. The proceedings were brought under art 3, the right not to be subjected to inhuman and degrading treatment. The report reads as follows (at 402–403 (paras 69–73)):

'I. *Alleged violation of art 3 of the convention*

69. The applicants alleged that the local authority had failed to protect them from inhuman and degrading treatment contrary to art 3 of the convention which provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

70. The Commission in its report found unanimously that there had been a violation of art 3 of the convention. It considered that there was a positive obligation on the government to protect children from treatment contrary to this provision. The authorities had been aware of the serious ill-treatment and neglect suffered by the four children over a period of years at the hands of their parents and failed, despite the means reasonably available to them, to take any effective steps to bring it to an end.

71. The applicants requested the court to confirm this finding of a violation.

72. The government did not contest the Commission's finding that the treatment suffered by the four applicants reached the level of severity prohibited by art 3 and that the state failed in its positive obligation under art 3 of the convention to provide the applicants with adequate protection against inhuman and degrading treatment.

73. The court re-iterates that art 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on high contracting parties under art 1 of the convention to secure to everyone within their jurisdiction the rights and freedoms defined in the convention, taken together with art 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see [*A v UK* (1998) 5 BHRC 137 at 141–142 (para 22)]). These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge . . .'

[47] In *X v Netherlands* (1986) 8 EHRR 235 the ECtHR was dealing with a case where a parent complained to the police about a sexual assault on his daughter a mentally defective girl of 16. The prosecutor's office decided not to prosecute provided the accused did not repeat the offence. X appealed against the decision and requested the court to direct that proceedings be brought. The appeal was dismissed partly on the ground that although the girl was incapable of making the complaint herself, no one else was entitled to complain on her behalf. Amongst other articles the claim was brought under art 8 the right to private and family life. The ECtHR held that there had been a violation of art 8 because no prosecution could be instituted for a sexual assault upon the mentally handicapped applicant because of a 'procedural obstacle which the Dutch legislature had apparently not foreseen', that obstacle being the Dutch law provision which meant that, although the applicant was unable herself to present her case in court due to her mental handicap no one else was entitled to complain on her behalf. The report reads (at 241):

'27. The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at

stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated . . .'

[48] In the very recent case in the House of Lords of *Lambeth London BC v Kay, Leeds City Council v Price* [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 WLR 570 in respect of which the decision was handed down on 8 March 2006, the respondents to the appeal are recorded in the speech of Lord Bingham (at [32]) as placing reliance on three principles which guide the Strasbourg authorities in their administration of the convention. The first two are not relevant for the purposes of this judgment. The third principle is described by Lord Bingham as follows:

'So too is the third principle, that inherent in the whole of the convention is a search for balance between the rights of the individual and the wider rights of the society to which he belongs, neither enjoying an absolute right to prevail over the other. It is unnecessary to cite authority for propositions so well established and understood.'

[49] An example of this balancing process is to be found in the decision of the Judicial Committee of the Privy Council in *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2003] 1 AC 681. In that case the Judicial Committee were considering a case where a motor car had been driven by a driver under the influence of alcohol above the legal limit. At the driver's trial for the relevant offence evidence was introduced of an admission by the defendant that he had been driving the vehicle at the relevant time as a result of the exercise of compulsory powers under s 172(2)(a) of the Road Traffic Act 1988. The defendant argued that it was contrary to art 6(1) of the convention for the prosecution to rely on an admission obtained under compulsory powers and in consequence there had been breaches of the devolution legislation with consequences it is not necessary to describe. In his speech Lord Bingham, having noted that art 6 contained no express right to PSI, which is not to be found elsewhere in the convention, is recorded as saying this ([2001] 2 All ER 97 at 115, [2003] 1 AC 681 at 704):

'Thus the right we have to consider in this case is an implied right. While it cannot be doubted that such a right must be implied, there is no treaty provision which expressly governs the effect or extent of what is to be implied.

The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within art 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. Ex facto oritur jus. The court has also recognised the need for a fair balance between the

general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the convention . . .' *a*

[50] Lord Steyn is recorded as saying ([2001] 2 All ER 97 at 118–119, [2003] 1 AC 681 at 708):

'The convention requires that where difficult questions arise a balance *b* must be struck. Subject to a limited number of absolute guarantees, the scheme and structure of the convention reflects this balanced approach. It differs in material respects from other constitutional systems but as a European nation it represents our Bill of Rights. We must be guided by it. And it is a basic premise of the convention system that only an entirely neutral, impartial, and independent judiciary can carry out the primary task *c* of securing and enforcing convention rights. This contextual scene is not only directly relevant to the issues arising on the present appeal but may be a matrix in which many challenges under the Human Rights Act 1998 should be considered.

III. *Article 6 of the convention* *d*

The present case is concerned with art 6 of the convention which guarantees to every individual a fair trial in civil and criminal cases. The centrality of this principle in the convention system has repeatedly been emphasised by the European Court. But even in respect of this basic guarantee, there is a balance to be observed. First, it is well settled that the public interest may be taken into account in deciding what the right to a fair *e* trial requires in a particular context.'

[51] Lord Hope is recorded as saying ([2001] 2 All ER 97 at 129, [2003] 1 AC 681 at 719):

'It is important therefore to distinguish between those convention rights *f* which are to be regarded as absolute and those which are not. The scheme of art 6, as Keir Starmer in *European Human Rights Law* (1999) pp 118–119 (para 3.88), has explained, is that the rights listed in arts 6(2) and 6(3) which are supplementary to art 6(1) are not intended to be an exhaustive list of the requirements of fairness in criminal proceedings. Those which are listed in *g* art 6(3) are described as minimum rights. Once the meaning of those rights has been determined, there is no room in their case for any implied modifications or restrictions. But the European Court and the European Commission of Human Rights (the commission) have interpreted the article broadly by reading into it a variety of other rights to which the accused *h* person is entitled in the criminal context. Their purpose is to give effect, in a practical way, to the fundamental and absolute right to a fair trial. They include the right to silence and the right against self incrimination with which this case is concerned. As these other rights are not set out in absolute terms in the article they are open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial. As *j* Keir Starmer, p 182 (para 4.75) has observed, where express restrictions are provided for by the convention there is no room for implied restrictions. But where the European Court has read implied rights into the convention, it has also read in implied restrictions on those rights.

The test of compatibility with art 6(1) of the convention which is to be applied where it is contended that those rights which are not absolute should

be restricted or modified will not be satisfied if the modification or limitation "does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (see *Ashingdane v UK* (1985) 7 EHRR 528 at 546–547 (para 57)). In *Sporrong v Sweden* (1983) 5 EHRR 35 at 52–53 (para 69) the court referred to the striking of a fair balance "between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".'

[52] It was submitted by Mr Casement for P that s 11 of the 1998 Act precludes modification of domestic PSI as contended for by the Attorney General because to do so in the manner suggested will diminish the ambit of an existing common law right by removing from its application a substantial amount of the material to which the common law, as it stood at the coming into force of the 1998 Act, would have applied the privilege.

[53] Section 11 provides: 'A person's reliance on a Convention right does not restrict—(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom . . .'

[54] I accept Mr Perry's submission that s 11 is not intended to determine the content of any particular right or freedom and must be read in conjunction with the requirements under the 1998 Act for public authorities to act compatibly with convention rights. To give s 11 the construction for which Mr Casement contends would confer on domestic PSI the status of an absolute right which authority shows it does not have. Once it is conceded that domestic PSI is not an absolute right, the requirement that the courts must give effect to that right compatibly with the convention means, that in any particular case, the right of the individual seeking the protection of PSI must be balanced against the countervailing rights of the public at large, in this case to be protected from the effects of crime.

[55] The concept of 'modification' of established rules of substantive and procedural law so as to make them human rights compliant is familiar to those who practise in the human rights field. In his speech in *Lambeth London BC v Kay, Leeds City Council v Price* [2006] 4 All ER 128 at [40], [2006] 2 WLR 570 at [40] Lord Bingham describes the process confronting the courts in that case in the following terms:

> 'Reference has already been made to the duty imposed on United Kingdom courts to take Strasbourg judgments and opinions into account and to the unlawfulness of courts, as public authorities, acting incompatibly with convention rights. The questions accordingly arise whether our domestic rules of precedent are, or should be modified; whether a court which would ordinarily be bound to follow the decision of another court higher in the domestic curial hierarchy is, or should be, no longer bound to follow that decision if it appears to be inconsistent with a later ruling of the court in Strasbourg . . .'

[56] To a puisne judge of the Chancery Division, or certainly this judge the idea that his judgment may 'modify' the right to a privilege described by Lord Wilberforce in his speech in *Rank Film Distributors Ltd v Video Information Centre (a firm)* [1981] 2 All ER 76 at 81, [1982] AC 380 at 442 as 'too long established in our law as a basic liberty of the subject . . . to be denied' is somewhat alarming. I have however come to the conclusion, subject to the question of precedent with

which I will now deal, that this is an appropriate case for that to be done. It seems to me that the public's right under arts 2, 3 and 8 to be protected from the effect of criminal activity when balanced against P's right to domestic PSI, which would otherwise operate to prevent me from directing that the offending material be passed to the police, requires me to modify P's right so as to enable the material to be so transferred. I am reinforced in arriving at that conclusion to know that it will be open to P to apply to the trial judge, at any prosecution of him for the offence of possession of such material, to exclude it as evidence under s 78 of the 1984 Act. I am further reinforced in arriving at that conclusion by the following considerations: (i) The current apparent anomaly between the scope of the privilege in civil proceedings and the scope of the privilege in criminal proceedings would disappear. As the pre-1998 Act law stood a suspect could not resist the production of material comprising free-standing evidence of possible guilt seized in a search by a constable under s 19(3) of the 1984 Act whereas he could resist production to a search order under s 7 of the Civil Procedure Act 1997 on grounds of PSI. (ii) It puts an end to what appears to be an irrational difference between the scope of domestic PSI and European PSI as recognised to form part of the rights comprised in art 6 by convention jurisprudence. (iii) It would remove or certainly reduce the anomalies in the application of domestic PSI presently imposed on disclosure in civil proceedings of which complaint has been made in such cases as *AT & T Istel Ltd v Tulley* [1992] 3 All ER 523, [1993] AC 45. (iv) The potential offence revealed by the offending material is serious enough having regard to the inhuman treatment of children which its production must have involved. In the course of the hearing on the 11 and 12 April I put to counsel the more extreme example of the discovery in the course of the execution of a civil search order of a substantial bomb with evidence that it was imminently about to be used to terrorise the public. In theory, at least, if the pre-1998 Act situation survives the court would be powerless to do other than hand the bomb back to the respondent to the search order in whose possession it had been found.

THE EFFECT OF PRECEDENT

[57] In *Lambeth London BC v Kay, Leeds City Council v Price* [2006] 4 All ER 128, [2006] 2 WLR 570 the House of Lords, in arriving at its conclusion, was confronted with a conflict between one of its own decisions and a later ruling of the ECtHR in Strasbourg (see the speech of Lord Bingham at [40] set out above). At [43] and following Lord Bingham having stated that the doctrine of stare decisis in our law is necessary in order to achieve a degree of certainty as to its application, said this:

> '... That degree of certainty is best achieved by adhering, even in the convention context, to our rules of precedent. It will of course be the duty of judges to review convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the [1998 Act]. But they should follow the binding precedent, as again the Court of Appeal did here.
>
> [44] There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The Strasbourg court authoritatively expounds the

interpretation of the rights embodied in the convention and its protocols, as it must if the convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.

[45] To this rule I would make one partial exception. In its judgment on the *Leeds* appeal, [[2005] 3 All ER 573 at [33]], the Court of Appeal said:

> "In [*D v East Berkshire Community Health NHS Trust, K v Dewsbury Healthcare NHS Trust, K v Oldham NHS Trust* [2003] EWCA Civ 1151, [2003] 4 All ER 796, [2004] QB 558] this court held that the decision of the House of Lords in [*X (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633] could not survive the introduction of the 1998 Act. This was, however, because the effect of the 1998 Act had undermined the policy consideration that had largely dictated the House of Lords decision. Departing from the House of Lords decision in those circumstances has attracted some academic criticism. It remains to see whether this will be echoed by the House itself."

When that case reached the House, no criticism of the Court of Appeal's bold course was expressed, the House agreed that the policy considerations which had founded its decision in [*X (minors) v Bedfordshire CC*] had been very largely eroded and it was accepted that that decision was no longer good law: [[2005] UKHL 23 at [21], [30]–[36], [82], [119], [124]–[125], [2005] 2 All ER 443 at [21], [30]–[36], [82], [119], [124]–[125], [2005] 2 AC 373]. The contrary was not suggested. But there were other considerations which made [*X (minors) v Bedfordshire CC*] a very exceptional case. Judgment was given in 1995, well before the [1998 Act]. No reference was made to the convention in any of the opinions. And, importantly, the very children whose claim in negligence the House had rejected as unarguable succeeded at Strasbourg in establishing a breach of art 3 of the convention and recovering what was, by Strasbourg standards, very substantial reparation: *Z v UK* (2001) 10 BHRC 384. On these extreme facts the Court of Appeal was entitled to hold, as it did in [*D v East Berkshire Community Health NHS Trust* [2003] 4 All ER 796 at [83], [2004] QB 558], that the decision of the House in [*X (minors) v Bedfordshire CC*], in relation to children, could not survive the 1998 Act. But such a course is not permissible save where the facts are of that extreme character.'

RELEVANT STATUTORY PROVISIONS

[58] PSI is referred to in the following statutory provisions. Section 14(1) of the Civil Evidence Act:

> 'The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or

thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—(a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty.'

The remaining subsections of s 14 contain nothing further which is of relevance.

[59] Section 31 of the Theft Act 1968 provides:

'A person shall not be excused, by reason that to do so may incriminate that person or the spouse or civil partner of that person of an offence under this Act—(a) from answering any question put to that person in proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property; or (b) from complying with any order made in any such proceedings; but no statement or admission made by a person in answering a question put or complying with an order made as aforesaid shall, in proceedings for an offence under this Act, be admissible in evidence against that person or (unless they married or became civil partners after the making of the statement or admission) against the spouse or civil partner of that person.'

[60] Section 72(1) of the Supreme Court Act 1981 provides as follows:

'In any proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person, or his or her spouse or civil partner, to proceedings for a related offence for the recovery of a related penalty—(a) from answering any question put to that person in the first-mentioned proceedings; (b) from complying with any order made in those proceedings.'

Section 7 of the 1997 Act provides, so far as material:

'The court may make an order under this section for the purpose of securing in the case of any existing or proposed proceedings in the court—(a) the preservation of evidence which is or may be relevant or (b) the preservation of property which is or may the subject-matter of the proceedings or as to which any question arises or may arise in the proceedings . . .

(7) This section does not affect any right of a person to refuse to do anything on the ground that to do so might tend to expose him or his spouse or civil partner to proceedings for an offence or for the recovery of a penalty . . .'

[61] Section 7 provides the compulsory powers relevant to this case. It seems to me that, whereas these statutory provisions govern the application of PSI in certain circumstances, they were not intended to, and do not, define its ambit so as necessarily to include in the privilege free-standing evidence. The words 'produce any document or thing' in s 14 of the Civil Evidence Act 1968 are capable of referring either to material produced by a witness under compulsion or material amounting to free-standing evidence.

THE AUTHORITIES

[62] It was Mr Casement's submission that *R v Hertfordshire CC, ex p Green Environmental Industries Ltd* [2000] 1 All ER 773, [2000] 2 AC 412 was another

example, similar to *Rank Film Distributors Ltd v Video Information Centre (a firm)* [1981] 2 All ER 76, [1982] AC 380, of the House of Lords finding that PSI applied to self-standing documentary evidence not created by the respondent but produced under the compulsory powers relating to disclosure. The relevant material is described by Lord Hoffmann as follows ([2000] 1 All ER 773 at 777, [2000] 2 AC 412 at 418):

> 'The request asked for particulars of all persons, companies or hospitals which had supplied clinical waste to Green; of the persons who carried waste on its behalf; of the staff which it employed in handling clinical waste at the two sites which had been found; of the companies which had employed Green to dispose of clinical waste; of the supplier or hirer of the trailers it had used; of the keepers of any vehicles used to collect waste from the producers; of the locations of any other sites used by Green and of three bins which had been seen on one of the sites but were no longer there.'

[63] The relevant statutory power to compel disclosure in that case is contained in s 71(2) of the Environmental Protection Act 1990 which, relevantly, provides:

> 'For the purpose of the discharge of its functions under this Part . . . (b) a waste regulation authority, may, by notice in writing served on him, require any person to furnish such information specified in the notice as the . . . authority . . . reasonably considers . . . it needs, in such form and within such period following service of the notice . . . as is so specified.'

[64] The 'person' spoken of in sub-s (b) is not required to deliver up documents or articles but to answer questions, possibly in writing. It follows, it seems to me, that the answers given by that person are a classic example of 'testimonial evidence', without more, potentially covered by PSI. As noted above Lord Hoffmann went on to find that none the less the respondents were bound to give the information requested because that information was confined to simple fact.

[65] It follows that the most recent House of Lords decision on this point is *AT & T Istel Ltd v Tully* [1992] 3 All ER 523, [1993] AC 45 in which the decision was handed down in July 1992. The background of the case is set out in the headnote as follows:

> 'In 1988 the second plaintiff company, then in the control of the first and second defendants, entered into a contract with a health authority for the supply of computer services. After the first plaintiff had purchased the entire shareholding of the second plaintiff, they learned of allegations that the contract with the health authority had been operated fraudulently. In proceedings against, inter alios, the first and second defendants for damages for fraud and breach of trust the plaintiffs obtained, from Buckley J., an order ex parte requiring both defendants to disclose information relating to dealings with certain assets and to produce copies of documents in respect of such dealings. Paragraph 33 of the order prohibited the use of the material so disclosed in the prosecution of either defendant. On the application of both defendants Wright J. set aside the order in so far as it related to such disclosure on the ground that it infringed their privilege against self-incrimination. The Crown Prosecution Service were informed of Buckley J.'s order and of the plaintiffs' intention to appeal from the decision

of Wright J., and were asked whether they wished to intervene or make representations in the appeal. By a letter dated 23 October 1991 they stated that they did not intend to intervene or be heard and that, since the paragraph applied only to disclosure by the defendants in compliance with the order it would not prevent them from using any material which they had already obtained or which they might obtain independently. The Court of Appeal dismissed the plaintiffs' appeal from Wright J.'s order, holding that it was not open to the court to devise protection in substitution for the defendants' privilege against self-incrimination, and that the plaintiffs' claim was neither proprietary nor within section 72 of the Supreme Court Act 1981.' (See [1993] AC 45.)

[66] The speeches of their Lordships proceed on the basis that all the material requested which would include self-standing evidence was potentially subject to PSI. However the House of Lords found that because of the arrangement with the prosecuting authorities the defendants were in no danger of being prosecuted for any offences in respect of which the requested material might serve as evidence for the prosecution and so the defendants should make the disclosure sought. However their Lordships, on the way to their conclusion, mounted a critique of the application of PSI to disclosure in civil proceedings.

[67] In his speech Lord Templeman stated ([1992] 3 All ER 523 at 530, [1993] AC 45 at 53):

> '... the privilege can only be justified on two grounds, first that it discourages the ill-treatment of a suspect and secondly that it discourages the production of dubious confessions. Neither of these considerations applies to the present appeal. It is difficult to see any reason why in civil proceedings the privilege against self-incrimination should be exercisable so as to enable a litigant to refuse relevant and even vital documents which are in his possession or power and which speak for themselves ... I regard the privilege ... exercisable in civil proceedings as an archaic and unjustifiable survival from the past when the court directs the production of relevant documents and requires the defendant to specify his dealings with the plaintiff's property or money.'

[68] Lord Griffiths noted ([1992] 3 All ER 523 at 533–534, [1993] AC 45 at 57):

> '... the privilege ... is in need of radical reappraisal. It is however deeply embedded in English law and can only be removed or moderated by Parliament [which] has in recent years made many inroads into the privilege in a number of statutes. In civil actions ... the privilege can be claimed to thwart the claims of victims of fraud. I can for myself see no argument in favour of the privilege against producing a document the contents of which may go to show that the holder has committed a criminal offence.'

[69] Lord Lowry said ([1992] 3 All ER 523 at 544, [1993] AC 45 at 69): 'reform ... is still needed in several respects ... such as ... the illogicality of protecting pre-existing documents ...'

[70] In *Re Arrows Ltd (No 4), Hamilton v Naviede* [1994] 3 All ER 814, [1995] 2 AC 75 the House of Lords was dealing with a case where the Court of Appeal had allowed an appeal from the judge who had directed that the transcripts of examinations of a director of an insolvent company under s 236 of the Insolvency Act 1986 on an undertaking by the director of the Serious Fraud Office that the

transcripts would not be used save in the circumstances specified in s 2(8) of the Criminal Justice Act 1987. The effect of the order of the Court of Appeal was that the transcripts should be made available to the director without condition. The House of Lords dismissed the appeal. Lord Browne-Wilkinson gave the leading speech. Having referred to *Rank Film Distributors Ltd v Video Information Centre (a firm)* [1981] 2 All ER 76, [1982] AC 380 and *AT & T Istel Ltd v Tully* and to art 6 of the convention as an example of the international acceptance of the principle of PSI he said ([1994] 3 All ER 814 at 821, [1995] 2 AC 75 at 96):

> 'The inevitable effect of a witness in civil proceedings claiming the privilege against self-incrimination is to deprive the opposite party and the court of evidence relevant to the dispute under consideration. Until recently, this has not given rise to much litigation. But the recent upsurge of financial fraud, particularly in relation to companies, has raised in an acute form the conflict between the witness's basic right to rely on the privilege on the one hand and the public interest in successfully pursuing and recovering the fruits of such fraud.'

[71] Then he continues ([1994] 3 All ER 814 at 833, [1995] 2 AC 75 at 109):

> 'Only Parliament can weigh the conflicting public interests as between the demands of justice to the accused, the need to obtain the information for the purposes of civil proceedings (including investigatory proceedings) and the public interest in the successful prosecution of those guilty of fraud.'

[72] The evidence in question in *Re Arrows Ltd (No 4)* was, of course, testimonial evidence to which the IEA would not apply. It is however the most recent decision of the House of Lords cited to me where their Lordships highlight the difficulties in the application of PSI to the disclosure of documents in civil proceedings but accept that the only solution is fresh legislation. It is of interest, however, to compare the balancing process spoken of by Lord Browne-Wilkinson in 1995 in the passage [1995] 2 AC 75 at 109 which he confines to Parliament with the similar balancing process spoken of by the Privy Council in *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2003] 1 AC 681 and which is assigned by them to the courts.

[73] The relevant decisions of the House of Lords were given well before the passing of the 1998 Act, indeed, probably before that measure was seriously proposed.

[74] The most recent decision of the Court of Appeal which is potentially inconsistent with the submissions of the Attorney General is *Den Norske Bank ASA v Antonatos* [1998] 3 All ER 74, [1999] QB 271 in which judgment was given on 7 April 1998. In that case the court was considering a claim by a bank to recover the proceeds of bribes given to him in the course of the bank's business and damages for frauds against the bank. In the course of those proceedings the bank obtained a freezing injunction over the assets of the defendant. Waller LJ sets out ([1998] 3 All ER 74 at 77–78, [1999] QB 271 at 277) the relevant parts of para 3 of that order. The defendant was required to inform the bank's solicitors in writing—

> '"as soon as reasonably practicable, of all his assets and of the Specific Assets whether in or outside England and Wales . . . or whether held by him legally or beneficially or held by him through nominees or otherwise howsoever, and of the Specific Assets, giving the value, location and

details of all such assets and Specific Assets, and (in the case of the Specific Assets) to the best of his knowledge and belief what has become of them, including without limitation details of all bank accounts including the name or names in which the account is held, the name of the bank, building society or other entity, the address of the relevant branch and the number of the account controlled by [DA] or to which [DA] is a signatory and details of all interests held by [DA] in any company, ship or partnership or joint venture relating to the companies, ships and individuals named out in Annexes C and D to this Order."

The paragraph further states:

"The first defendant (DA) may be entitled to refuse to provide some or all of this information on the grounds that it may incriminate him. In the event that [DA] claims to be entitled to the benefit of such privilege, he must provide such allegedly privileged information to the Supervising Solicitor who will hold such information to the order of the court."

In schedule 4 the supervising solicitor undertook to explain to DA the effect of the order including his entitlement to avail himself of the privilege against self-incrimination.

The order also provided that "the information must be confirmed in an affidavit which must be served on the Plaintiff's Solicitors within 7 days after this Order has been served on [DA]".'

[75] It seems to me that the form of para 3 is similar in effect to the request for information made in *R v Hertfordshire CC, ex p Green Environmental Industries Ltd* [2000] 1 All ER 773, [2000] 2 AC 412 the written answer to which would constitute testimonial evidence by the defendant. Accordingly it seems to me that the defendant could have refused to answer it on grounds of PSI today regardless of whether the IEA is correct or not.

[76] The judge at first instance in charge of the case went on to direct cross-examination of the defendant on his answers and that examination took place. In the course of that examination the defendant asserted PSI in answer to a number of the questions. The judge required him to answer. The matter came before the Court of Appeal on appeal from that ruling. The Court of Appeal allowed the appeal in part ruling that the defendant should not be required to provide answers to questions which sought to establish his receipt of money from a client of the bank and the amount received.

[77] The leading judgment was delivered by Waller LJ. The judgment deals with the effect on PSI of the handing over of documents to the supervising solicitor. It is not clear from the report what documents were handed over but it seems likely that they constituted that part of the written answer to the request made under para 3 of the order which the defendant was refusing to answer on grounds of PSI. Be that as it may Waller LJ having quoted from the judgment of Cockburn CJ in *R v Boyes* (1861) 1 B & S 311, 121 ER 730 says ([1998] 3 All ER 74 at 89, [1999] QB 271 at 289):

'Thus, it is not simply the risk of prosecution. A witness is entitled to claim the privilege in relation to any piece of information or evidence on which the prosecution might wish to rely in establishing guilt. And, as it seems to me, it also applies to any piece of information or evidence on which the

prosecution would wish to rely in making its decision whether to prosecute or not.'

[78] It is possible that, in so far as that passage in Waller LJ's case is to be read as covering free-standing evidence, it is obiter, as being not necessary for his decision, because the documents in question did not fall within that classification.

[79] The other aspect of the case which is of relevance for present purposes is that passage in Waller LJ's judgment under the heading 'Unsatisfactory nature of the rule allowing privilege to be claimed', where he says ([1998] 3 All ER 74 at 84, [1999] QB 271 at 284):

> 'One must start by expressing sympathy for all those involved in the procedure summarised above, not least the judge. So far as [the bank] were concerned, they had a strong prima facie case that DA had taken bribes and been a party to a fraud, and utilised front companies to disguise the whereabouts of the spoils. They thought and think they are being frustrated in their attempts to discover what bribes DA did receive, and if he did receive them, where the moneys went, and/or where the money is now. So far as DA was concerned there was (as the judge found) a risk of him being prosecuted in a criminal court for corruption. If only Parliament had done that for which there has been a need now for far too long, of extending the policy underlining s 31 of the [Theft Act 1968] to criminal offences more generally, the above sorry saga might never have needed to unfold in the way it did.'

[80] I return to the passage in the speech of Lord Bingham in *Lambeth London BC v Kay, Leeds City Council v Price* [2006] 4 All ER 128, [2006] 2 WLR 570. It does seem to me that it is at least strongly arguable that this is the exceptional case which fits into the 'partial exception' spoken of by Lord Bingham. I do so for the following reasons: (i) The decisions of the House of Lords, *Rank Film Distributors Ltd v Video Information Centre (a firm)* [1981] 2 All ER 76, [1982] AC 380 and *AT & T Istel Ltd v Tully* [1992] 3 All ER 523, [1993] AC 45, and of the Court of Appeal ([1992] 2 All ER 28, [1992] QB 315), *Den Norske Bank ASA v Antonatos* [1998] 3 All ER 74, [1999] QB 271 and earlier cases which would otherwise bind me, were handed down before the coming into force of the 1998 Act on 2 October 2000. The decisions of the House of Lords were handed down before that Act was passed. In none of those cases was a convention point taken. Although *A-G's Ref (No 7 of 2000)* [2001] 1 WLR 1879 and *R v Kearns* [2002] 1 WLR 2815 are referred to in the judgment of Lindsay J in *O Ltd v Z* [2005] All ER (D) 387 (Apr) it is clear that the IEA was not raised before him. (ii) The enactment of the 1998 Act fundamentally altered the legislative circumstances after those decisions of the House of Lords and the Court of Appeal. I refer back to [71], above, to illustrate this point. It seems to me to be highly likely that had the case for modification of domestic PSI, for which the Attorney General contends, been available to the House of Lords in the *Rank Film Distributors* and *AT & T Istel* cases they would have accepted it with open arms. (iii) There appears to be almost universal disapproval of the way in which domestic PSI operates on the procedure for disclosure in civil cases. I repeat the earlier passage in this judgment where I set out the perceived advantages, urged on me on behalf of the Attorney General, of a decision to modify the privilege. (iv) It is arguable that the decision of the Court of Appeal in *A-G's Ref (No 7 of 2000)*, in which the *Rank Film Distributors* case is cited, is authority, binding upon me in favour of the IEA.

[81] As Lord Bingham indicates two courses are open to me the first, if satisfied that the case falls within Lord Bingham's 'partial exception', to decide the case by directing delivery of the offending material to the police, staying the order pending an appeal for which I would give permission. The second course is to decline to make that order, give permission to the Attorney General to appeal by-passing the Court of Appeal if appropriate permission is given, so that the matter can be dealt with by the House of Lords who are able to depart from their own decisions.

[82] After some hesitation I have come to the conclusion that subject to the question of the implied undertaking to keep confidential material produced in the course of disclosure in civil actions, with which I will shortly deal, I should take the former course and hold that this is a case where the court can modify the application of domestic PSI so as to exclude from its ambit material constituting free-standing evidence which was not created by the respondent to the search order under compulsion.

THE IMPLIED UNDERTAKING

[83] In his judgment in *O Ltd v Z* [2005] All ER (D) 387 (Apr) at [72]–[85] Lindsay J sets out the authorities which govern the circumstances in which a civil court may release material obtained as a result of disclosure from the implied undertaking of the parties to litigation to keep such material confidential to the proceedings. I gratefully adopt that passage in Lindsay J's judgment. My conclusion that the public interest in the prosecution of crime which leads me, in the balance that must be taken between that interest and the interest of P to a fair trial, to come down in favour of the public interest must carry with it the parallel conclusion that I should release the implied undertaking so that the offending material be passed to the police: see in particular the judgment of Swinton Thomas LJ in *Re EC (a minor) (care proceedings: disclosure)* [1996] 3 FCR 521, sub nom *Re C (a minor) (care proceedings: disclosure)* [1997] Fam 76.

[84] I will make an order directing W to pass the computer and associated electronic materials on which the offending material is stored to the appropriate police authority.

[85] I will give P permission to appeal and stay this order pending the reasonably urgent prosecution of such appeal. I am aware of the domestic situation of P which makes it of importance that circumstances of this case are investigated as soon as possible by the police.

Order accordingly. Permission to appeal given.

Celia Fox Barrister.

Re Wylde (deceased)
Wylde v Culver
[2006] EWHC 923 (Ch)

CHANCERY DIVISION

GEORGE BOMPAS QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

3, 12 APRIL 2006

Probate – Costs – Discontinuance – Claimant commencing probate action – Claimant subsequently applying to discontinue action – Incidence of costs on discontinuance – CPR 57.11.

The claimant and the defendant had both been named as executors in a will made by W in 1991. The claimant was a child of W's husband by his first marriage and the defendant was a child of W by her first marriage. In 1993 W's husband died. In 2003 W made another will, in which the defendant was named as executrix and under which W's husband's children did not benefit. She died in 2005 and probate of the 2003 will was granted to the defendant. The claimant brought proceedings seeking revocation of probate, pronouncement against the validity of the 2003 will and pronouncement in solemn form for the 1991 will. He claimed that the will had been executed without W's knowledge and approval, relying, inter alia, on the circumstances that the 2003 will had been written out in the manuscript of the defendant, a principal beneficiary, and was purportedly witnessed by someone W had not liked, whose signature did not resemble her usual signature. Subsequently, however, the claimant applied under CPR 57.11[a] for discontinuance of the proceedings with no order for costs. That rule provided that on the application of the claimant in a probate claim or a defendant who had acknowledged service the court might order that the claim be discontinued or dismissed on such terms as to costs as it thought just. The defendant resisted the application that there be no order for costs, arguing that as it would be inappropriate to allow discontinuance if a serious issue had been raised as to the due execution of the 2003 will, it followed that if no serious issue had been raised it was difficult to see why the claimant should avoid having to pay the costs of the action on the action being discontinued.

Held – Where a claimant sought to discontinue a probate action and the question of costs then arose, the considerations as to discontinuance and costs were different. As to discontinuance, the question was whether, viewed objectively, there was at the time of discontinuance a serious issue to be resolved in relation to the will. As to costs, the question was whether, viewed from the perspective of the discontinuing party, the opposition had been on reasonable grounds. In the instant case, the matters which had been raised by the claimant did not raise a serious issue such as should lead the court to refuse permission to discontinue and instead make directions for a trial. However, there was no basis on which to doubt that the claimant might reasonably have thought it right to

a CPR 57, so far as material, provides: 'At any stage of a probate claim the court, on the application of the claimant or of any defendant who has acknowledged service, may order that—(a) the claim be discontinued or dismissed on such terms as to costs or otherwise as it thinks just . . .'

begin and continue the action, and no basis to believe that he had never had faith in the case or that he had at any time pursued the case in bad faith. Accordingly, permission to discontinue would be given, with no order as to costs (see [28], [29], [33]–[37], [39], [40], below).

Notes

For discontinuance and dismissal, and for costs of probate proceedings: unsuccessful parties, see 17(2) *Halsbury's Laws* (4th edn reissue) paras 292, 330.

Case referred to in judgment

Green v Briscoe [2005] EWHC 3455 (Ch), [2005] All ER (D) 96 (May).

Application to discontinue

Robert Culver, the claimant in proceedings for (i) revocation of the probate granted on 16 February 2005 out of the Oxford District Registry to Theresa Dianne Culver (the defendant) of the will of Jean Wylde deceased dated 20 November 2003; (ii) pronouncement against the validity of the 2003 will; and (iii) pronouncement in solemn form for a will of the deceased made in 1991, applied to the court seeking permission under CPR 57.11 to discontinue the action with no order as to costs. The facts are set out in the judgment.

Sara Hargreaves (instructed by *Pitmans*, Reading) for the claimant.

Daniel Bromilow (instructed by *Field Seymour Parkes*, Reading) for the defendant.

Cur adv vult

12 April 2006. The following judgment was delivered.

GEORGE BOMPAS QC.

[1] In May 2005 the present action was started by Mr Robert Culver. He is now seeking permission under r 57.11 of the CPR to discontinue the action. The application is made under that rule because the action, being a probate claim, is not subject to Pt 38 of the CPR (see r 57.11(1)). The application was made on the day when the action was due to come on for trial, notice of the application having been given only on 27 March 2006.

[2] The first question is whether to allow discontinuance. If discontinuance is allowed, questions arise as to the costs of the action.

BACKGROUND

[3] Mrs Jean Wylde (the deceased) died on 3 February 2005. She was a widow, having been married twice. By her first marriage she had three children. One of the children is the defendant. By a will dated 20 November 2003 (the 2003 will) the defendant had been named as executrix. Probate of the 2003 [will] was granted to the defendant out of the Oxford District Registry on 16 February 2005. The reason why probate was sought and granted so promptly after the death of the testatrix was because the defendant, who had been in England during the deceased's last illness, lives and works in the United States and was under pressure to return there.

[4] The deceased's second husband had had six children by a previous marriage. One of these is the claimant. There were no children of the marriage between the deceased and her second husband.

[5] At the time of the deceased's second marriage in 1974 she and her husband already had several grandchildren between them. Over the years many more were born, so that by the time of the deceased's death there were 29 in all.

[6] The deceased and her second husband were not wealthy. Their principal asset was a comparatively modest house in Reading, where they lived. On 16 August 1991 they made wills by which, broadly speaking, each left to the other (if surviving) all her or his assets, including the house, and subject to that left her or his estate to 17 of their grandchildren but with the defendant having expressly a right to live in the house should she so wish. These 17 grandchildren, of whom 8 or 9 were children of the deceased's children, may have been all the grandchildren born by 1991. Certainly there were further grandchildren born later. The deceased's second husband died in 1993.

[7] In the will made by the deceased in 1991 (the 1991 will) the claimant was named as an executor along with the defendant. So far as is known, the deceased had not sought to change the 1991 will or to make a fresh will until 2003. The 1991 will was professionally drawn. The 2003 will was not. It is written out in the manuscript of the defendant.

[8] In the 2003 will the deceased left a gift of £1,000 apiece to each of three of her husband's grandchildren, with three more of those receiving £500 each. These bequests depended upon the deceased's net estate being greater than £10,000. Subject to this her estate was to be divided between her three children with a deceased child's natural children taking in the event of their parent pre-deceasing the deceased.

[9] The last several lines of the 2003 will contained a statement explaining that the deceased felt that her husband's family had not welcomed her into the family and had had no contact and should not benefit under her will. It continued by explaining, so it seems, that these people should not be welcomed at her funeral. An exception was made for the claimant and his family and for one of his brothers, Kevin Wylde, and his family.

[10] The 2003 will bears an attestation clause and signatures indicating that the 2003 will had been signed by the deceased in the presence of a D Hiscock and a P Hiscock. The first of these is Mrs Doris Hiscock; the second is her son Patrick. Mrs Hiscock is the defendant's mother-in-law.

[11] It is said on behalf of the claimant that the content of the 2003 will was a great surprise to him and his siblings, who had been aware of the 1991 will. (i) His brother, Kevin Wylde, says that he had had a conversation with the defendant in November 2003, when she was visiting her mother. In this conversation, says Kevin Wylde, the defendant told him that the deceased had that day been to solicitors and had altered her will, principally to remove as beneficiaries four of the Wylde grandchildren with whom the deceased had had no contact for some time. He also says that he was told he had been made an executor. (ii) It is said by the claimant and his son that at a dinner with his family at his house on Boxing Day 2004 the deceased had announced that all her inheritance was going to the grandchildren and that 'no adults would get anything'.

[12] It is further suggested by the claimant that the deceased's relations with Mrs Hiscock were difficult, that the deceased did not like Mrs Hiscock, and that it is improbable that the deceased would have turned to Mrs Hiscock to find a witness to a will. Mrs Hiscock has stated that she was telephoned by the deceased on 20 November 2003 asking to come round to see her; but the claimant has given evidence that the deceased, who unquestionably had impaired hearing, did not use the telephone. Recent disclosure of telephone bills reveals that on

20 November 2003 there was no call from the deceased's house to Mrs Hiscock's house by land-line. *a*

[13] The possibility that Mrs Hiscock may not in truth have witnessed the signing of the will is suggested by the fact that the signature used on the 2003 will does not appear to be Mrs Hiscock's normal signature: it did not resemble the signatures on two letters, one of which did take the form of typed statement, sent to the claimant after the deceased's death and before the action was started. As *b* to this it was explained by the defendant's solicitors in correspondence shortly before this action was started that 'when asked to "sign" formal documents [Mrs Hiscock] "prints" her name in contrast to the "signature" she places on more informal documents such as letters'.

[14] It is also said by the claimant and by his brother that following the *c* deceased's death the deceased's affairs were dealt with in a rushed and secretive manner, causing suspicion. In particular it is said that the claimant asked to see a copy of the will, but was not shown one; that probate of the will was obtained with undue haste; and that the sale of the house was rushed and not handled with candour.

[15] This action was started on 17 May 2005. On about the 18 February 2005 *d* the claimant had sought to lodge a caveat, but had learnt shortly afterwards that probate had already been granted. Correspondence ensued between the claimant and solicitors on the one side and the defendant and solicitors on the other. This concerned both the making of the 2003 will and the proposed sale of the deceased's house. The final impetus for the action came when, probably as a result of confusion, the claimant thought that the house was about to be sold *e* with a risk of the proceeds being distributed.

[16] The claims made in the particulars of claim are (a) that the 2003 will was executed without the deceased's knowledge and approval, the circumstances being such that the burden of proving the contrary lies with the defendant; and (b) that the defendant should in circumstances prove that the 2003 will was duly *f* executed. The prayer seeks revocation of the probate granted on 16 February 2005, that the court should pronounce against the validity of the 2003 will, and that the court should pronounce in solemn form for the 1991 will.

[17] The defendant has served only a defence, not making any Pt 20 counterclaim: she is not seeking to have a grant of probate in solemn form. No one has sought in the proceedings to require the defendant to obtain such a *g* grant, putting the defendant to proof of due execution.

[18] As the action has proceeded there has been no development which has radically changed matters. The delivery of witness statements showed some small refinement in the explanations previously given as to the manner of the execution of the 2003 will. Later a handwriting expert has considered what *h* appears to be Mrs Hiscock's signature on the 2003 will, and has given a somewhat inconclusive report. And the disclosure of telephone records to which I have referred has shown that Mrs Hiscock may well have been mistaken in stating that on the day when the 2003 will was made she was telephoned by the deceased.

[19] With this introduction I turn to the question of discontinuance, before *j* considering the arguments on costs.

PERMISSION TO DISCONTINUE

[20] Probate claims are not simply proceedings between the parties. There are likely to be others affected by the outcome of the proceedings. The present case is no exception. There is no doubt that the court may refuse permission to

discontinue, where it considers that there is a serious question which should be decided by the court.

[21] Mr Bromilow, counsel for the defendant, drew my attention to the case of *Green v Briscoe* [2005] All ER (D) 96, in which the court had dismissed an action seeking, among other matters, an order pronouncing against a will, revocation of the probate granted in respect of the will and a declaration of intestacy. The defendant executor counterclaimed for a grant of probate in solemn form. One member of the family had acknowledged service of the action and had indicated that he wanted to be satisfied that the will had been properly executed but did not intend to put forward any positive case. Although the action was dismissed, permission was refused to the defendant to discontinue the counterclaim: this was directed to be continued against the family member, because a serious issue had been raised as to the validity of the will. In effect the defendant executor was required to continue to seek an order for a grant of probate in solemn form.

[22] In the present case the claimant is seeking to argue that discontinuance should be permitted, but that either (a) the claimant should be paid costs out of the deceased's estate, or (b) there should be no order made as to costs. On behalf of the claimant Miss Hargreaves drew my attention to the passage in Parry and Clark *Law of Succession* (11th edn, 2002) p 457 (para 19-43). The general rule in probate actions is no different from ordinary actions: costs follow the event. To this there are exceptions. As to this the editors comment:

> 'The special circumstances justifying a different order may be classified under two heads, ie (i) fault of the testator or the residuary beneficiary—costs out of the estate, (ii) case for inquiry—no order as to costs.'

[23] Mr Bromilow has pointed out that the claimant is faced with something of a dilemma in seeking to discontinue while seeking either of these orders. He submits, and I think rightly, that there is no basis for finding that costs should be paid out of the estate. Therefore as to costs the question is whether or not (and I speak loosely) there was a case for inquiry. That there was such a case is urged by Miss Hargreaves, drawing attention to various of the matters I have referred to in describing the background. But if there was such a case, there still is: there has been no dramatic change in the strength of the case since the outset. It is here that the difficulty arises. (i) If on the one hand, a serious issue has been raised as to the due execution of the 2003 will, it would quite probably be inappropriate to allow discontinuance. (ii) If on the other hand, no serious issue has been raised, it is difficult to see why the claimant should avoid having to pay the costs of the action on the action being discontinued.

[24] Shortly stated, do the matters put forward by Miss Hargreaves to show that there should be no order as to costs on discontinuance lead to the conclusion that there should be no permission to discontinue?

[25] There are three documents which set out on behalf of the claimant matters said to raise concerns about the deceased's knowledge and approval of the 2003 will or its due execution. These are (a) a letter dated 13 April 2003 from the claimant's solicitors, (b) the particulars of claim in this action, and (c) the skeleton argument provided for the present hearing. In each case the points made have been broadly similar. In effect these are: (i) the circumstances surrounding the making of the 2003 will, in particular the facts that the 2003 will was written out by a principal beneficiary and was purportedly witnessed by someone the deceased did not like, whose signature did not seem to be genuine,

following a telephone conversation the deceased was unlikely to have made; (ii) the fact that probate was obtained so promptly; (iii) discrepancy between the contents of the 2003 will and what was supposedly told to Kevin Wylde and what was said by the deceased at the Boxing Day dinner; (iv) the fact that the sale of the house had been progressed in a secretive manner and with apparent haste to distribute the proceeds of sale; and (v) the lack of explanation for the decision of the deceased to replace the 1991 will.

[26] Of these points there is nothing in the second or the fourth. What was done does not, on examination, suggest anything sinister or underhand. The fifth I find unimpressive. The fact is that by 2003 it would have been quite reasonable for the deceased to change the dispositions contemplated by the 1991 will. For one thing she now had more grandchildren than in 1991. It is quite understandable that she might have decided to be more discriminating in the selection of beneficiaries.

[27] In relation to the third of these points Mr Bromilow has rightly drawn attention to the fact that there is a conflict of evidence concerning the conversation between the defendant and Kevin Wylde. As he rightly submits, I cannot assume that Kevin Wylde's version of events is correct. Indeed, given that the claimant is now seeking to discontinue the case, it may possibly be that I should treat the defendant's version as more likely to be true. As to the Boxing Day dinner announcement, even if made as suggested, there are possible explanations that are consistent with the 2003 will having been duly made as the deceased's last will. The evidence of the announcement does not compel, and barely advances, the conclusion that the deceased had not duly executed the 2003 will with full knowledge and approval of its contents.

[28] What then of the matters in sub-para (i)? Whatever grounds these might provide for questioning the making of the 2003 will they do not in my judgment raise a serious issue which should lead me to refuse permission to discontinue and instead to make directions for a trial. As in the case of conversation between Mr Kevin Wylde and the defendant, parts of what is relied upon (as, for example, the deceased's alleged dislike of Mrs Doris Hiscock and her unwillingness to use the telephone) turn on disputed evidence. For the rest, though it may be possible that cross-examination will demolish the statements and written evidence of the defendant, Mrs Doris Hiscock and Mr Patrick Hiscock, that result does not look likely on the materials at present before the court.

[29] I am therefore satisfied that permission to discontinue may appropriately be given. But this then leads to the questions of costs. If there is not a serious issue, was there ever? If not, on what ground can the claimant possibly avoid having to pay the defendant's costs, much less obtain an order for costs? This, in a nutshell, is Mr Bromilow's argument

COSTS

[30] Rule 57.11 of the CPR differs from r 38.6, the general rule dealing with discontinuance, in that in probate actions there is no stated presumption that a discontinuing claimant should pay the costs down to the discontinuance. However I approach the question of costs on the basis that the claimant, in seeking to discontinue, should ordinarily pay the costs, and that the onus lies with him to show why there should be some different order. Shortly stated, in the absence of some good reason for a different order, it can be taken that the action was wrongly brought. This, after all, would be the starting point if the action went to trial and was dismissed.

[31] Earlier in this judgment I have rejected the argument that the claimant's costs should be paid out of the estate. Little needs to be said about this submission. In my judgment the deceased did nothing of consequence to invite or encourage the claimant to challenge the 2003 will. I fail to see that the defendant or her siblings did anything to justify their having to bear the claimant's costs of these proceedings.

[32] I have found the question whether there should be no order as to costs much harder.

[33] I can see how the claimant might reasonably have thought it right to start the action; and I can also see how the claimant might reasonably have thought it right to begin and continue the action. The point here is that in starting and continuing the action the claimant may very well have been reasonable in believing that Mr Kevin Wylde's description of the conversation with the defendant was true, that the deceased did dislike Mrs Doris Hiscock and that the deceased did not use the telephone, and that Mrs Hiscock's signature on the 2003 will was suspicious. In short, so the argument runs, the claimant acted reasonably in seeking to challenge the 2003 will.

[34] In the event I have concluded that this argument is to be accepted. I am not inclined to doubt the sincerity of the claimant; and on this basis I have decided that the claimant should not be ordered to pay the costs on discontinuance.

[35] As it seems to me, the 'case for inquiry no order as to costs' principle requires examination of the conduct of the claimant in bringing and pursuing the action. The principle is given particular expression in one rule in the CPR. Special provision is made for the case where a defendant to a probate action gives a notice in his defence along the lines given in the *Green v Briscoe* case, that he will not raise any positive case but nevertheless insists on the will being proved in solemn form and the attesting witnesses being cross-examined in such a case according to r 57.7(5)(b) of the CPR, 'the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will'. In my judgment, a reasonable but nevertheless ultimately mistaken belief in a state of affairs which if not mistaken would lead to a will being pronounced against does amount to a reasonable ground for opposing a will.

[36] The principle is not confined to cases where a defendant has given such a notice as referred to in r 57.7(5). It is of general application. And in its general application also it at the least allows, if it does not require, the conduct of the unsuccessful party to be looked at. This is supported by the editors of Parry and Clark *Law of Succession* (11th edn, 2002) p 457 (para 19-45): this contains the statement that 'It is . . . necessary to consider whether the losing party had reasonable grounds, looking to his knowledge and means of knowledge, for the issues he raised'.

[37] In other words the dilemma postulated by Mr Bromilow is not so stark as he would have it. This is because the considerations are in fact different. As to discontinuance the question is whether, viewed objectively, there is at the time of discontinuance a serious issue to be resolved in relation to the will. As to costs the question is whether viewed from the perspective of the discontinuing party the opposition has been on reasonable grounds.

[38] Were it not for one matter I would have had no hesitation in concluding that there should be no order as to costs. This is that the claimant is now discontinuing. Although he did not quite articulate the point in this way, Mr Bromilow argued that the discontinuance shows that the claimant has no faith in his case, that therefore the claimant cannot have had any faith in the case,

and that therefore the case should never have been brought. This is in effect the argument used by Mr Bromilow to support a submission that the claimant should be ordered to pay costs assessed on an indemnity basis. a

[39] The explanation given on behalf of the claimant for the decision to discontinue is not detailed. What I gain from what has been said by his solicitor and by Miss Hargreaves is that the claimant has got cold feet: his perception of the case now is that it is weak, and he is plainly worried about costs. But I do not think it right to believe that the claimant never had faith in the case or that he has at any time pursued the case in bad faith, believing the case to be unjustified. As I mentioned above, I am not inclined to doubt the claimant's sincerity. b

[40] In the event, therefore, I shall give permission to discontinue but shall make no order as to costs.

[41] Given this decision, it is not necessary to consider what basis of assessment should be ordered or whether any third parties should be joined in the proceedings. c

Order accordingly.

Rakesh Rajani Barrister.

R v Coutts

[2006] UKHL 39

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD HUTTON, LORD RODGER OF EARLSFERRY AND LORD MANCE

14, 15 JUNE, 19 JULY 2006

Criminal law – Murder – Manslaughter – Reduction to manslaughter – Facts raising possibility of manslaughter verdict – Judge in murder trial asking counsel whether he should direct jury on manslaughter because evidence had arisen to support such a verdict – Prosecution and defence counsel both declining to invite judge to direct jury on manslaughter – Judge directing jury only on murder – Whether judge having duty to direct jury on obvious alternative offence arising on the evidence irrespective of parties' wishes.

The deceased died at the defendant's flat. He stored her body first in his car, then in his shed and then in a commercial storage facility. More than a month after her death, he took the body to some woodland and set fire to it. When the deceased's body was found burning and unclothed, it had a ligature made from a pair of tights tied twice around the neck, with a knot on the right-hand side. The defendant was charged with murder on an indictment which contained that charge alone. At his trial, the defendant testified that he and the deceased had had consensual asphyxial sex, and that her death had been a tragic accident. During the course of the trial, evidence was adduced which would have enabled a rational jury, if they accepted it, to convict the defendant of manslaughter. At the close of evidence, the judge asked counsel whether he should direct the jury that a verdict of guilty of manslaughter was open to them. Prosecuting counsel submitted that it would be unfair to do so, stating that the Crown had throughout put forward a case of deliberate killing and nothing else, and if that were not proved the defendant was entitled to be acquitted. Counsel for the defendant subsequently discussed the issue with his client. After being advised of the sentence he would receive if convicted of manslaughter, the defendant agreed that counsel should not ask the judge to leave manslaughter to the jury in the hope that they would acquit him if faced with a stark choice between murder and accident. The judge duly made no mention of manslaughter in his direction to the jury, directing them instead to acquit if they thought that the death had or might have been an accident. The defendant was convicted. He appealed, contending that the judge ought to have left a verdict of manslaughter for the jury's consideration, irrespective of the parties' wishes, since there was evidence to support it. The Court of Appeal rejected that contention and dismissed the appeal. The defendant appealed to the House of Lords.

Held – In order to achieve the public interest objective that defendants are neither over-convicted nor under-convicted, nor acquitted when they had committed a lesser offence of the type charged, a jury had to be alerted in some cases to the options open to it, and that was the responsibility not of the prosecutor or defence counsel but of the trial judge. Thus the public interest in the administration of justice was best served if, in any trial on indictment, the trial

judge left to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there was evidence to support and was more than trifling. That rule would not be extended to summary proceedings since, for all their potential importance to individuals, they did not engage the public interest to the same degree. It would also be confined to alternative verdicts obviously raised by the evidence, ie alternatives which would suggest themselves to the mind of any ordinarily knowledgable and alert criminal judge, excluding alternatives which ingenious counsel might identify through diligent research after trial. Application of that rule might in some cases benefit the defendant, protecting him against an excessive conviction. In other cases, it might benefit the public by providing for the conviction of a lawbreaker who deserved punishment. A defendant might, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency. It was, of course, fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial. That might be so if it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged. If the prejudice were significant and could not be avoided or mitigated at that stage, the overall interests of justice might mean that the duty to direct on the alternative verdict would not apply. There might also be unfairness if the jury first learned of the alternative from the judge's summing-up, when counsel had not had the opportunity to address it in their closing speeches. However, that risk would be met if the proposed direction was indicated to counsel at some stage before they made their closing speeches. In the instant case, the judge's failure to leave a manslaughter verdict to the jury was a material irregularity. No appellate court could be sure that a jury, fully directed, would not have convicted of manslaughter. Accordingly, the appeal would be allowed, and the matter remitted to the Court of Appeal which would be invited to quash the conviction and could also deal with any application for a retrial (see [12], [23], [24], [27], [28], [40], [43]–[45], [61]–[63], [76], [78], [80]–[85], [92], [93], [100], [102], below).

Dicta of Lord Clyde in *Von Starck v R* [2000] 4 LRC 232 at 237 applied.

Notes

For the judge's summing up, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1014.

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Appeal

Graham James Coutts appealed with leave of the Appeal Committee of the House of Lords given on 18 April 2005 from the decision of the Court of Appeal (Criminal Division) (Lord Woolf CJ, Cresswell and Simon JJ) on 21 January 2005 ([2005] EWCA Crim 52, [2005] 1 WLR 1605) dismissing his appeal against his conviction for murder in the Crown Court at Lewes on 4 February 2004 following a trial before Judge Brown and a jury. The facts are set out in the opinion of Lord Bingham of Cornhill.

Edward Fitzgerald QC and *Paul Taylor* (instructed by *Fisher Meredith*) for the appellant.
John Kelsey-Fry QC and *Mark Summers* (instructed by the *Crown Prosecution Service*) for the Crown.

Their Lordships took time for consideration.

19 July 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, the appellant, Mr Coutts, was convicted of murder on an indictment charging him with that crime alone. Evidence was adduced at the trial which would have enabled a rational jury, if they accepted it, to convict him of manslaughter. But the trial judge, with the support of the prosecution and the consent of the defence, did not leave an alternative count of manslaughter to the jury. He directed the jury that they should convict of murder if satisfied that the appellant had committed that offence and, if not so satisfied, acquit. On his appeal to the Court of Appeal (Criminal Division) the appellant contended that a manslaughter verdict should have been left to the jury for their consideration, irrespective of the parties' wishes, since there was evidence to support it. The Court of Appeal rejected that contention, and by leave of the House the appellant now challenges its decision. The narrow question raised by the appeal is whether, on the facts of this case, the trial judge should have left an alternative verdict of manslaughter to the jury. The broader question, of more general public importance, concerns the duty and discretion of trial judges to leave alternative verdicts of lesser-included offences to the jury where there is evidence

which a rational jury could accept to support such a verdict but neither prosecution nor defence seek it.

THE FACTS AND THE PROCEEDINGS

[2] The facts of the case were summarised at some length by the Court of Appeal ([2005] EWCA Crim 52, [2005] 1 WLR 1605), and are the subject of a fairly detailed statement agreed between the parties for the purpose of this appeal. For present purposes a bare outline will suffice.

[3] The deceased (Jane Longhurst) lived with her male partner in Brighton. The appellant and his girlfriend Lisa Stephens lived in a flat in Hove. Lisa Stephens was a friend of the deceased, with whom the appellant became acquainted. On 14 March 2003 the deceased died at the appellant's flat. He stored her body first in his car, then in his shed, then in a commercial storage facility. On 19 April he took her body to an area of woodland some distance away and set fire to it. When found, the body was burning and unclothed. It had a ligature made from a pair of tights tied twice around the neck, with a knot on the right-hand side. The appellant was interviewed by the police before and after discovery of the body, but prevaricated for reasons which he later sought to explain and justify. Some weeks later he told a legal representative that he had not intended to kill the deceased or cause her serious harm, and that he had never caused harm to anybody in the past when using ligatures in sexual activities. He was charged with murder and in due course tried before Judge Brown and a jury in the Crown Court at Lewes.

[4] The expert pathologists called by the prosecution and the defence respectively at the trial were agreed that the cause of the deceased's death was compression of her neck by the ligature, causing her to be asphyxiated. But they disagreed on the most likely mechanism. The prosecution expert thought vascular strangulation or respiratory strangulation the most likely mechanisms, and considered vagal inhibition to be less likely. The defence expert thought vagal inhibition the most likely explanation. Both experts gave reasons for holding the opinions which they did, which were fully explored in evidence before the jury. The evidence suggested that death, if caused by vascular or respiratory strangulation, would have occurred within about 2–3 minutes; if by vagal inhibition, it would have occurred more quickly, possibly within 1–2 seconds.

[5] Much of the evidence at trial was directed to the appellant's sexual habits and propensities. One witness, called by the prosecution, had had a seven-year relationship with the appellant, during which he had, with her consent, placed his hand around her neck, before and during intercourse, and had used tights and knickers around her neck. Another witness had had a shorter and more recent relationship. The appellant had asked her to put her hands around his neck during intercourse, and he had put pressure on her windpipe, sometimes using a stocking tied round her neck, which he would pull from both sides. She had allowed him to do this because of the pleasure it gave him but she had never enjoyed it herself and he had always stopped when she asked. With his current partner, Lisa Stephens, he had on a few occasions indulged in what he called 'breath control play'. There was some evidence, which was denied, that the deceased had engaged in similar activity with a partner other than the appellant.

[6] The appellant said that he had been fascinated by women's necks for about 20 years, but that he had no interest in violence and his fetish did not extend to strangulation. He testified that on 14 March 2003 he and the deceased had had

consensual asphyxial sex and her death had been a tragic accident. He had put his hand around her neck, and she had squeezed his hand to tighten his grip. He had then, with her consent, tied a pair of tights round her neck and tied a knot in them. At some point he had closed his eyes and released the tights. He did not know how the deceased had died.

[7] The prosecution led evidence to show that before and after 14 March 2003 the appellant had visited a number of pornographic websites, showing violence towards women. Reliance was also placed on certain websites and on repeated visits by the appellant to the storage facility where the body of the deceased had been stored to suggest that he had necrophiliac propensities.

[8] At the close of the evidence the trial judge very properly invited the submissions of counsel on whether he should direct the jury that a verdict of guilty of manslaughter was open to them. Prosecuting counsel submitted that it would be unfair to do so. He said:

> 'It is true that one could mount an argument in law to suggest that the defence account, even if accepted, might amount either to gross negligence, on the one hand, or, arguably, an unlawful and dangerous act on the other; and so there would be room, arguably, for an alternative verdict, even on the defence account, of manslaughter . . .'

But he submitted that the Crown had throughout put forward the case that this was a deliberate killing and nothing else. If that was not proved, the appellant was entitled to be acquitted. It would be wrong to put the case on any alternative basis. Counsel then representing the appellant agreed, although he later ventilated the possibility of a verdict of 'no intent manslaughter' as opposed to 'unlawful act or gross negligence manslaughter'. The judge asked counsel directly whether he was inviting him to put manslaughter on any basis to the jury, and counsel gave a provisional answer in the negative, while reserving the right to discuss the question with the appellant and raise the matter again. He did not raise the matter with the judge again, but did discuss it with the appellant. According to a statement of the appellant, seen and not controverted by counsel then acting, the latter asked him 'Do you want us to make representation, or do you want to roll the dice and be home with Lisa and the boys?' The appellant was advised that if convicted of manslaughter he would receive a sentence of as long as 15 years, and agreed that counsel should not ask the judge to leave manslaughter to the jury. Thus the judge directed the jury on the ingredients of murder in terms of which no complaint is made, and directed them to acquit if they thought that the death was or might have been an accident. No mention was made of manslaughter. The jury convicted the appellant of murder.

[9] In the Court of Appeal it was submitted for the appellant that a trial judge ought in the ordinary way and save in some exceptional cases to leave to the jury an alternative count of manslaughter which there is evidence to support, and that the trial judge in this case should have done so whether or not that was the course which counsel on both sides preferred. The Court of Appeal (Lord Woolf CJ, Cresswell and Simon JJ), having reviewed the leading authorities, rejected that submission ([2005] 1 WLR 1605 at [81]–[84]). The court did not recognise a risk that a jury in a case of this kind, faced with a stark choice between convicting of murder and acquitting altogether, might improperly convict. It would have been unfair and unjust to leave the alternative count 'for the very good reason that it

involved a different and inconsistent case from that put forward by the prosecution'. To have introduced an alternative count would have made the jury's task far more complicated without enhancing the interests of justice.

THE PARTIES' SUBMISSIONS

[10] Mr Fitzgerald QC (who did not appear at the trial) submitted for the appellant that if in a trial for murder there is credible evidence which would, if accepted, support a verdict not of murder but of manslaughter, the trial judge ought in the ordinary way to leave manslaughter to the jury for their consideration, unless it would for any reason be unfair to do so. The judge should follow that course even though the defence has not advanced such a case or sought such a verdict, and even though the prosecution has not raised, or has rejected, that possibility. The jury, as the tribunal of fact and arbiter of guilt, ought in principle to be invited to consider all issues properly raised by the evidence. If in a horrific case such as this the jury are faced with a stark choice between convicting of murder and acquitting a defendant whose conduct might be thought not only repulsive but dangerous, and are not alerted to an intermediate verdict which might (depending on their assessment of the evidence) best fit the facts as they find them, the risk arises that the jury may convict of murder because, consciously or subconsciously, they are unwilling to acquit. If the trial judge fails to leave to the jury a verdict which is raised by credible evidence, that is an irregularity which will ordinarily render the verdict unsafe, unless in all the circumstances the Court of Appeal concludes that the jury would inevitably have convicted even if the alternative verdict had been left.

[11] Mr Kelsey-Fry QC for the Crown took issue with this approach. Accepting, as he had throughout, that the evidence, if accepted, supported a possible verdict of gross negligence manslaughter, he pointed out that neither the Crown nor the defence had asked that such a verdict be left to the jury and it was not a course the judge had favoured. The Crown had taken its stand that this was a deliberate, sadistic killing. The defence said that the death was an accident. The judge had given the jury a clear and accurate direction. If the jury thought that the death might have been an accident, they were to acquit. The integrity of jury trial depended on acceptance that a properly instructed jury would heed and follow the instructions of the judge. It must therefore be accepted that the jury, having deliberated, had found the full elements of murder to be established. There is no reason to suggest that the jury may, despite their oaths, have convicted improperly, and there is nothing to render the conviction unsafe. The Court of Appeal were right to dismiss the appeal for the reasons they gave.

DISCUSSION

[12] In any criminal prosecution for a serious offence there is an important public interest in the outcome (see *R v Fairbanks* [1986] 1 WLR 1202 at 1206). The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the

type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge (see *Von Starck v R* [2000] 4 LRC 232 at 237, [2000] 1 WLR 1270 at 1275; *Hunter v R* [2003] UKPC 69 at [27], [2004] 2 LRC 719 at [27]).

[13] Statutory rules (building in part on rules developed at common law) have been enacted to facilitate achievement of this important objective. Subsections (2) and (3) of s 6 of the Criminal Law Act 1967 provide:

> '(2) On an indictment for murder a person found not guilty of murder may be found guilty—(a) of manslaughter, or of causing grievous bodily harm with intent to do so; or (b) of any offence of which he may be found guilty under an enactment specifically so providing, or under section 4(2) of this Act [assisting offenders]; or (c) of an attempt to commit murder, or of an attempt to commit any other offence of which he might be found guilty; but may not be found guilty of any offence not included above.
>
> (3) Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.'

Thus, to take familiar examples, a defendant accused of murder may be convicted of manslaughter if the evidence shows that he was or may have been provoked, and a defendant accused of wounding with intent may be convicted of unlawful wounding if the evidence establishes the wounding but leaves room for doubt about the intent.

[14] These statutory rules are reinforced by two principles developed in the cases. The first of these principles, relating to manslaughter on grounds of provocation in the context of a count of murder, was expressed by Lord Reading CJ in the Court of Criminal Appeal in *R v Hopper* [1915] 2 KB 431 at 435:

> 'We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question ought to have been left to the

jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand.'

This passage was quoted with approval by Viscount Simon LC giving the unanimous opinion of the House in *Mancini v DPP* [1941] 3 All ER 272 at 276, [1942] AC 1 at 7–8. It was again cited with approval by Lord Tucker, giving the reasons of the Privy Council in *Bullard v R* [1957] AC 635 at 642, [1957] 3 WLR 656 at 659–660, who held that it had—

> 'long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked.'

Lord Tucker went on to say (at 644 and 661 respectively):

> 'Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.'

Lord Tucker's ruling first quoted above was itself quoted with approval by the Court of Criminal Appeal in *R v Porritt* [1961] 3 All ER 463 at 468, [1961] 1 WLR 1372 at 1376–1377. It has since been applied in many cases. But the fullest statement of the principle is that given by Lord Clyde on behalf of the Privy Council in *Von Starck v R* [2000] 4 LRC 232 at 237, [2000] 1 WLR 1270 at 1275, when, in a case where there was evidence throwing doubt on the defendant's capacity to form the intent necessary for murder, he said:

> 'The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular, counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration, in a fair and balanced manner, the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial, whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course

the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognised in *Xavier v The State* (17 December 1998, unreported), a low one and, as was also recognised in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons, counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled, on the evidence, to reach in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them. In *Xavier v The State* the defence at trial was one of alibi. But it was observed by Lord Lloyd of Berwick in that case that, "If accident was open on the evidence, then the judge ought to have left the jury with the alternative of manslaughter". In the present case the earlier statements together with their qualifications amply justified a conclusion of manslaughter and that alternative should have been left to the jury.'

This ruling has been applied by the Privy Council in *Hunter v R* [2004] 2 LRC 719 and by the Court of Appeal in Northern Ireland in *R v Shaw* [2001] NIJB 269. The judge's duty to leave a possible manslaughter defence arising on the evidence to the jury, even though such defence has not been advanced or has been expressly disavowed at the trial, is clear (see, for example, *R v Cox* [1995] 2 Cr App R 513 at 516–517; *R v Dhillon* [1997] 2 Cr App R 104 at 114).

[15] The second principle is closely allied with the first (and is not, as counsel for the appellant insisted, engaged on the facts of this case). It is that ordinarily, and subject to limited exceptions, a trial judge should leave to the jury the possibility of convicting of lesser-included offences, that is, lesser offences within s 6(3) of the 1967 Act but not all the ingredients of the offence charged. In *R v McCormack* [1969] 3 All ER 371, [1969] 2 QB 442 a defendant accused of unlawful sexual intercourse with a girl under the age of 16 denied that charge but admitted in evidence an act which was in law an indecent assault. The judge left that alternative to the jury, holding that he had no discretion to do otherwise, and the defendant was convicted of the lesser offence. His argument that the judge should not have left that alternative to the jury was rejected on appeal, although a discretion not to do so was held to exist. Fenton Atkinson LJ, giving the judgment of the Court of Appeal (which also included Melford Stevenson and James JJ), said ([1969] 3 All ER 371 at 373–374, [1969] 2 QB 442 at 445–446):

'It is said that the prosecution had not specifically run indecent assault as a possible verdict for the jury to consider, and it is said, therefore, that the learned deputy chairman had a discretion whether or not to leave that matter to the jury, and there was some discussion about that and counsel for the Crown submitted to the deputy chairman that it was his duty to put all the alternatives. The deputy chairman said: "I would like to know whether I have a discretion not to do it. Frankly, I would exercise that discretion". In fact, he went on to decide that he had no discretion in the matter, he left the

alternative of indecent assault to the jury and the jury convicted. Indeed, on our view as to what constitutes an indecent assault on a girl under 16, and in face of the defendant's own evidence, there was no possible answer to such a lesser charge.

The view this court has formed is that the learned deputy chairman did have a discretion in the matter. Cases vary so infinitely that one can well envisage a case where the possibility of conviction of some lesser offence has been completely ignored by both prosecution and defence—it may be that the accused has never had occasion to deal with the matter, has lost a chance of giving some evidence himself about it or calling some evidence to cover or guard against the possibility of conviction of that lesser offence—and in such a case, where there might well be prejudice to an accused, it seems to this court there must be a discretion in the trial judge whether or not to leave the lesser offence to the jury.

But that was not the situation here, and on the facts of this case we think plainly it would have been a wrong exercise of discretion not to leave this question of indecent assault to the jury, because this was a case where the defendant himself had given evidence and had said on oath "True I did not have intercourse, but I did do that which amounts to an indecent assault". In view of that perfectly plain evidence which he had given, we think the only right course for the learned deputy chairman to take was to do what he did and to leave that matter to the jury.'

[16] In *R v Fairbanks* [1986] 1 WLR 1202 the question before the Court of Appeal was whether, on an indictment charging a single count of causing death by reckless driving, an alternative of driving without due care and attention should have been left to the jury. Giving the reserved judgment of the court, Mustill LJ (sitting with Hodgson and Wood JJ) cited earlier authority on the leaving of lesser counts to the jury, including (at 1205) *R v Parrott* (1913) 8 Cr App R 186 where Phillimore J had said (at 193):

'There may be cases where, in the interests of the prisoner, a judge ought to do so; there are certainly many cases where the interests of justice are not met unless it is pointed out to the jury that they may convict of a lesser offence, or, thinking it a case of "neck or nothing", they may acquit altogether.'

Mustill LJ continued ([1986] 1 WLR at 1205–1206):

'These cases bear out the conclusion, which we should in any event have reached, that the judge is obliged to leave the lesser alternative only if this is necessary in the interests of justice. Such interests will never be served in a situation where the lesser verdict simply does not arise on the way in which the case had been presented to the court: for example if the defence has never sought to deny that the full offence charged has been committed, but challenges that it was committed by the defendant. Again there may be instances where there was at one stage a question which would, if pursued, have left open the possibility of a lesser verdict, but which, in the light of the way the trial has developed, has simply ceased to be a live issue. In these and

other situations it would only be harmful to confuse the jury by advising them of the possibility of a verdict which could make no sense. *a*

We can also envisage cases where the principal offence is so grave and the alternative so trifling, that the judge thinks it best not to distract the jury by forcing them to consider something which is remote from the real point of the case: and this may be so particularly where there are already a series of realistic alternatives which call for careful handling by judge and jury, and *b* where the possibility of conviction for a trivial offence would be an unnecessary further complication.

On the other hand the interests of justice will sometimes demand that the lesser alternatives are left to the jury. It must be remembered that justice serves the interests of the public as well as those of the defendant, and if the *c* evidence is such that he ought at least to be convicted of the lesser offence, it would be wrong for him to be acquitted altogether merely because the jury cannot be sure that he was guilty of the greater.'

The conviction was quashed. *d*

[17] The Court of Appeal (Mustill LJ, Farquharson and Tucker JJ) returned to this issue in *R v Maxwell* [1988] 1 WLR 1265. In that case the defendant had been charged with and convicted of robbery. He had denied that charge but had expressed willingness to plead guilty to burglary, a charge which the prosecution declined to prefer (and which was not a lesser-included offence). The judge *e* rejected a submission by counsel for the defendant that the lesser offence of theft should be left to the jury. The jury, during their deliberations, asked whether there was a lesser charge than robbery of which the defendant could be convicted, having burglary in mind. The judge answered, correctly, that burglary was not an alternative and, incorrectly, that there was no available lesser charge: the defendant could in law have been convicted of theft. The issue on appeal was *f* whether this lesser count should have been left. The court adhered to its general observations in *R v Fairbanks* [1986] 1 WLR 1202, observing (at 1270) that while the right course would vary from case to case 'the judge should always use his powers to ensure, so far as practicable, that the issues left to the jury fairly reflect the issues which arise on the evidence'. That precept had not been observed. Considering what consequences should flow from that conclusion, the court *g* ruled (at 1270):

'To interfere with the verdict would require us to identify solid grounds for suspecting that the members of the jury had foresworn their oaths by *h* deliberately returning a verdict of guilty when they were not sure of it, simply to avoid an unwanted outcome.'

Since no such grounds were established, the appeal was dismissed. On further appeal to the House of Lords ([1990] 1 All ER 801, [1990] 1 WLR 401), the Court *j* of Appeal's decision in *R v Fairbanks* was approved, as was the court's ruling on the judge's use of his powers (at 1270, quoted above), although the House shared the view of the trial judge that theft, as compared with robbery, had been too trifling an offence to leave to the jury. But counsel's criticism of the passage of the court's ruling (at 1270, quoted above) was accepted. Lord Ackner, speaking for the House, said ([1990] 1 All ER 801 at 807, [1990] 1 WLR 401 at 408):

'What is required in any particular case where the judge fails to leave an alternative offence to the jury, is that the court, before interfering with the verdict, must be satisfied that the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct.'

[18] *R v Maxwell* was applied by the Court of Appeal in *R v Maxwell (Nolan)* [1994] Crim LR 848. The judgment of the court was delivered by Hobhouse LJ, sitting with Garland and Curtis JJ, and at pp 5–6 of the transcript he said:

'We consider that, in a case such as this, where there is a factual situation which requires a jury to consider the extent of the joint enterprise and whether all the ingredients of the offence have been proved against one of the defendants, and the fact that the evidence was capable of showing that different offences may have been committed by him, the jury should have that opportunity to consider the alternatives. This is not a case, such as often occurs, where there is a single main clear count charging an offence, and the alternatives to it are not viable alternatives. This is a case where the alternatives were, on the evidence before the jury, clearly viable as regards the appellant . . .

The present case undoubtedly involved disgraceful conduct on the part of this appellant. He had been identified as one of the men in the minicab. It was clear and undisputed on the evidence that he had taken part in a joint attack on the minicab driver in the early hours of the morning and had, on any view, inflicted some injuries upon him. Indeed, on one view, he was the person who had started the actual violence. It was disgraceful conduct, and it would cause outrage if the appellant, having been identified as one of the men involved, were to "get clean away". If the jury were to have a proper opportunity to consider all the alternatives which were open to them in respect of the appellant, they should have had further directions from the judge upon the alternative verdicts that were open to them. The judge laid the ground in his directions about what was involved in a joint enterprise, and the different views that might be taken of how far the joint enterprise went. He referred to the facts, which indicated the increased gravity of the later parts of the incident, and the role of Oakley in aggravating the assault, as well as being involved in the robbery. But he did not then go on to direct the jury that there were alternative verdicts which were open to them.

In our judgment, that did amount to a material irregularity in the conduct of this trial, and makes the appellant's conviction unsafe.'

[19] *R v Maxwell* is not an easy authority, for although, as already noticed, the defendant failed both in the Court of Appeal ([1988] 1 WLR 1265) and in the House of Lords ([1990] 1 All ER 801), he did so on different grounds, neither of which is unproblematical. The Court of Appeal dismissed the appeal because the jury were not shown to have returned an improper verdict. But given the restraint on disclosure of jury deliberations this is ordinarily very hard to show. Mr Kelsey-Fry was disposed to agree that the only basis for drawing an inference that the jury had returned an improper verdict would ordinarily be a question asked by the jury. Yet in *R v Maxwell* the jury did ask such a question and the

inference was not drawn. The House dismissed the appeal because the lesser alternative offence was relatively trifling. Theft is, of course, a much less serious offence than robbery, lacking the aggravating feature of violence. But it carried a maximum sentence of ten years' imprisonment, and the discrepancy in terms of gravity between the offence charged and the lesser alternative was scarcely greater than in *R v Fairbanks* [1986] 1 WLR 1202, where the defendant's appeal succeeded.

[20] In *Gilbert v R* (2000) 170 ALR 88 the defendant was charged with murder and the trial judge directed the jury, incorrectly under the law as later laid down, that manslaughter was not an alternative verdict. The jury, correctly directed on the ingredients of murder, convicted. The issue in the High Court of Australia was whether a substantial miscarriage of justice had occurred. Mr Kelsey-Fry relied on strong statements by McHugh and Hayne JJ, very much in line with his own submission, that the verdict of a properly directed jury should be respected (see in particular [30]–[31] and [52]). But these were dissenting judgments. Gleeson CJ and Gummow J (at [6]) recognised the difficulty of knowing whether a misdirection is advantageous to one party or the other and held (at [13]) that while it could, as a general rule, be assumed that juries understand and follow judicial directions, it need not be assumed that juries were unaffected by matters of possible prejudice when making their decisions. An appellate court should not (see [16]) assume that juries adopted a mechanistic approach to the task of fact-finding, oblivious of the consequences of their conclusion. Callinan J, agreeing, recognised (at [96]) that a jury room might not be a place of undeviating intellectual and logical rigour, and concluded (at [101]):

> 'The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice.'

[21] In Australia, as here, the trial judge's duty to direct the jury on alternative verdicts which there is evidence to support is not removed by the decisions of trial counsel. In *Pemble v R* (1971) 124 CLR 107 at 117–118 Barwick CJ said:

> 'Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part . . .
>
> Here, counsel for the defence did not merely not rely on the matters now sought to be raised; he abandoned them and expressly confined the defence to the matters he did raise. However, in my opinion, this course did not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused.'

[22] It appears that the approach of the majority of the High Court of Australia in *Gilbert v R* reflects the principle generally applied in the United States (see *Stevenson v US* (1896) 162 US 313 at 323, *Berra v US* (1956) 351 US 131 at 134, *Keeble v US* (1973) 412 US 205 at 212–213). In the last of these authorities Brennan J, giving the opinion of the Supreme Court, said:

> 'Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option—convicting the defendant of simple assault—could not have resulted in a different verdict.'

But the approach to the decisions of trial counsel appears to differ. While the Federal Rules of Criminal Procedure provide that '[t]he defendant may be found guilty of an offense necessarily included in the offense charged . . .' this has been universally interpreted as granting a defendant a right to a requested lesser-included offence instruction if the evidence warrants it (see *Beck v Alabama* (1980) 447 US 625 at 635, n 11). In the Supreme Court of Canada, the failure of the trial judge to direct the jury on the possibility of a manslaughter conviction has been held to be, following the language of Lord Tucker in *Bullard v R* [1957] AC 635 at 644, [1957] 3 WLR 656 at 661, a grave miscarriage of justice (see *R v Jackson* [1993] 4 SCR 573 at 593).

[23] The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment.

A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency. a

[24] It is of course fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial. This might be so if it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged. But no such infringement has ordinarily been found where there is evidence of provocation b not relied on by the defence, nor will it ordinarily be unfair to leave an alternative where a defendant who, resisting conviction of a more serious offence, succeeds in throwing doubt on an ingredient of that offence and is as a result convicted of a lesser offence lacking that ingredient. There may be unfairness if the jury first learns of the alternative from the judge's summing-up, when counsel have not had the opportunity to address it in their closing speeches. But that risk is met if c the proposed direction is indicated to counsel at some stage before they make their closing speeches. They can continue to discount the alternative in their closing speeches, but they can address the jury with knowledge of what the judge will direct. Had this course been followed in the present case there would have been no unfairness to the appellant, and while taking a contrary view the Court d of Appeal did not identify the unfairness which it held would arise. It is not unfair to deprive a defendant, timeously alerted to the possibility, of what may be an adventitious acquittal.

[25] The Court of Appeal rightly recognised the high sense of public duty which juries customarily bring to their task. I would not wish to belittle that in any way. But one does not belittle it to decline (as the High Court of Australia e has done) to attribute to juries an adherence to principle and an obliviousness to consequences which is scarcely attainable.

[26] Nor, with respect, is it an objection that the jury's task would have been more complicated had a manslaughter direction been given. Compared with many directions given to juries, a manslaughter direction in this case would not f have been complicated. But even if it would, that cannot be relied on as a reason for not leaving to the jury a verdict which they should on the facts have considered. If juries are to continue to command the respect of the public, they must be trusted to understand the issues raised even by a case of some complexity. For reasons already given, the wishes of counsel cannot override the judge's duty. g

[27] I am of opinion that the judge should have left a manslaughter verdict to the jury. His failure to do so, although fully understandable in the circumstances, was a material irregularity. While the murder count against the appellant was clearly a strong one, no appellate court can be sure that a jury, fully directed, would not have convicted of manslaughter. For these reasons, and those given h by my noble and learned friends Lord Hutton, Lord Rodger of Earlsferry and Lord Mance, with which I agree, I would accordingly allow the appeal. I would remit the matter to the Court of Appeal and invite that court to quash the conviction. It may also deal with any application for a retrial which may be made, the appellant remaining in custody meanwhile.

j

LORD NICHOLLS OF BIRKENHEAD.

[28] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill, Lord Hutton, Lord Rodger of Earlsferry and Lord Mance. For the reasons they give, with which I agree, I too would allow this appeal.

LORD HUTTON.

[29] My Lords, the appellant in this case was convicted of the murder of Jane Longhurst. At his trial his defence was that she had died by accident when he and she had been engaged in consensual sexual activity. The only issue left to the jury was whether he was guilty of murder. The question which arises on this appeal to the House is whether the issue of manslaughter should have been left to the jury as an alternative verdict which they could return under s 6(2) of the Criminal Law Act 1967, the appellant's contention that this issue should have been left having been rejected by the Court of Appeal ([2005] EWCA Crim 52, [2005] 1 WLR 1605).

[30] An outline of the facts of the case are set out in the speech of my noble and learned friend Lord Bingham of Cornhill and in order to state my opinion on the point before the House it is relevant to refer to two particular parts of the evidence at the trial. One matter which was established was that in the past when the appellant engaged in sexual activity with a female partner by reason of his fetish with women's necks he would frequently restrict her breathing with her consent, telling her that it would heighten her feelings. On occasions he would put tights round her neck which he would pull tight from both sides. Two women who had had a relationship with the appellant, one between 1989 and 1996 and the other between 1996 and 1997, gave evidence of this consensual asphyxial sex with him. One of them said that she often had to tell the appellant to stop putting pressure on her neck and he always stopped when asked, and there was no suggestion that he continued putting pressure on the neck of the other woman if she asked him to stop.

[31] The second part of the evidence to which I refer is the evidence of the forensic pathologist, Dr Richard Shepherd, called for the defence, as to the danger of pressure being put on the neck. In the course of his examination-in-chief he said:

> 'Q. So it rather looks as if pressure to the neck is a pretty dangerous business?
>
> A. It—certainly from my practice I know and from reports recorded in the forensic literature, there is no safe way to squeeze someone's neck. It always carries with it the risk of this stimulating these receptors and producing this vagal response.
>
> Q. We can all understand that if you are choking someone, in the sense that you are restricting either the blood flow or the airflow in either of the first two ways, the vascular or the respiratory are potential ways of strangling someone but it is going to take time?
>
> A. Yes.
>
> Q. And there may be some sort of struggle or the opportunity to say: "I can't breathe"?
>
> A. Yes.
>
> Q. What about the vagal inhibition method, how does that affect that scenario?
>
> A. If it kicks in at the level that we have mentioned, where there is a severe effect on the heart, causing it to slow right down or causing it to beat abnormally or causing it to stop, there is no prior warning to that; that will occur out of the blue.
>
> Q. And is the situation therefore that someone may literally drop dead?

A. They may literally drop dead with the pressure being applied to their neck, and there are recorded cases of that occurring within the forensic literature.' *a*

In the course of his cross-examination he said:

'Q. Doctor, I want to ask you about something else, please, and that is blood, not bruising blood, but blood in the way I am about to describe. If I have understood you correctly, vagal inhibition, stimulating the bearer (?) receptors, can make you drop dead? *b*

A. Yes.

Q. Presumably if what you were saying earlier was right, that would mean anywhere on the neck that might happen? *c*

A. Absolutely. Pressure anywhere on the neck is an extremely dangerous action. Extremely dangerous action.'

[32] Therefore if one of the appellant's sexual partners in the years between 1989 and 1997 had died as a result of his putting tights round her neck and pulling them tight and there had been no additional evidence, as there was at his trial, of his visits to pornographic websites showing extreme violence towards women under headings such as 'asphyxiation and strangulation' and his visits to the place where he had stored the body of the deceased, which suggested that he had necrophiliac propensities, I consider it to be clear that if he had been charged with murder the defence could have advanced a case of some force that he had not intended to kill or cause grievous bodily harm and was, at most, guilty of manslaughter. *d* *e*

[33] At the close of the evidence prosecuting counsel, Mr Kelsey-Fry QC, raised the issue of manslaughter: *f*

'Mr Kelsey-Fry: May I raise what perhaps might be the first and most important topic. Ordinarily, of course, in a charge of murder there is an alternative verdict available.

Judge Brown: Yes.

Mr Kelsey-Fry: The way the Crown have put the case, from start to finish, is that this was a deliberate killing, and it is a contest between the Crown's allegation of a deliberate killing on the one hand, and accident on the other. It is true that one could mount an argument in law to suggest that the defence account, even if accepted, might amount either to gross negligence, on the one hand, or, arguably, an unlawful and dangerous act on the other; and so there would be room, arguably, for an alternative verdict, even on the defence account, of manslaughter. The Crown's view is that that would be quite unfair and quite wrong in this case. Having set the case out as a contest between deliberate killing and the defence version, if we failed to prove the deliberate killing, in our submission the defendant is entitled to a full acquittal.' *g* *h* *j*

[34] A discussion then took place between the judge and prosecution and defence counsel, and the judge put the specific question to defence counsel whether he invited him to put manslaughter on any basis to the jury. Counsel replied that his provisional answer was that he did not, but that he had

not, as yet, had the opportunity to discuss the matter in detail with the appellant. He asked permission, if the position changed, to raise the matter with the judge the next morning, which permission the judge granted. Defence counsel made no reference to the matter the next day and therefore with the agreement of both counsel the judge did not leave manslaughter to the jury.

[35] In a statement which the appellant made for the purposes of his appeal to the Court of Appeal he said (and defence counsel accepts that it correctly represents the gist of his discussion with the appellant) that after the discussion between the judge and counsel, defence counsel said to him: 'Do you want us to make representation, or do you want to roll the dice and be home with Lisa and the boys?' The appellant also said that he was advised that he would receive a sentence as long as 15 years on a conviction for manslaughter. Therefore it is apparent that rather than accept the strong probability of a conviction for manslaughter with a lengthy sentence, the appellant decided that he would bank on an acquittal on the count of murder with consequent release, although that course involved running the risk of a conviction for murder.

[36] It is clear that there was evidence at the trial which enabled the Crown to advance a strong case that the appellant deliberately and intentionally killed Jane Longhurst to satisfy his fantasies of sexual violence. But I also consider that there were parts of the evidence to which I have referred above which raised the reasonable possibility that he lacked the necessary intent either to kill or to cause grievous bodily harm and that he was guilty of manslaughter. When he raised the matter with the judge, prosecuting counsel accepted that the appellant's account of what had happened might amount either to manslaughter by gross negligence or, 'arguably', manslaughter by an unlawful and dangerous act. In the absence of a finding of an intent to kill or cause grievous bodily harm, I consider that on the facts of this case the death would come more appropriately within the category of manslaughter by an unlawful and dangerous act than within the category of death by gross negligence. Quite apart from the evidence of Dr Shepherd, ordinary common sense indicates that putting tights round a woman's neck and pulling them tight is a dangerous act which creates a realistic risk of serious harm.

[37] The appellant's actions in doing so were unlawful because of the danger involved and because consent does not prevent such a dangerous act in the course of sex being unlawful. In *R v Emmett* [1999] EWCA Crim 1710 (which the judge very properly drew to the attention of counsel in his discussion with them) the appellant in the course of sexual activity with his female partner and with her consent covered her head with a plastic bag which he tied at her neck with a ligature and which he then tightened to her point of endurance. She suffered distress because of loss of oxygen and was found by a doctor to have suffered subconjunctival haemorrhages in both eyes and some petechial bruising around the neck. The appellant was charged with assault occasioning actual bodily harm. The Crown Court judge ruled that the defence of consent was not available to the appellant and he appealed to the Court of Appeal against this ruling. In dismissing the appeal the court (constituted by Rose LJ and Wright and Kay JJ) stated:

> 'Accordingly, whether the line beyond which consent becomes immaterial is drawn at the point suggested by Lord Jauncey and Lord Lowry [in *R v Brown* [1993] 2 All ER 75, [1994] 1 AC 212], the point at which common assault becomes assault occasioning actual bodily harm, or at some higher

level, where the evidence looked at objectively reveals a realistic risk of a more than transient or trivial injury, it is plain, in our judgment, that the activities [engaged] in by this appellant and his partner went well beyond that line. The learned judge, in giving his ruling said:

> "In this case, the degree of actual and potential harm was such and also the degree of unpredictability as to injury was such as to make it a proper cause [for] the criminal law to intervene. This was not tattooing, it was not something which absented pain or dangerousness and the agreed medical evidence is in each case, certainly on the first occasion, there was a very considerable degree of danger to life; on the second, there was a degree of injury to the body."
>
> With that conclusion, this court entirely agrees.'

[38] In *DPP v Newbury* [1976] 2 All ER 365 at 367, [1977] AC 500 at 506–507 Lord Salmon in a speech with which all the other members of the House agreed stated:

> 'The direction which [the trial judge] gave is completely in accordance with established law, which, possibly with one exception to which I shall presently refer, has never been challenged. In *R v Larkin* [1943] 1 All ER 217 at 219, Humphreys J said:
>
> "Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently he causes the death of that other person by that act, then he is guilty of manslaughter."

I agree entirely with Lawton LJ that that is an admirably clear statement of the law which has been applied many times. It makes it plain (a) that an accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that that act inadvertently caused death and (b) that it is unnecessary to prove that the accused knew that the act was unlawful or dangerous. This is one of the reasons why cases of manslaughter vary so infinitely in their gravity. They may amount to little more than pure inadvertence and sometimes to little less than murder.

I am sure that in *R v Church* [1965] 2 All ER 72, [1966] 1 QB 59 Edmund Davies J, in giving the judgment of the court, did not intend to differ from or qualify anything which had been said in *R v Larkin*. Indeed he was restating the principle laid down in that case by illustrating the sense in which the word "dangerous" should be understood. Edmund Davies J said ([1965] 2 All ER 72 at 76, [1966] 1 QB 59 at 70):

> "For such a verdict [guilty of manslaughter] inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."

a The test is still the objective test. In judging whether the act was dangerous the test is not did the accused recognise that it was dangerous but would all sober and reasonable people recognise its danger.'

In *A-G's Reference (No 3 of 1994)* [1997] 3 All ER 936 at 956–957, [1998] AC 245 at 270–271 Lord Salmon's statement of the law was approved and followed by b Lord Hope of Craighead. Therefore, I consider that there was a viable defence case that the death of Jane Longhurst constituted manslaughter by an unlawful and dangerous act.

[39] There is a long line of authority that the trial judge is bound to put to the jury such questions as appear to him properly to arise on the evidence even though defence counsel may not have raised a particular issue himself. Two of c those cases are *R v Hopper* [1915] 2 KB 431 and *Mancini v DPP* [1941] 3 All ER 272, [1942] AC 1. In *R v Hopper* Lord Reading CJ said (at 435):

'Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to d him properly to arise upon the evidence although counsel may not have raised some question himself.'

In *Mancini v DPP* Viscount Simon LC said ([1941] 3 All ER 272 at 276, [1942] AC 1 at 7):

e

'The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would f justify a direction that they should consider it.'

[40] This principle was applied by the Privy Council in *Von Starck v R* [2000] 4 LRC 232 at 237, [2000] 1 WLR 1270 at 1275 and in delivering the judgment of the Board the rationale of the principle was fully stated by Lord Clyde:

g 'The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular, counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put h to the jury for their consideration, in a fair and balanced manner, the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial, whether or not they have all j been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them . . . if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any,

in which the judge has no duty to put the possibility before the jury. For tactical reasons, counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled, on the evidence, to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them.'

Lord Clyde's judgment was applied by the Privy Council in *Hunter v R* [2003] UKPC 69, [2004] 2 LRC 719 and by the Court of Appeal of Northern Ireland in *R v Shaw* [2001] NIJB 269.

[41] In their judgment ([2005] 1 WLR 1605) the Court of Appeal in the present case referred to two features which they considered distinguished the present case from the authorities relied on by Mr Fitzgerald QC for the appellant (who did not appear at the trial). At [58] they said:

'It is to be noted that there are two critical features of this case, which distinguish it from the previous cases. First, as we have seen, it is the fact that both counsel for the prosecution and the defence thought that it would not be in the interests of the fair trial of the defendant, if the offence of manslaughter was left to the jury. The second distinction is that the only basis upon which the jury could convict the appellant of manslaughter, was factually wholly different from the case that the prosecution was advancing in order to obtain a conviction of murder. It was not, for example, a case where it would be possible for the jury to come to the conclusion that the appellant was not guilty of murder but guilty of manslaughter on the case for the prosecution.'

They further said (at [61]):

'In addition, at that stage of the case all the evidence, on behalf of both the prosecution and the defence, had been given so it could well have caused unfairness to the appellant to change fundamentally the nature of the case against him during the summing up. While it is conceded that there was a viable basis for a verdict of manslaughter based upon the appellant's account, namely that it involved an unlawful and dangerous act of tightening the ligature around the victim's neck during consensual asphyxial sex, such a view of the facts would be wholly inconsistent with the case for the prosecution. So, for the judge to introduce the possibility of a verdict of manslaughter on these grounds would have transformed the nature of the case that the appellant was required to meet. The jury would not only have had to decide whether the victim may have died in the course of consensual sexual intercourse, but they would also have had to come to a conclusion as to the degree of danger that consensual asphyxial sexual intercourse, as practised by the appellant, involved.'

[42] Later in their judgment the Court of Appeal said:

'[83] . . . What is important here is that the judge accepted it would be unfair, and therefore unjust, to leave the alternative count for the very good reason that it involved a different and inconsistent case from that put forward by the prosecution. If, in this case, manslaughter had been included, and the jury convicted the appellant of this offence, an appeal would almost inevitably have followed, and it is doubtful whether the conviction could have been regarded as safe. There may be cases where the approach based upon not withdrawing a defence from the jury should be extended to situations where the alternative verdict would not be a defence, but this case is not that situation. The judge's task is, as far as practical and appropriate, to simplify the task of the jury, not to make it more complicated than it would otherwise be.

[84] As our detailed consideration earlier in this judgment of the facts is intended to make clear, the case for the prosecution required the jury to consider a formidable body of circumstantial evidence. The critical issue for the jury to determine, however, was whether it was possible for the victim's death to have been an accident. In this situation, to introduce an alternative count would make the jury's task far more complicated without enhancing the interests of justice. Properly understood, the authorities only require a jury to be directed as to manslaughter, as an alternative to murder, when it is in the interests of justice for this to happen. It is not in the interests of justice for this to happen where it would result in unfairness to a defendant, or where it would make the task of the jury far more difficult without there being any sufficient countervailing benefit which justifies an additional burden being placed upon the jury.'

[43] I am, with respect, unable to agree with the reasons given by the Court of Appeal for not following the principle applied in *Von Starck v R* [2000] 4 LRC 232, [2000] 1 WLR 1270. As regards the first reason, although defence counsel did not wish the judge to leave manslaughter to the jury it is clear that this was because of a tactical decision by the appellant to go for a complete acquittal notwithstanding that this involved the risk of a conviction for murder. But, although it appears distasteful that a defendant can ask the judge not to leave a lesser alternative count to the jury and then, when convicted on the greater count, complain to an appellate court that the alternative count was not left, the interests of justice require, as Lord Clyde stated, that the jury should be able to reach a sound conclusion on the facts in the light of a complete understanding of the law applicable to them.

[44] As regards the second reason given by the Court of Appeal, I consider that the leaving of relevant issues to the jury which may result in the jury coming to the conclusion which is the most just one on the evidence cannot depend on the way in which the prosecution chooses to present its case but must depend on all the evidence; as Lord Clyde stated in *Von Starck v R* [2000] 4 LRC 232 at 238, [2000] 1 WLR 1270 at 1276, 'the issues in a criminal trial fall to be identified in light of the whole evidence led before the jury'.

[45] I am also unable to agree with the view of the Court of Appeal that it would have been unfair to the defendant to leave manslaughter to the jury and that a conviction for manslaughter would almost inevitably have led to an appeal which might have succeeded. If the judge had decided to leave manslaughter to the jury he would have told counsel of his decision and they would have referred

to the issue in their closing speeches to the jury. The actions and mental attitude of the defendant at the time of sexual activity with the deceased were relevant to the issue of manslaughter as they were to the issue of murder, and the defendant had given a full account of his actions and mental attitude to the jury. Not infrequently in a murder case, the defendant advances a defence which, if not disproved by the prosecution, would entitle him to a complete acquittal, as when the defendant claims that he used a weapon in self-defence, but the judge, pursuant to his duty, leaves the issue of provocation to the jury if it arises on the evidence, notwithstanding that defence counsel has not wished that issue to be left, and a verdict of manslaughter by reason of provocation does not necessarily mean that the defendant has had an unfair trial. In *R v McCormack* [1969] 3 All ER 371 at 373, [1969] 2 QB 442 at 446 the Court of Appeal said:

> 'Cases vary so infinitely that one can well envisage a case where the possibility of conviction of some lesser offence has been completely ignored by both prosecution and defence—it may be that the accused has never had occasion to deal with the matter, has lost a chance of giving some evidence himself about it or calling some evidence to cover or guard against the possibility of conviction of that lesser offence—and in such a case, where there might well be prejudice to an accused, it seems to this court there must be a discretion in the trial judge whether or not to leave the lesser offence to the jury.'

Whilst there will be cases, as the Court of Appeal recognised in *R v McCormack*, where it would be unfair to the defendant to leave an alternative verdict to the jury, I am satisfied that this is not such a case. Nor do I think that the task of the jury would have been unduly complicated by leaving the issue of manslaughter to them. Therefore, although it was understandable why he failed to do so, I consider that the judge should have left the issue of manslaughter to the jury. The question then arises whether the conviction for murder should be quashed as unsafe.

[46] In the authorities which consider whether a conviction should be quashed on appeal when the judge has erred in failing to leave an alternative verdict to the jury two lines of reasoning have been adopted. One line of cases has followed the reasoning of Lord Ackner in *R v Maxwell* [1990] 1 All ER 801, [1990] 1 WLR 401 (with whose judgment the other members of the House agreed). In that case the appellant had been tried and convicted on a count of robbery. Under s 6(3) of the 1967 Act on the count of robbery the jury could return the alternative verdict of theft, but an alternative verdict of burglary could not be returned. The prosecution declined to add a count of burglary to the indictment, a decision which Lord Ackner considered to have been justified (see [1990] 1 All ER 801 at 807, [1990] 1 WLR 401 at 408). The appellant appealed on the ground that the judge should have left the alternative verdict of theft to the jury and the House dismissed the appeal, Lord Ackner stating (at 807 and 408 respectively) that—

> 'on the facts of this case the judge was entitled to conclude that the alternative of theft was relatively so trifling that the jury's attention upon the essential issue, did the appellant intend violence to be used?, should not be distracted.'

Lord Ackner therefore held that he could find no vitiating error or reason for regarding the verdict as unsafe or unsatisfactory, but he went on to state (by way of obiter):

> 'What is required in any particular case, where the judge fails to leave an alternative offence to the jury, is that the court, before interfering with the verdict, must be satisfied that the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct. If they are so satisfied then the conviction cannot be safe or satisfactory.'

[47] A second line of cases makes no reference to the concern that a jury, properly directed by the judge as to the law on the count left to them, may nevertheless have convicted, not on a sound basis in accordance with the judge's directions and on their honest assessment of the facts, but from a reluctance to see the defendant get clean away with disgraceful conduct. These cases take a more direct approach to the issue and hold that where a lesser alternative verdict which was reasonably open on the evidence should have been left, but was not left, there has been a serious miscarriage of justice and the conviction must be quashed as unsafe.

[48] Mr Kelsey-Fry relied on Lord Ackner's judgment and submitted that even if the judge should have left the manslaughter issue to the jury, nevertheless the conviction for murder was safe and should be upheld because the judge had properly directed the jury as to the relevant law, and on the facts of the case the House could not be satisfied that the jury had convicted out of a reluctance to see the appellant get clean away.

[49] A considerable number of authorities have followed Lord Ackner's judgment in *R v Maxwell* [1990] 1 All ER 801, [1990] 1 WLR 401. In *R v Maxwell (Nolan)* [1994] Crim LR 848 in delivering the judgment of the Court of Appeal Hobhouse LJ after citing Lord Ackner's judgment said at p 6 of the transcript:

> 'The present case undoubtedly involved disgraceful conduct on the part of this appellant. He had been identified as one of the men in the minicab. It was clear and undisputed on the evidence that he had taken part in a joint attack on the minicab driver in the early hours of the morning and had, on any view, inflicted some injuries upon him. Indeed, on one view, he was the person who had started the actual violence. It was disgraceful conduct, and it would cause outrage if the appellant, having been identified as one of the men involved, were to "get clean away". If the jury were to have a proper opportunity to consider all the alternatives which were open to them in respect of the appellant, they should have had further directions from the judge upon the alternative verdicts that were open to them. The judge laid the ground in his directions about what was involved in a joint enterprise, and the different views that might be taken of how far the joint enterprise went. He referred to the facts, which indicated the increased gravity of the later parts of the incident, and the role of Oakley in aggravating the assault, as well as being involved in the robbery. But he did not then go on to direct the jury that there were alternative verdicts which were open to them.'

[50] In *Hunter v R* [2004] 2 LRC 719 Lord Hope said (at [28]):

> 'Their Lordships consider that the trial judge was wrong to deprive the jury of the opportunity of considering whether, in the light of the mixed statements, the Crown had proved in the case of each appellant that the "triggerman" test was satisfied. He ought to have directed the jury to consider this question, and to have left with them the alternative verdict that the appellants were guilty of non-capital murder which would have been open to them on the evidence if they were satisfied that the appellants were acting in pursuance of a joint enterprise. They were, of course, left with the alternative verdict of not guilty [of capital murder]. But, as Lord Ackner explained in *R v Maxwell* [1990] 1 All ER 801 at 807, if the judge fails to leave an alternative offence to the jury, the court must consider whether the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct. That was a very real possibility in this case. There was ample evidence that the appellants had guns in their hands, and that they had been using them during their running battle which they and their companions had started with the police. According to the police witnesses, all four men had been attempting to inflict grievous bodily harm on them from the start of this incident.'

[51] In *Gilbert v R* (2000) 170 ALR 88 in the High Court of Australia Gleeson CJ and Gummow J, who were in the majority with Callinan J, delivered a judgment which acknowledged some degree of validity in the concern which underpins the approach stated by Lord Ackner in *R v Maxwell*. They said (at [13]):

> 'The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges. It does not involve the assumption that their decision-making is unaffected by matters of possible prejudice.'

And after citing passages in the judgments in *Mraz v R* (1955) 93 CLR 493, delivered at a time when murder attracted the death penalty, including the statement of Fullagar J (at 513) that: 'A jury which would hesitate to convict of murder may be only too glad to take a middle course which is offered to them', they said (at [16]):

> 'These statements are inconsistent with the notion that an appellate court must assume, on the part of a jury, a mechanistic approach to the task of fact-finding, divorced from a consideration of the consequences. Indeed, juries are ordinarily asked to return a general verdict. They make their findings of fact in the context of instructions as to the consequences of such findings, and for the purpose of returning a verdict which expresses those consequences.'

[52] However, McHugh J and Hayne J, dissenting, rejected the view taken by Gleeson CJ and Gummow J as to how a jury might come to their decision. McHugh J said (at [30]–[31]):

'[30] The argument for the appellant is a claim that this court should proceed on one of two bases, each of which necessarily involves an assumption that, if manslaughter had been left as an issue, the jury might have disregarded their sworn duty to give a verdict in accordance with the evidence. The first assumption is that, if manslaughter had been left, the jury might have convicted of manslaughter even though they knew, because of the trial judge's directions, that the appellant was guilty of murder. The second assumption is that the jurors were not convinced beyond reasonable doubt that the appellant knew that his brother intended to kill or to inflict grievous bodily harm on Linsley, that they knew therefore that he was not guilty of murder, but that they nevertheless convicted him of murder rather than acquit him and see him go free. In my respectful opinion, as a matter of legal policy, no court of justice can entertain either assumption.

[31] The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence and that they obey the trial judge's directions. On that assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was rejected or disregarded, no one—accused, trial judge or member of the public—could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves a jury trial. If it was rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any totalitarian state. Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials.'

[53] Hayne J said (at [51]–[52]):

'[51] Nor does the conclusion which I have reached depend upon some judicial assessment of what was acknowledged to be a strong case against the appellant. It is a conclusion which depends entirely upon giving due weight to the verdict of the jury in light of what they were told by the judge and assuming (there being no basis for suggesting otherwise) that they did their duty conscientiously.

[52] The trial to which the appellant was entitled was a trial according to law. There were two questions for the Court of Appeal. First, was there a trial according to law (and all agreed that there was not). Secondly, and no less important, was the question whether a substantial miscarriage of justice had actually occurred. That second question is not concluded by pointing to the fact that there was a misdirection and that there was, therefore, not a trial according to law. The existence of the proviso denies that the fact of misdirection will, in every case, require an order for retrial. Nor can this second question be answered by making an assumption that the jury *might* have chosen to disregard what they were told by the judge. Such an assumption is unwarranted. It is an assumption which suggests that emotion (whether induced by the eloquence of counsel or otherwise) might have supplanted the collective common sense and careful reasoning that jurors bring to bear upon a difficult task. It is an assumption which, if effect is given to it, turns the judge's charge to a jury into a ritual incantation which

appellate courts must examine for formal correctness but which appellate courts are free (if not bound) to assume a jury may have disregarded.' a

[54] Callinan J in giving his reasons for allowing the appeal expressed a view (at [101]) which I think does not involve acceptance that a jury may fail to carry out their duty: b

'The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice.' c

[55] In the later case of *Gillard v R* (2003) 202 ALR 202 at [133], Hayne J described the effect of the decision of the majority in *Gilbert v R* (2000) 170 ALR 88 as follows: d

'In *Gilbert*, a majority of the court concluded that if manslaughter should have been, but was not, left to a jury as an available verdict on the appellant's trial for murder, the verdict of guilty of murder did not preclude the possibility that the jury may have failed to apply the instructions they were given. No party in this appeal sought to reopen the decision in *Gilbert*. It e follows from what was decided in *Gilbert* that, in deciding here whether no substantial miscarriage of justice has actually occurred and thus, whether the proviso to s 353(1) of the Criminal Law Consolidation Act applies, account may not be taken of the findings implicit in the jury's verdicts at the appellant's trial. It must be assumed that the jury may have chosen to disregard the instructions they were given, and convict the appellant of f murder and attempted murder, rather than return verdicts of not guilty. Once it is accepted that the jury may have disregarded the instructions they were given, it is not permissible to reason, as the respondent submitted, from the fact that the jury returned verdicts of guilty on all three counts to the conclusion that the jury must therefore be taken to have applied the trial g judge's instructions. Once it is said, as it was in *Gilbert*, that the jury may have disregarded the instructions they were given, it cannot be said that some levels of disobedience may be less probable than others.'

Therefore the view taken by the High Court of Australia is that if, on a trial for h murder, manslaughter was not left when it should have been, it must be assumed by the appellate court (contrary to Lord Ackner's requirement that the appellate court must be satisfied) that the jury may have chosen to disregard the instructions they were given.

[56] The second line of cases does not follow the *R v Maxwell* [1990] 1 All ER j 801, [1990] 1 WLR 401 approach but takes the more direct view that if a lesser alternative verdict could reasonably have been come to on the evidence, justice to the defendant requires that the jury should have been given the opportunity to return that verdict and the conviction must be quashed, and does not take into account the question whether the jury may have convicted out of a reluctance to see the defendant get clean away. In delivering the judgment of the

Privy Council in *Bullard v R* [1957] AC 635 at 644, [1957] 3 WLR 656 at 661, Lord Tucker said:

> 'Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.'

[57] In the High Court of Australia in *Pemble v R* (1971) 124 CLR 107 at 117–118 Barwick CJ said:

> 'Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part.'

[58] In *R v Jackson* [1993] 4 SCR 573 at 593 in delivering the judgment of the Supreme Court of Canada McLachlin J said:

> 'It is true that the trial judge charged the jury clearly and correctly on the mental state required to find Davy guilty of murder. It is also true that the jury found Davy guilty of murder. Nevertheless, I agree with the Court of Appeal [of Ontario] that one cannot be satisfied the verdict is just, given the failure of the trial judge to set out the basis for convicting Davy of manslaughter under ss 21(1) and 21(2) [of the Criminal Code] and the absence of any instruction that a party may be guilty of manslaughter even though the perpetrator is guilty of murder.'

[59] In *Von Starck v R* [2000] 4 LRC 232 at 238, [2000] 1 WLR 1270 at 1276 Lord Clyde made no reference to the *R v Maxwell* approach and said that it was the duty of the judge 'to secure that a just result is obtained in the whole circumstances disclosed in the evidence'. In the context of the importance of ensuring a just result in the whole circumstances disclosed in the evidence, I consider, with respect, that there is much force in the perceptive observation of Callinan J in *Gilbert v R* (2000) 170 ALR 88 at [101] which I have already cited that: 'It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered . . .' It is also relevant to observe that in addition to ensuring fairness to the defendant, the leaving of a lesser alternative verdict to the jury is in the public interest. As Mustill LJ said in *R v Fairbanks* [1986] 1 WLR 1202 at 1206:

> 'It must be remembered that justice serves the interests of the public as well as those of the defendant, and if evidence is such that he ought at least to be convicted of the lesser offence, it would be wrong for him to be

acquitted altogether merely because the jury cannot be sure that he was guilty of the greater.' *a*

[60] I was a member of the Board which followed the *R v Maxwell* [1990] 1 All ER 801, [1990] 1 WLR 401 approach in *Hunter v R* [2004] 2 LRC 719, but I now consider that that approach is an unsatisfactory one and should no longer be taken. It requires the appellate court, without having material before it to enable *b* a proper assessment to be made, to attempt to make an assessment whether a jury has returned a verdict of guilty, not on a proper and fair weighing of the evidence in the light of the judge's directions as to the law, but from reluctance to see a defendant, who has behaved disgracefully, get clean away. In reality, it appears to oblige the appellate court to engage in speculation as to the factors which may have influenced the jury's decision. And it is relevant to observe that *c* in following a course somewhat similar to the *R v Maxwell* approach the High Court of Australia has arrived at the point at which, if the judge has erred in not leaving an alternative verdict of manslaughter to the jury, it is to be assumed by the appellate court that the jury may have chosen to convict of murder in disregard of the instructions they were given. *d*

[61] Therefore I consider that the House should follow the reasoning in the second line of cases and hold that, save in exceptional circumstances, an appellate court should quash a conviction, whether for murder or for a lesser offence, as constituting a serious miscarriage of justice where the judge has erred in failing to leave a lesser alternative verdict obviously raised by the evidence.

[62] In conclusion I refer briefly to one further matter. The authorities make *e* it clear that an alternative verdict should only be left if it is one to which 'a jury could reasonably come' (per Lord Clyde in *Von Starck v R* [2000] 4 LRC 232 at 237, [2000] 1 WLR 1270 at 1275; see also Mustill LJ in *R v Fairbanks* [1986] 1 WLR 1202 at 1205: 'unless the alternatives really arise on the issues as presented at the trial'). Therefore I am in full agreement with the test proposed by Lord Bingham *f* (at [23], above) that the alternative or alternatives 'should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial'. I also agree that the rule discussed by Lord Bingham should not be extended to summary proceedings.

[63] Therefore for the reasons which I have given, and also for the reasons *g* given by Lord Bingham and Lord Rodger of Earlsferry with which I agree, I would allow this appeal and make the order which Lord Bingham proposes.

LORD RODGER OF EARLSFERRY.

[64] My Lords, in July 2003 the appellant, Graham James Coutts, was charged *h* with the murder of Jane Katherine Longhurst earlier that year. After trial in the Crown Court at Lewes he was convicted of her murder and sentenced to life imprisonment with a recommendation that he serve a minimum of 30 years before being considered for release. He appealed to the Court of Appeal against his conviction, inter alia on the ground that the judge had wrongly failed to direct *j* the jury that it was open to them to return an alternative verdict of manslaughter. The Court of Appeal dismissed his appeal against conviction, but allowed his appeal against sentence to the extent of substituting a minimum period of 25 years two months to be served by him before being considered for release.

[65] The reason for the very long period to be served by the appellant before being considered for release becomes obvious when the nature of the murder of

which the appellant was convicted is understood. The case for the Crown as presented to the jury was that he had murdered the deceased in order to obtain sexual stimulation and that, having strangled her with a pair of tights, he did indeed have some kind of sexual contact with her body. The prosecution led evidence, which was not disputed, that the appellant was in the habit of visiting various websites which related to sex and violence and which contained images under headings such as 'asphyxiation and strangulation', 'rape, torture and violent sex'. In particular, the day before the deceased's death, he had logged on to a website 'Death by asphyxia' for approximately an hour and three quarters.

[66] The appellant did not dispute that the deceased had died in his flat, nor that, following her death, he had concealed her body in a storage unit, before eventually setting fire to it on an area of open land. His position at trial was that the deceased had died by accident when he and she had been engaged in consensual sexual activity. With her consent, when they were face to face on his bed, he had put a ligature, in the form of a pair of tights, round the deceased's neck. The sight of the ligature was intended to stimulate him sexually and the restriction of oxygen to the deceased's brain was intended to heighten her sexual pleasure. According to the appellant, when he was on his back and she was above him, he held the ends of the tights behind her neck with his left hand, while masturbating with his right hand. At some time before he ejaculated, he must have closed his eyes. When he opened them again, he was aware of the deceased lying over him and not moving. In fact, she was dead. He could not remember what had happened in the moments before her death. The appellant said that he had not pulled the ends of the ligature sufficiently strongly to cut off her blood supply and to kill her. Her death had just been an accident in the course of this consensual sexual activity.

[67] There was evidence, led by the Crown but relied on by the defence, from two women with whom the appellant had had relationships, to the effect that they had sometimes engaged in consensual sexual activities with him which involved him putting some kind of pressure on their necks. Another woman spoke to having had a consensual sexual encounter with him in which he bound her wrists with masking tape.

[68] Both counsel for the prosecution and counsel for the defence conducted the trial on the basis that the jury had to choose between these two starkly different versions of events, one involving a particularly horrendous murder, the other involving an accident in the course of a consensual sexual encounter. But after the evidence was over, and before speeches, in the absence of the jury the judge raised with counsel the possibility of an alternative verdict of manslaughter. On an indictment for murder a jury can, of course, return a verdict of manslaughter in an appropriate case (see s 6(2) of the Criminal Law Act 1967). Prosecuting counsel, Mr Kelsey-Fry QC, immediately acknowledged that one could mount an argument in law to suggest that the defence account, even if accepted, might amount to manslaughter on the basis either of gross negligence or, arguably, of an unlawful and dangerous act. On either version there would be room, arguably, for an alternative verdict of manslaughter. The Crown's view, however, was that it would be quite unfair and quite wrong to allow for such a verdict in this case: 'Having set the case out as a contest between deliberate killing and the defence version, if we failed to prove the deliberate killing, in our submission the defendant is entitled to a full acquittal.' Under reference to the decision in *R v Emmett* [1999] EWCA Crim 1710, the judge raised concerns which he had about that approach, but he eventually indicated that, if

the Crown took the view that this was a case where, the Crown having opened the case in the way that it had, it would be unfair to proceed down an alternative, then it was not for the judge to enter into unfair approaches. Prosecuting counsel reiterated that, from the Crown's point of view, the case was about a deliberate and macabre murder: they had never advanced the case on the alternative basis and it would be wrong to do so now. Defence counsel readily agreed with the judge that he could not be expected to argue against that approach.

[69] Subsequently, when the judge specifically asked defence counsel whether he was inviting him to put manslaughter on any basis to the jury, counsel said that he could provisionally answer the question, 'No, I am not'. He indicated that he had not had an opportunity to discuss the matter in detail with the appellant and asked to be allowed to raise it briefly the following morning if the position changed. Counsel did not subsequently raise the matter with the judge.

[70] In a statement prepared for the purposes of his appeal to the Court of Appeal, the appellant said that the issue of manslaughter had been discussed in the preparation of the case, when he was advised that, if convicted of manslaughter, he would receive a lengthy sentence. He was also certain that he had discussed the matter further with defence counsel after the exchange in court. He recalled counsel saying 'Do you want us to make representation, or do you want to roll the dice and be home with Lisa and the boys?' He had been told that he would receive a sentence of as long as 15 years if convicted of manslaughter. The appellant followed his counsel's advice and agreed that they should not ask for manslaughter to be left to the jury. Trial counsel accepted that the appellant's statement correctly reflected the gist of their conversation. It is therefore clear that the appellant took a tactical decision not to ask the judge to give the jury directions on manslaughter in the hope that, faced with a stark choice between murder and accident, the jury would acquit him and he would immediately be free to go home.

[71] In the light of the submissions made to him by counsel, the judge did not give the jury any direction on manslaughter. His direction on the law was to this effect:

> 'As you know, of course, his defence is that this was an accident taking place during the course of consensual asphyxial sexual activities between himself and Jane, and therefore it follows that he is saying to you that he never had any intention to kill her or to cause her any really serious bodily harm. If her death was or may have been an accident, then, of course, he is not guilty of this allegation. The reason for that would be that you would not be satisfied that he intended to kill her or at least to cause her some really serious bodily harm. If, having considered all of the evidence in the case, you are sure that it was not an accident and that he did intend to kill her, or at least to cause her really serious bodily harm, then it would then follow that he is guilty of murder.'

[72] Despite the tactical decision which the appellant and his trial counsel took, not to ask the judge to direct the jury on manslaughter, he now contends that actually the judge was bound to give such a direction in the circumstances of this case and that his failure to do so amounted to a material misdirection in law. On behalf of the Crown Mr Kelsey-Fry contends that the judge was under no duty to give a direction on manslaughter but that, even if he was, the failure to

do so did not make the jury's verdict unsafe since, in order to convict the appellant of murder, the jury must have been satisfied beyond a reasonable doubt that he had intended to kill the deceased or at least to cause her serious bodily harm.

[73] My Lords, the inconsistency in the appellant's attitude at trial and on appeal is striking, not to say disturbing. But he is not the first defendant to have placed an appeal court in this predicament. In *R v Dhillon* [1997] 2 Cr App R 104, where the trial judge had consulted counsel and, in the light of their submissions, had not given a direction on provocation when he should have done, the Court of Appeal held that his failure to do so was an unfortunate material misdirection. Ward LJ aptly concluded (at 114):

> 'The result, making some mockery of our hallowed adversarial procedure which strives to do justice to both sides, is that the appellant is able both to have his cake at trial and also to eat it on appeal.'

In *R v Cox* [1995] 2 Cr App R 513 at 518, Glidewell LJ had been forced to a similar conclusion where the judge had failed to leave the issue of provocation to the jury. In *Gillard v R* (2003) 202 ALR 202, at trial counsel for the defendant had successfully resisted an attempt by the prosecution to persuade the judge to direct the jury that verdicts of manslaughter were available. The appellant had fully exploited the forensic advantages of the jury being presented with a straight choice between murder and nothing. But, in the event, the jury convicted him. He appealed on the ground that the judge should indeed have directed the jury that manslaughter verdicts were available. Kirby J commented (at [41]):

> 'Having secured, but lost, the advantages of the dichotomy which he urged at his trial, the appellant now wants another trial with a further chance to contest the indictment under new rules. It is easy to feel a sense of distaste about allowing such a course to succeed.'

Nevertheless, Kirby J came to the view that the failure to give a direction on manslaughter constituted a wrong decision on a question of law and that there would indeed have to be a new trial.

[74] These authorities help to identify the attitude which an appeal court must adopt in a case such as this, despite any justifiable feeling of distaste for the appellant's approach. If the court concludes that there was a material misdirection which rendered the jury's verdict unsafe, then it must give effect to that conclusion and quash the conviction. An unsafe verdict cannot stand just because the appellant was partly to blame for its being unsafe.

[75] At the hearing before the House Mr Fitzgerald QC, who did not appear in the trial, submitted on behalf of the appellant that a verdict of manslaughter would have been available on the basis of the defence version of events. So far as the Crown is concerned, as I have explained, when the trial judge raised the question of manslaughter, Mr Kelsey-Fry immediately acknowledged that, on the defence account, there would be room for an alternative verdict of manslaughter, on the basis that the victim's death had resulted either from gross negligence or, arguably, from an unlawful and dangerous act. Before the House he similarly acknowledged that a verdict of manslaughter would have been open on the defence version—though he submitted that the proper basis would have

been gross negligence, rather than an unlawful and dangerous act. It is therefore common ground that, on the totality of the evidence, if directed on the law of manslaughter, the jury would have been entitled to find the appellant guilty of manslaughter. I agree with that view. In these circumstances, it is unnecessary to determine whether one, rather than the other, legal basis for such a verdict would have been the more appropriate.

[76] The issue accordingly is whether, given that a verdict of manslaughter would have been available on the evidence before the jury, the trial judge should have directed the jury on manslaughter. Here the judge raised the issue with counsel and their common position was that he should not do so. While the judge was fully entitled to take account of counsel's attitude, ultimately any trial judge is responsible for ensuring a fair trial in which the defendant is convicted of a crime only if his guilt is proved according to law. That duty is not compromised or qualified by the strategy or tactics adopted by counsel on either side—although these may affect what the judge has to do in fulfilment of his duty.

[77] Appeal courts have frequently had to consider whether on a murder indictment a trial judge needed to put the alternative verdict of manslaughter before the jury. In *Mancini v DPP* [1941] 3 All ER 272 at 276, [1942] AC 1 at 7 Viscount Simon LC said:

> 'Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it . . . "Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself . . ."'

Viscount Simon added ([1941] 3 All ER 272 at 276–277, [1942] AC 1 at 8):

> 'The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or, at any rate, might induce a reasonable doubt as to whether this was, or was not, the case.'

In *Kwaku Mensah v R* [1946] AC 83, the judge had failed to give a direction on provocation in a case where the issue properly arose. Delivering the judgment of the Privy Council, Lord Goddard said (at 91–92):

> 'But if on the whole of the evidence there arises a question whether or not the offence might be manslaughter only, on the ground of provocation as

well as on any other ground, the judge must put that question to the jury. This was distinctly laid down in *R v Hopper* [1915] 2 KB 431, a case in some respects resembling the present, more especially in that the line of defence adopted was that the killing was accidental and no attempt had been made at the trial to rely on provocation. The ruling was expressly approved by the House of Lords in *Mancini v DPP* [1941] 3 All ER 272, [1942] AC 1. The reason for the rule is that on an indictment for murder it is open to the jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then, whether the defence have relied on it or not, the judge must bring it to the attention of the jury, because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder.'

The Privy Council adopted and applied this statement of the law in *DPP v Daley* [1980] AC 237 at 244, [1979] 2 WLR 239 at 244.

[78] In *Von Starck v R* [2000] 4 LRC 232, [2000] 1 WLR 1270 the appellant had been convicted of murdering a woman by stabbing her. On being arrested, he admitted killing her. In the course of the trial the Crown led evidence of that admission and of a statement in which the appellant said that he and the deceased woman had been taking drugs in his hotel room when he suddenly had a knife in his hand and, although he did not know exactly what had happened, he remembered seeing her on the ground and thinking she was dead. In an unsworn statement at his trial the appellant did not mention taking cocaine but said that he did not know what had happened. The judge withdrew the appellant's pre-trial statements from the consideration of the jury on the ground that they were inconsistent with what he had said at his trial. The Privy Council allowed his appeal and, by agreement, substituted a conviction of manslaughter. In the course of giving the judgment of the Board Lord Clyde said ([2000] 4 LRC 232 at 237, [2000] 1 WLR 1270 at 1275):

'The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular, counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration, in a fair and balanced manner, the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course

the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognised in *Xavier v The State* (17 December 1998, unreported), a low one, and, as was also recognised in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled, on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them. In *Xavier v The State* the defence at trial was one of alibi. But it was observed by Lord Lloyd of Berwick in that case that, "If accident was open on the evidence, then the judge ought to have left the jury with the alternative of manslaughter." In the present case the earlier statements together with their qualifications amply justified a conclusion of manslaughter and that alternative should have been left to the jury.'

[79] The statement of the law in *Von Starck v R* [2000] 4 LRC 232, [2000] 1 WLR 1270 was applied by Sir Robert Carswell LCJ in the Court of Appeal in Northern Ireland in *R v Shaw* [2001] NIJB 269 and by Lord Hope of Craighead, giving the judgment of the Privy Council, in *Hunter v R* [2004] 2 LRC 719 at [27].

[80] In the present case, however, the Court of Appeal ([2005] EWCA Crim 52 at [69], [2005] 1 WLR 1605 at [69]) suggested that in *Von Starck v R* Lord Clyde had expressed his views in terms that were more extensive than was necessary for the decision in that case. They did not believe that he would have expressed himself in those terms if he had had in mind the sort of situation being considered here. In my view Lord Clyde's observations, while not specifically phrased in terms of murder and manslaughter, are simply a fuller version of the statements of law to be found in the earlier decisions which I have quoted. I would respectfully endorse his formulation of the law.

[81] As these authorities make clear, the duty of the trial judge to direct the jury on manslaughter arises if a jury might reasonably return such a verdict on the whole of the evidence, whether led by the Crown or by the defence. Contrary to what the Court of Appeal said at [83] of their judgment, the duty applies even though the result may be that the jury convict the defendant of manslaughter on a basis which is different from, and inconsistent with, the case put forward by the prosecution. That is a necessary implication of the judge's duty to direct on manslaughter when it arises on all the evidence, even if the prosecution case is that the jury should accept particular elements of the evidence, on the basis of which they should find the defendant guilty of nothing less than murder. The stance of prosecuting counsel cannot be determinative of the range of verdicts fairly open to the jury on the evidence.

[82] Directing the jury on the way that the law applies to any reasonable view of the facts disclosed by the evidence ensures that they have a proper understanding of the way that the law is intended to work, depending on the view of the facts which they take. Therefore, by omitting to mention manslaughter in a case where it could apply on a reasonable view of the facts, the

judge will misrepresent the position by making the law seem more rigid and less nuanced than it actually is. While, for tactical reasons, it may suit counsel on either or both sides to represent the law in this way, as offering a stark alternative between murder and acquittal, with nothing in between, in fact the law provides for an intermediate position. The jury are entitled to be told of that intermediate position, whenever it might come into play on a reasonable view of the evidence. The intermediate position may not be to the liking of either the prosecution or the defence, but the jury are still entitled to be told of it, so that they may reach their conclusions 'in light of a complete understanding of the law applicable to them' (see *Von Starck v R* [2000] 4 LRC 232 at 237, [2000] 1 WLR 1270 at 1275). Where the duty of the judge is to give a direction on the alternative verdict, counsel have to adjust their speeches to the jury to take account of that prospective direction.

[83] As Lord Clyde points out, this approach secures that the overall interests of justice are served in the resolution of the matter committed to the jury. If the jury are not aware that the law provides for conviction of manslaughter on the view of the evidence which they form, there is a risk that they may go wrong in either of two ways. On the one hand, the jury may convince themselves that, despite what the judge has told them, a conviction of murder must be open even in circumstances where it is not actually the lawful verdict because the crime of manslaughter comes into play; on the other hand, they may conclude that the defendant is entitled to be acquitted completely, say, on the ground of accident, in circumstances where the law actually requires that he should be convicted of manslaughter. The first eventuality harms the defendant, the second harms the wider public interest. But both are unacceptable. And our system guards against them by requiring the judge to explain the law of manslaughter to the jury so that they are aware of it in any appropriate case. Omitting the direction removes the safeguard.

[84] Since the duty to put the possibility of a viable alternative verdict before the jury exists to promote the interests of justice in this way, it will not apply in circumstances where giving the direction would not serve those interests and might indeed undermine the fairness of the trial. For instance, there might be cases where it could properly be said that one or other of the parties was prejudiced because, if they had realised that the alternative verdict was going to be left to the jury, they would have examined or cross-examined the witnesses differently or would have led other evidence. If the prejudice was significant and could not be avoided or mitigated at that stage, the overall interests of justice might mean that the duty to direct on the alternative verdict would not apply. There could also be cases, other than murder-manslaughter, where the alternative verdict would be so trivial that the jury would be unlikely to be misled by not knowing about it and the public interest would not suffer if the defendant were not convicted of the offence. In such a case, as Mustill LJ envisaged in *R v Fairbanks* [1986] 1 WLR 1202 at 1206, the judge could properly conclude that it was best not to introduce an unnecessary complication and distract the jury by forcing them to consider something which was remote from the real point of the case. Again, the duty would not apply. But, in a case such as the present, the duty applies and any additional complications in the directions to the jury are the necessary price of ensuring that they have all the information on the law which they need to discharge their responsibilities.

[85] Since, in order to discharge those responsibilities, the jury requires to be directed on manslaughter whenever (as in this case) it arises as a viable issue on a

reasonable view of the evidence, a failure by the judge to give the direction will amount to a material misdirection in law. In terms of s 2(1) of the Criminal Appeal Act 1968 an appellate court will therefore have to quash the conviction if they think that, by reason of the misdirection, the conviction is unsafe. This is just to reach virtually the same position as is succinctly stated in the judgment of Lord Tucker in the Privy Council in *Bullard v R* [1957] AC 635 at 644, [1957] 3 WLR 656 at 661:

> 'Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.'

[86] Mr Kelsey-Fry submitted, however, that, even if your Lordships concluded—as I have concluded—that the judge had been wrong not to give the jury directions on the alternative verdict of manslaughter, this would not be a sufficient basis for quashing the appellant's conviction of murder. In effect, his argument was that, when a jury has been properly directed on a more serious offence and has convicted the defendant of that more serious offence, the failure to direct on a lesser alternative offence does not of itself render the conviction unsafe. In the words of Lord Ackner in *R v Maxwell* [1990] 1 All ER 801 at 807, [1990] 1 WLR 401 at 408, 'the court, before interfering with the verdict, must be satisfied that the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct'.

[87] Despite its authoritative provenance, the test propounded by Lord Ackner is problematical, to say the least. So far as murder-manslaughter is concerned, it appears to be inconsistent with Lord Tucker's approach in *Bullard v R*. The test is also difficult to apply. Since the appeal court cannot inquire into what went on in the jury room, it is very far from clear how they are meant to satisfy themselves in any given case that a jury may have convicted out of a reluctance to see the defendant get clean away. Moreover, the test supposes that the jury will have consciously convicted the defendant in the face of the judge's directions. Yet the foundation of the system of trial by jury is the assumption, which is thought to be borne out by experience, that juries apply the directions which the judge gives them. In *R v Bergman* [1996] 2 Cr App R 399 the Court of Appeal suggested that Lord Ackner's test might be satisfied if the jury had asked whether an alternative verdict was open to them—but Hutchison LJ pointed out that this had not actually availed the defendant in *R v Maxwell*. Mr Kelsey-Fry suggested that protracted deliberations by the jury might be a pointer to the jury having ultimately gone wrong in this way—but the lengthy deliberations could equally point to the jury having taken particular care in applying the directions which they had been given. The reality is that the test is so uncertain that it is likely to produce inconsistent results, however conscientiously it may be applied.

[88] In any event, the test is wrong in principle. In *Bullard v R* [1957] AC 635 at 644, [1957] 3 WLR 656 at 661 the Privy Council regarded the direction on manslaughter as essential in an appropriate case and as leading to a grave and irremediable miscarriage of justice if it was omitted. This can only be because the direction is necessary if the jury are to consider their verdict on the proper basis and to avoid the risk of being misled into an inappropriate verdict. So it must be

assumed that giving or omitting the direction affects the way that the jury consider the issues in the case. In the words of Callinan J in *Gilbert v R* (2000) 170 ALR 88 at [101]:

> 'The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice.'

[89] The present case provides a good illustration of the point. The jury were told that they had to choose between convicting the appellant of murder and acquitting him on the ground that the victim had died as a result of an accident. On that basis they chose to convict of murder. But the jury should also have been told that, depending on their view of the facts, they could convict him of manslaughter. Mr Kelsey-Fry says that the additional choice is irrelevant since the jury convicted the appellant of murder and so they would never have reached the question of manslaughter, which only arose if they were not prepared to convict of murder. But that is to make an unreal assumption that, at all stages of their deliberations, the jury would keep the various issues in separate boxes, to be considered in a prescribed order. The reality is that, in the course of their deliberations, a jury might well look at the overall picture, even if they eventually had to separate out the issues of murder, manslaughter and accident. So, introducing the possibility of convicting of manslaughter could have changed the way the jury went about considering their verdict.

[90] Mr Kelsey-Fry further objects that, in any event, when reaching their verdict, the jury would have considered all the relevant facts—it made no difference that they were unaware that the law attached the label of manslaughter to one version of those facts. But experience shows that, as in this case, counsel deliberately choose not to mention manslaughter to the jury on the view that this may indeed influence the way that the jury react to the facts. At the very least, Mr Kelsey-Fry's submission ignores the possibility that the jury's approach might have been different if they had known that the appellant's version of events might better be regarded as constituting the crime of manslaughter, rather than as involving a mere accident. In *Muir v HM Advocate* 1933 JC 46 at 50, where the jury in a murder trial had not been directed on the possible verdict of culpable homicide on the ground of diminished responsibility, Lord Sands, who agreed that the appeal should be allowed, noted: 'A brutal crime had been committed, and a measure of mental weakness might have been regarded from quite a different angle if the jury were aware that its affirmance did not involve complete acquittal.' In much the same way, in the present case the jury might have regarded the defendant's version of events from quite a different angle if they had been aware that accepting it did not involve his complete acquittal.

[91] In my view therefore, in a case where the judge has wrongly omitted to direct the jury on a viable alternative verdict, the failure to give the direction must be regarded as a material misdirection. In *Bullard v R* [1957] AC 635 at 644, [1957] 3 WLR 656 at 661 the Privy Council considered that failure to give the appropriate direction on manslaughter in a case of murder would always be irremediable. In the absence of detailed argument on that particular point, it is

enough to say that a failure to give the necessary direction must usually make the verdict unsafe since the appeal court will have no sufficient basis for concluding that a reasonable jury would inevitably have convicted the appellant of murder if they had been given the appropriate direction.

[92] In the present case I am certainly unable to say that, if given a direction on manslaughter, a reasonable jury would inevitably have convicted the appellant of murder. I think accordingly that the verdict is unsafe. For these reasons, as well of those given by my noble and learned friends, Lord Bingham of Cornhill, Lord Hutton and Lord Mance, I would allow the appeal and make the order which Lord Bingham proposes.

LORD MANCE.

[93] My Lords, I have had the advantage of reading in draft the judgments prepared by my noble and learned friends, Lord Bingham of Cornhill and Lord Rodger of Earlsferry. I agree with their reasoning and conclusions and add only a few words of my own out of deference to the careful submissions of Mr Kelsey-Fry QC for the Crown and because our decision marks a change from the approach taken in previous authority in both this House and the Privy Council to the safety of a verdict of guilty of a particular offence where the jury has not been directed as to the possibility of a finding of guilt of some alternative lesser offence.

[94] Many of the cases cited to the House concerned failure by a judge to direct the jury about the possibility of circumstances which would reduce the charge laid to some lesser offence, eg provocation or self-defence which would reduce a murder charge to manslaughter (see eg *Mancini v DPP* [1941] 3 All ER 272, [1942] AC 1 and *Bullard v R* [1957] AC 635, [1957] 3 WLR 656). The Privy Council decision in *Von Starck v R* [2000] 4 LRC 232, [2000] 1 WLR 1270 falls to my mind into the same category—the judge directed the jury not to consider the issue of intoxication by cocaine, thus withdrawing from them the possibility of a finding that the defendant, because of such intoxication, lacked the specific intent necessary for a conviction for murder, while retaining the basic intent which is sufficient for a conviction for manslaughter (cf *Blackstone's Criminal Practice* (15th edn, 2006) pp 42–44 and 157 (paras A3.10 and B1.35)). Depriving a defendant of the benefit of an answer to the Crown's case, so leaving him or her exposed in law to conviction for an offence which he did not commit, must render any verdict unsafe.

[95] But there have been some cases considering the situation where an alternative offence presents itself not as an answer to the Crown's case, but as a possibility which (although not canvassed by either side) arises in law on the defendant's own case if and only if the Crown's case is rejected. In this situation, a direction by the judge to the jury to consider the alternative offence may lead to conviction in circumstances when otherwise the jury would in law have had completely to acquit. Not surprisingly, there are cases in which defendants have complained that the judge should *not* have left an alternative offence to the jury in these circumstances (see eg *R v McCormack* [1969] 3 All ER 371, [1969] 2 QB 442; where, equally unsurprisingly, the complaint was rejected (although the court pointed out (at 373 and 446) that a trial judge must have a discretion not to leave an alternative to a jury, if to do so might cause undue prejudice, as where the defendant had lost the chance of giving or calling evidence to cover or guard against the alternative)). An important public interest is served by the conviction of offenders of offences which they have committed, and the judge is not bound

by the way in which either side has presented its case, if an alternative offence can without injustice be left to the jury.

[96] In the present case the appellant's complaint is the reverse. The appellant was content at trial that the jury should be left with a choice between being satisfied of murder and the possibility of accident. But a criminal judge has to ensure a fair trial, irrespective of the attitude taken at trial by either side (see *Von Starck v R* [2000] 4 LRC 232 at 237, [2000] 1 WLR 1270 at 1275 per Lord Clyde). The appellant now therefore complains that the judge should have insisted on directing the jury that, even on the defence case of accident, they should consider whether the appellant's conduct amounted to manslaughter, at least by gross negligence, and that the verdict is unsafe because he did not.

[97] It can be said with some force that our jury system rests on the hypothesis that juries follow the directions and decide between the options they are given loyally and dispassionately (see eg the dissenting judgments of McHugh and Hayne J in *Gilbert v R* (2000) 170 ALR 88 (High Court of Australia)). There are after all many circumstances in which no alternative verdict is possible, but the jury may, on the defendant's own account of events, feel very considerable disgust regarding his conduct (as they did no doubt in the present case with regard to the defendant's conduct after the deceased's death). The jury is in such circumstances trusted, nevertheless, to approach the question of guilt or innocence in respect of the offence charged loyally and dispassionately.

[98] However, in the limited number of previous cases in the United Kingdom, a different general approach has been taken in a context where an alternative verdict presents itself as possible. The approach has been (a) to recognise that there *can* be a real risk of the absence of a direction regarding the possibility of an intermediate alternative verdict influencing a jury to convict of the more serious charge laid by the Crown, out of reluctance to let the appellant 'get clean away' with a complete acquittal, and (b) to seek to identify whether in the particular circumstances of the case that real risk actually arose (see eg *R v Fairbanks* [1986] 1 WLR 1202, *R v Maxwell* [1990] 1 All ER 801, [1990] 1 WLR 401, *R v Maxwell (Nolan)* [1994] Crim LR 848, *Hunter v R* [2003] UKPC 69, [2004] 2 LRC 719 (cf also *R v Shaw* [2001] NIJB 269)). The test involved in part (b) of this approach was advanced by Lord Ackner in *R v Maxwell* [1990] 1 All ER 801 at 807, [1990] 1 WLR 401 at 408 in the following terms:

> 'What is required in any particular case, where the judge fails to leave an alternative offence to the jury, is that the court, before interfering with the verdict, must be satisfied that the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct.'

[99] I am persuaded that this is an unworkable test to apply to a jury trial. There is no reliable means by which an appellate court can, on so particular a basis, measure whether or how a jury may react to an unnatural limitation of the choices put before it. One is entitled to assume that juries go about their task in the utmost good faith, but the concern is with subconscious as well as conscious reactions. Like my noble and learned friends, I find persuasive the reasoning of Callinan J in *Gilbert v R* (2000) 170 ALR 88 at [101], to the effect that, as a matter of human experience, a choice of decisions may be affected 'by the variety of choices offered, particularly when . . . a particular choice [is] not the only or

inevitable choice'. (In the present case, the possibility that the decision not to leave manslaughter to the jury might conceivably play out against, rather than for, the appellant is also inherent in defence counsel's apparent remark to the appellant at the time about 'rolling the dice'.) a

[100] Accordingly, in my view, where, as Lord Bingham has said, an obvious alternative verdict presents itself in respect of some more than trifling offence and can without injustice be left for the jury to consider, the judge should in fairness ensure that this is done, even if the alternative only arises on the defence case in circumstances where as a matter of law there should apart from that alternative be a complete acquittal. b

[101] Mr Kelsey-Fry submits, with some force, that the charge of murder laid by the Crown and any alternative offence of manslaughter which may be suggested would, despite its deplorable nature, still be of a very different order of seriousness. Nevertheless the latter could not conceivably be regarded as anywhere near trifling—a point which defence counsel's advice at trial that a conviction for manslaughter could attract a sentence as long as 15 years amply demonstrates. c

[102] It follows that the present verdict of guilt, arrived at when the jury was presented with a stark choice between murder and complete acquittal, cannot be regarded as safe, and I too would therefore allow this appeal and remit the case to the Court of Appeal on the basis indicated by Lord Bingham. d

Appeal allowed.

Kate O'Hanlon Barrister.

Majrowski v Guy's and St Thomas's NHS Trust

[2006] UKHL 34

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOPE OF CRAIGHEAD, BARONESS HALE OF RICHMOND, LORD CARSWELL AND LORD BROWN OF EATON-UNDER-HEYWOOD

10, 11 MAY, 12 JULY 2006

Vicarious liability – Employer and employee – Prohibited act by employee – Statutory prohibition – Harassment – Whether employer vicariously liable for harassment committed by employee in course of employment in breach of statutory prohibition – Protection from Harassment Act 1997, ss 3, 10.

The claimant brought proceedings against the defendant NHS trust in the county court, claiming damages pursuant to s 3[a] of the Protection from Harassment Act 1997 for distress, anxiety and consequential losses caused by harassment that he had suffered, at the hands of his departmental manager, while employed by the trust. His claim was based exclusively on the trust's vicarious liability for the alleged breach of the statutory prohibition of harassment by the manager who, he said, had at all times been acting in the course of her employment by the trust. The proceedings were struck out by the judge, but his decision was reversed by the Court of Appeal. The trust appealed to the House of Lords, contending that an employer could not be vicariously liable under s 3 for harassment committed by an employee. In determining the appeal, their Lordships considered, inter alia, a provision of the 1997 Act which applied only to Scotland—s 10[b]. That section inserted a new s 18B into the Prescription and Limitation (Scotland) Act 1973, providing that no action for harassment under the 1997 Act could be brought within a period of three years after, inter alia, the date on which the pursuer became aware, or on which it would have been reasonably practicable for him to have become aware, that the defender was a person responsible for the alleged harassment 'or the employer or principal of such a person'.

Held – An employer would be vicariously liable in damages under s 3 of the 1997 Act for harassment, in breach of that Act, committed by an employee in the course of his employment. It was impossible to avoid the conclusion that the effect of the phrase 'or the employer or principal of such a person' in s 18B of the 1973 Act was to show that it was the intention of Parliament that it was to be open to the court, in appropriate circumstances, to find an employer vicariously liable in damages to the victim of a course of conduct amounting to harassment, in breach of the relevant provision of the 1997 Act, where the person responsible was an employee. Although the provisions of the 1997 Act which applied to Scotland differed in various respects from those which applied to England and Wales, it was not suggested that Parliament had intended there to be any difference in substance between the two jurisdictions as to the scope of the civil remedy for harassment. It followed that the indication in s 10(1) of the

a Section 3 is set out at [20], below

b Section 10 is set out at [44], below

1997 Act—that vicarious liability was available in Scotland where damages were claimed for conduct by an employee amounting to harassment within the meaning of the 1997 Act—had to be taken to apply to England and Wales also. Accordingly, the appeal would be dismissed (see [40], [41], [45], [52], [53], [58], [63], [73], [74], [79]–[81], below).

Per curiam. Unless the statute expressly or impliedly indicates otherwise, the principle of vicarious liability is applicable where an employee commits a breach of a statutory obligation sounding in damages while acting in the course of his employment (see [16], [17], [57], [72], [78], [81], below).

Notes

For vicarious liability of employers for breaches of statutory duty by their employees, see 45(2) *Halsbury's Laws* (4th edn reissue) para 406.

For the Protection from Harassment Act 1997, s 3, see 12(1) *Halsbury's Statutes* (4th edn) (2005 reissue) 1754.

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Appeal

The defendant, Guy's and St Thomas' NHS Trust, appealed with permission of the Appeal Committee of the House of Lords given on 7 July 2005 from the order of the Court of Appeal (Auld and May LJJ, Scott Baker LJ dissenting) on 16 March 2005 ([2005] EWCA (Civ) 251, [2005] IRLR 340, [2005] QB 848) allowing an appeal by the claimant, William Majrowski, from the order of Judge Collins in Central London County Court on 24 February 2004 striking out, as showing no reasonable cause of action, proceedings for damages brought by Mr Majrowski against the trust under s 3 of the Protection from Harassment Act 1997. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

Mark Turner QC and *David Platt* (instructed by *Berrymans Lace Mawer*) for the trust.
Robin Allen QC, William Latimer-Sayer and *Hannah Godfrey* (instructed by *Reynolds Williams*, Poole) for Mr Majrowski.

Their Lordships took time for consideration.

12 July 2006. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, the Protection from Harassment Act 1997 prohibits harassment. A person must not pursue a course of conduct which amounts to harassment of another. A breach of this prohibition may be the subject, amongst other matters, of a claim for damages. The question raised by this appeal is whether an employer is vicariously liable for harassment committed by an employee in the course of his employment.

[2] The harassment in this case concerns two employees of Guy's and St Thomas's NHS Trust (the trust). In November 1998 the trust employed William Majrowski as a clinical auditor co-ordinator. His departmental manager was Mrs Sandra Freeman. Mr Majrowski was not happy with the way she treated him. He claimed she bullied and intimidated him. She was, he said, rude and abusive to him in front of other staff. She was excessively critical of his time-keeping and work. She imposed unrealistic performance targets for him and threatened him with disciplinary action if he failed to meet them. She isolated him by refusing to talk to him. This treatment, he said, was fuelled by homophobia: he is a gay man.

[3] On 20 April 1998 Mr Majrowski made a formal complaint of harassment against Mrs Freeman. The trust investigated this in accordance with its anti-harassment policy. The investigation resulted in a finding that harassment had occurred. Subsequently, on 7 June 1999 the trust dismissed Mr Majrowski for reasons unrelated to the circumstances of this case.

[4] Nearly four years later, on 13 February 2003 Mr Majrowski commenced these proceedings against the trust. He claimed damages pursuant to s 3 of the

1997 Act for distress and anxiety and consequential losses caused by the harassment he suffered while employed by the trust. Mrs Freeman, he said, was at all times acting in the course of her employment by the trust. He made no claim against Mrs Freeman herself. Nor did he make any claim against the trust for negligence or breach of his contract of employment. His claim was based exclusively on the trust's vicarious liability for Mrs Freeman's alleged breach of the statutory prohibition of harassment.

[5] The proceedings were struck out summarily by Judge Collins CBE sitting at the Central London County Court on 24 February 2004. He held that the 1997 Act was not designed to create another level of liability in employment law. Employees are already adequately protected by the common law.

[6] Mr Majrowski appealed. The appeal was heard by the Court of Appeal, comprising Auld, May and Scott Baker LJJ ([2005] EWCA Civ 251, [2005] IRLR 340, [2005] QB 848, [2005] 2 WLR 1503). On 16 March 2005, by a majority of two to one, Scott Baker LJ dissenting in part, the Court of Appeal allowed the appeal. The case should be permitted to go to trial. The court would then have to determine whether Mrs Freeman did harass Mr Majrowski within the meaning of the 1997 Act in the ways he alleged. The trust has now appealed to your Lordships' House.

VICARIOUS LIABILITY AND STATUTORY OBLIGATIONS

[7] Vicarious liability is a common law principle of strict, no-fault liability. Under this principle a blameless employer is liable for a wrong committed by his employee while the latter is about his employer's business. The time-honoured phrase is 'while acting in the course of his employment'. It is thus a form of secondary liability. The primary liability is that of the employee who committed the wrong. (To a limited extent vicarious liability may also exist outside the employment relationship, for instance, in some cases of agency. For present purposes these other instances can be put aside.)

[8] This principle of vicarious liability is at odds with the general approach of the common law. Normally common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts.

[9] Whatever its historical origin, this common law principle of strict liability for another person's wrongs finds its rationale today in a combination of policy factors. They are summarised in Professor Fleming's *Law of Torts* (9th edn, 1998) pp 409–410. Stated shortly, these factors are that all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise. This is 'fair', because it means injured persons can look for recompense to a source better placed financially than individual wrongdoing employees. It means also that the financial loss arising from the wrongs can be spread more widely, by liability insurance and higher prices. In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of 'good practice' by their employees. For these reasons employers are to be held liable for wrongs committed by their employees in the course of their employment.

[10] With these policy considerations in mind, it is difficult to see a coherent basis for confining the common law principle of vicarious liability to common law wrongs. The rationale underlying the principle holds good for equitable

wrongs. The rationale also holds good for a wrong comprising a breach of a statutory duty or prohibition which gives rise to civil liability, provided always the statute does not expressly or impliedly indicate otherwise. A precondition of vicarious liability is that the wrong must be committed by an employee in the course of his employment. A wrong is committed in the course of employment only if the conduct is so closely connected with acts the employee is authorised to do that, for the purposes of the liability of the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the employee while acting in the course of his employment: see *Lister v Hesley Hall Ltd* [2001] UKHL 22 at [69], [2001] 2 All ER 769 at [69], [2002] 1 AC 215, per Lord Millett, and *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48 at [23], [2003] 1 All ER 97 at [23], [2003] 2 AC 366. If this prerequisite is satisfied the policy reasons underlying the common law principle are as much applicable to equitable wrongs and breaches of statutory obligations as they are to common law torts.

[11] This approach accords with the trend of judicial decisions and observations and also academic writings. In the *Dubai Aluminium* case, your Lordships' House applied the principle of vicarious liability to an equitable wrong. In the shot-firing case of *Harrison v National Coal Board* [1951] 1 All ER 1102 at 1120, [1951] AC 639 at 671, Lord MacDermott observed:

> 'Vicarious liability is not confined to common law negligence. It arises from the servant's tortious act in the scope of his employment and there can now be no doubt that [the employee] breaking the shot-firing regulations committed a tort.'

In the following year Lord Guthrie, sitting in the Court of Session, followed this observation when deciding the shot-firing case of *Nicol v National Coal Board* (1952) 102 L Jo 357. In the further shot-firing case of *National Coal Board v England* [1954] 1 All ER 546 at 554, [1954] AC 403 at 422, Lord Oaksey expressed approval of Lord Guthrie's decision:

> 'Unless there is something in the statute which creates the obligation indicating the intention that no action shall be brought at common law in respect of its breach, the ordinary rules of the common law of tort are applicable, including the doctrine respondeat superior.'

In Canada Craig JA expressed a similar view in the British Columbia Court of Appeal in *Re Nelson and Byron Price & Associates Ltd* (1981) 122 DLR (3d) 340 at 347. So did Professor Atiyah in his well-known book *Vicarious Liability in the Law of Torts* (1967) pp 280–284. Like opinions are expressed in Fleming *Law of Torts* (9th edn 1998) p 567, and *Clerk and Lindsell on Torts* (18th edn, 2000) p 249 (para 5-47), and see also 19th edition (2006) p 352 (para 6-51).

[12] The sole reported exception to this trend appears to be the decision of the High Court of Australia in *Darling Island Stevedoring & Lighterage Co v Long* (1956) 97 CLR 36. In that case a regulation, reg 31, prescribed precautions which should be observed before loading or unloading a ship. In default a penalty was imposed on the person in charge. The High Court held the employer of the person in charge was not liable for the latter's breach of the regulations.

[13] Their Honours did not speak with one voice. There are two principal strands in their reasoning. Neither assists on the broad issue before your

Lordships' House. The first strand concerned the interpretation of reg 31. The regulation imposed liability on the person in charge. To impose vicarious liability on his employer would give the regulation an operation not justified by its provisions.

[14] The second strand of reasoning was more general. The principle of vicarious liability imposes upon an employer liability for his employee's acts, not his wrongs. Vicarious liability exists not because the employee is liable but because of what the employee has done. Regulation 31 imposed no duty on the employer. The duty was imposed solely on the person in charge. So imputing his acts to the employer did not give rise to a claim against the employer.

[15] In times past this 'employer's tort' analysis of vicarious liability had respectable support in England. But since then your Lordships' House has firmly discarded this basis in favour of the 'employee's tort' approach. An employer's liability is not confined to responsibility for acts done by an employee in the course of his employment. An employer's liability goes further. He is liable for the wrongs of his employee committed in the course of employment. Reasons of policy so dictate. The employee's wrong is imputed to the employer: see *Staveley Iron and Chemical Co Ltd v Jones* [1956] 1 All ER 403, [1956] AC 627 and *Imperial Chemical Industries Ltd v Shatwell* [1964] 2 All ER 999, [1965] AC 656. This approach has received wide academic support: Fleming *Law of Torts*, p 412, *Clerk and Lindsell on Torts* p 351 (para 6-50), Markesinis and Deakin's *Tort Law* (5th edn, 2003) p 582, Salmond and Heuston *Law of Torts* (21st edn, 1996) pp 431–433, and *Munkman on Employer's Liability* (13th edn, 2001) p 114. In this country this approach is now settled law. It seems likely this is also the law in Australia: see *Hollis v Vabu Pty Ltd* [2002] 1 LRC 93 at 110 (paras 34–35).

[16] One further general question should be noted on the interpretation of statutory provisions in this context. The question can be framed this way. Does employers' vicarious liability arise *unless* the statutory provision expressly or impliedly *excludes* such liability? Or does employers' liability arise only *if* the statutory provision expressly or impliedly *envisages* such liability may arise? As already indicated, I prefer the first alternative. It is more consistent with the general rule that employers are liable for wrongs committed by employees in the course of their employment. The general rule should apply in respect of wrongs having a statutory source unless the statute displaces the ordinary rule. This accords with the approach adopted by Lord Oaksey in the passage cited above from *National Coal Board v England* [1954] 1 All ER 546 at 554, [1954] AC 403 at 422.

[17] Accordingly on this point I agree with the Court of Appeal. Unless the statute expressly or impliedly indicates otherwise, the principle of vicarious liability is applicable where an employee commits a breach of a statutory obligation sounding in damages while acting in the course of his employment.

THE 1997 ACT

[18] I turn to the material provisions of the 1997 Act. The purpose of this statute is to protect victims of harassment, whatever form the harassment takes, wherever it occurs and whatever its motivation. The Act seeks to provide protection against stalkers, racial abusers, disruptive neighbours, bullying at work and so forth. Section 1 prohibits harassment in these terms:

> '(1) A person must not pursue a course of conduct—(a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other.

> (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.'

Certain courses of conduct are excepted: where the course was pursued for the purpose of preventing or detecting crime, or was pursued under any enactment or rule of law, or where in the circumstances it was reasonable to pursue the course of conduct: s 1(3). Harassment is not defined in the Act, but it includes causing anxiety or distress. A course of conduct means conduct on at least two occasions: s 7(2), (3). Harassment may be of more than one person.

[19] This statutory prohibition applies as much between an employer and an employee as it does between any other two persons. Further, it is now tolerably clear that, although the victim must be an individual, the perpetrator may be a corporate body.

[20] Section 2 creates the criminal offence of harassment. The offence comprises pursuit of a course of conduct in breach of s 1. Criminal proceedings can deal only with offences which have been committed. Section 3 goes further. Section 3 affords victims a civil remedy in respect both of actual breaches of s 1 and also threatened breaches. For instance, a single act of harassment may have occurred, not in itself a course of conduct, and the victim may fear repetition. Section 3 provides:

> '(1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
>
> (2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.'

Subsequent provisions in the section make plain that the court may grant an injunction for the purpose of restraining a defendant from pursuing any conduct which amounts to harassment. Breach, without reasonable excuse, of such an injunction is itself a criminal offence: sub-s (6).

[21] The trust, relying on the permissive 'may' in s 3(2), submitted that an award of damages under this section is discretionary. A claimant is not entitled to damages as of right. Hence, it was said, harassment cannot be equated with a common law tort.

[22] I do not agree. The effect of s 3(1) is to render a breach of s 1 a wrong giving rise to the ordinary remedies the law provides for civil wrongs. This includes an entitlement to damages for any loss or damage sustained by a victim by reason of the wrong. Ordinary principles of causation and mitigation and the like apply. Subsection (2) is consistent with this understanding of the section. The phrase 'among other things' assumes that damages are recoverable. The enabling language ('may be awarded') is apt simply to extend or clarify the heads of damage or loss for which damages are recoverable.

VICARIOUS LIABILITY AND HARASSMENT

[23] Against that legislative background I turn to the trust's case. The principal thrust of the trust's submissions is that the 1997 Act was primarily a legislative response to the public order problem of stalking. The Act was not

aimed at the workplace. It is a public order provision designed to punish perpetrators for the anxiety and upset they cause to victims, not blameless employers who happen to be solvent and available as a target for litigation. Vicarious liability would have consequences for employers which Parliament cannot have intended. Vicarious liability would mean that a blameless employer would be liable in damages in respect of a cause of action wherein damages are recoverable for anxiety short of personal injury, foreseeability of damage is not an essential ingredient, and the limitation period is six years and not the usual period applicable to personal injury claims. The deterrent effect of ordering the perpetrator to pay compensation would be undermined by drawing litigation away from the very person guilty of the offence. Vicarious liability would increase very considerably the volume of claims based on stress, anxiety or other emotional problems at work. The courts would be unable to strike out unmeritorious claims. The burden on employers, insurers and the administration of justice would be wholly unjustified.

[24] I am not persuaded by these arguments. Neither the terms nor the practical effect of this legislation indicate that Parliament intended to exclude the ordinary principle of vicarious liability.

[25] As to the terms of the legislation, by s 3 Parliament created a new cause of action, a new civil wrong. Damages are one of the remedies for this wrong, although they are not the primary remedy. Parliament has spelled out some particular features of this new wrong: anxiety is a head of damage, the limitation period is six years, and so on. These features do not in themselves indicate an intention to exclude vicarious liability. Vicarious liability arises only if the new wrong is committed by an employee in the course of his employment, as already described. The acts of the employee must meet the 'close connection' test. If an employee's acts of harassment meet this test, I am at a loss to see why these particular features of this newly created wrong should be thought to place this wrong in a special category in which an employer is exempt from vicarious liability. It is true that this new wrong usually comprises conduct of an intensely personal character between two individuals. But this feature may also be present with other wrongs which attract vicarious liability, such as assault.

[26] Nor does imposition of criminal liability only on the perpetrator of the wrong, and on a person who aids, abets, counsels or procures the harassing conduct, point to a different conclusion. Conversion, assault and battery may attract criminal liability as well as civil liability, but this does not exclude vicarious liability.

[27] I turn to the practical effect of the legislation. Vicarious liability for an employee's harassment of another person, whether a fellow employee or not, will to some extent increase employers' burdens. That is clear. But, here again, this does not suffice to show Parliament intended to exclude the ordinary common law principle of vicarious liability. Parliament added harassment to the list of civil wrongs. Parliament did so because it considered the existing law provided insufficient protection for victims of harassment. The inevitable consequence of Parliament creating this new wrong of universal application is that at times an employee will commit this wrong in the course of his employment. This prompts the question: why should an employer have a special dispensation in respect of the newly-created wrong and not be liable if an employee commits this wrong in the course of his employment? The contemporary rationale of employers' vicarious liability is as applicable to this new wrong as it is to common law torts.

[28] Take a case where an employee, in the course of his employment, harasses a non-employee, such as a customer of the employer. In such a case the employer would be liable if his employee had assaulted the customer. Why should this not equally be so in respect of harassment? In principle, harassment arising from a dispute between two employees stands on the same footing. If, acting in the course of his employment, one employee assaults another, the employer is liable. Why should harassment be treated differently?

[29] As I see it, the matter of most concern to employers is the prospect of abuse in cases of alleged workplace harassment. Employers fear the prospect of a multiplicity of unfounded, speculative claims if they are vicariously liable for employees' harassment. Disgruntled employees or ex-employees, perhaps suffering from stress at work unrelated to harassment, perhaps bitter at being dismissed, will all too readily advance unmeritorious claims for compensation for harassment. Internal grievance procedures will not always satisfy an employee who is nursing a grievance. Although awards of damages for anxiety under the 1997 Act will normally be modest, a claimant may well pursue his present or erstwhile employer, not the alleged wrongdoer himself. The claim may be put forward for the first time years after the alleged harassment is said to have occurred. The alleged perpetrator may no longer be with the employer and may not be traceable.

[30] This is a real and understandable concern. But these difficulties, and the prospect of abuse, are not sufficient reasons for excluding vicarious liability. To exclude liability on these grounds would be, to use the hackneyed phrase, to throw the baby out with the bathwater. It would mean that where serious harassment by an employee in the course of his employment has occurred, the victim—who may not be a fellow employee—would not have the right normally provided by the law to persons who suffer a wrong in that circumstance, namely, the right to have recourse to the wrongdoer's employer. The possibility of abuse is not a good reason for denying that right. Courts are well able to separate the wheat from the chaff at an early stage of the proceedings. They should be astute to do so. In most cases courts should have little difficulty in applying the 'close connection' test. Where the claim meets that requirement, and the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under s 2.

THE OVERLAP WITH THE EC DISCRIMINATION LEGISLATION

[31] I turn next to a difficult part of the case. The trust placed reliance on the overlap which exists between the harassment provisions in the 1997 Act and the harassment provisions in the series of non-discrimination regulations introduced to give effect to Council Directives (EC) 2000/43 (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin) (OJ 2000 L180 p 22)), 2000/78 (establishing a general framework for equal treatment in employment and occupation) (OJ 2000 L303 p 16) and 2002/73 (OJ 2002 L269 p 15). These directives were made pursuant to a new non-discrimination article, art 13 EC, inserted into the Treaty on European Union by the Amsterdam Treaty in 1997. The Amsterdam Treaty came into force on 1 May 1999. The directives

established a common framework for tackling discrimination on six specific grounds: sex, race, disability, sexual orientation, religion or belief, and age. a

[32] One example of the overlap will suffice. On the relevant point the several regulations are substantially to the same effect. The Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626 inserted into the Race Relations Act 1976 new provisions regarding harassment. The effect of s 4(2A), read with s 3A, is that it is unlawful for an employer to subject an employee to harassment b on the grounds of race or ethnic or national origins. Harassment means, in short, engaging in unwanted conduct which has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for another person. Section 32, which was part of the statute as originally enacted in 1976, provides that anything done by a person in the course of his employment shall be treated as done by his employer c as well as by him, subject to the 'employer's defence', as it is known colloquially. The employer's defence is that in proceedings brought against an employer in respect of an act alleged to have been done by an employee the employer has a defence where he can prove he took such steps as were reasonably practicable to prevent the employee from doing that act or acts of that description: s 32(3). The d trust contrasted the availability of this defence in proceedings brought under the 1976 Act with the position under the 1997 Act if an employer is strictly liable under the 1997 Act for harassment committed by his employees in the course of their employment. The contrast means that if an employer's liability under the 1997 Act is strict, victims of racial harassment can in some circumstances bypass the defence intended to be available to employers under the amendments made e to the 1976 Act. Victims can do so by taking the simple step of bringing their harassment claims under the 1997 Act. By this means victims can also bypass the strict time limits applicable to discrimination claims.

[33] Had the amending regulations of 2003 been made before the 1997 Act was enacted this would have been a telling point. But they were not. In short the f historical explanation of how it comes about that the employer's defence is available in harassment claims brought under the 1976 Act is as follows.

[34] The employer's defence seems to have had its origin in s 13 of the Race Relations Act 1968. Employers were subject to non-discrimination obligations. But these obligations were qualified. Acts done by an employee in the course of g his employment were to be treated as done by his employer, subject to the employer being able to show he had taken all reasonably practicable steps to prevent his employee doing such acts. Harassment was not mentioned in this 1968 statute. In due course the employer's defence was brought forward into s 32 of the 1976 Act. That is the starting point.

[35] The next step was that Directive 2000/43 made provision for putting the h principle of equal treatment into effect in member states. For the purposes of this directive equal treatment means there should be no discrimination based on racial or ethnic origin. Harassment related to racial or ethnic origin is deemed to be discrimination for this purpose: art 2(3).

[36] The final step was that, as one would expect, effect was given to this j directive in this country by making appropriate amendments to the existing race discrimination legislation, namely, the 1976 Act. Harassment by an employer is deemed by the directive to be discrimination, and so harassment was treated in this country's legislation on much the same footing as discrimination. Accordingly the employer's defence was applied to acts of harassment in the same way as it already applied to acts of discrimination.

[37] The legislative history regarding harassment on grounds of sex or disability is essentially similar. Amendments were made by regulations to the existing discrimination legislation: the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995. Both those statutes already included provision for the employer's defence in respect of discrimination claims. There was no discrimination legislation already in existence regarding sexual orientation, religion or belief, or age. In these cases corresponding provision was made by regulations which have to stand on their own feet.

[38] Given this history, the *existence* of the employer's defence in the discrimination legislation, embracing harassment as it now does pursuant to the requirements of the directives, and the *absence* of such a defence from the (earlier) 1997 Act, does not assist materially in the interpretation of the 1997 Act. The discrimination legislation, as it existed in 1997, is too removed from harassment for the inclusion of the employer's defence in that legislation to throw any light on the interpretation of the 1997 Act. The accretion of harassment to the discrimination legislation derives from the directives and came later.

[39] Although these later amendments to the discrimination legislation do not assist in the interpretation of the 1997 Act, it must be acknowledged that in the fields they cover they have produced a discordant and unsatisfactory overlap with the 1997 Act.

SCOTLAND

[40] A final point should be noted on the interpretation of the 1997 Act. Sections 1–7 of the 1997 Act apply to England and Wales. Sections 8–11 make corresponding provision for Scotland. During the oral hearing of this appeal my noble and learned friend Lord Hope of Craighead drew attention to s 10. Section 10 inserts a new section, s 18B, into the Prescription and Limitation (Scotland) Act 1973. As explained by Lord Hope in his speech, the new s 18B envisages that the employer of a person responsible for harassment may be the defender in an action of harassment. In other words, s 18B appears to assume that in Scotland an employer may be vicariously liable. This is confirmatory of the conclusion expressed above regarding England and Wales. Parliament cannot have intended that in this respect the position would be different north and south of the border.

[41] I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD.

[42] My Lords, the question in this case is whether an employer may be held vicariously liable in damages under s 3 of the Protection from Harassment Act 1997 for a course of conduct by one of its employees which amounts to harassment in breach of s 1 of that Act. Underlying this question there is a broader issue. This is whether an employer may be vicariously liable for a breach of a statutory duty imposed only on his employee. But the Court of Appeal ([2005] EWCA Civ 251, [2005] IRLR 340, [2005] QB 848, [2005] 2 WLR 1503) held unanimously that in general an employer may be vicariously liable for a breach of statutory duty imposed on the employee which is committed in the course of his employment, and Mr Turner QC for the appellant NHS trust accepted that he could not succeed on that issue in his appeal to this House. So the question which has to be decided by your Lordships has been confined to the narrow issue. This is whether conduct by an employee in breach of s 3 of the 1997 Act is conduct for which the employer may be vicariously liable.

[43] Had it not been for the fact that the wording of the Act itself provides the answer, I would have found it hard to disagree with the reasons which Scott Baker LJ gave in his dissenting opinion in the Court of Appeal for answering this question in the negative. He said (at [113]) that the statutory duty which the Act imposed was personal in nature, that it was difficult to envisage circumstances in which it would be just and reasonable to hold an employer vicariously liable and that he did not think, viewing the statute as a whole, that it was Parliament's intention that an employee should be vicariously liable. It seemed to me that there were indeed powerful reasons for thinking that Parliament intended that liability in damages should be personal to the perpetrator of the harassment and that it should not be extended to his employer, if any, under the doctrine of vicarious liability. My noble and learned friend Lord Nicholls of Birkenhead, whose speech I have had the advantage of reading in draft, has subjected them all to careful scrutiny. While I respectfully agree with the conclusions that he has reached, the issue nevertheless seems to me to be finely balanced and far from easy to decide.

[44] But in my opinion there is no escape from the fact that the statute when viewed as a whole includes ss 8–11, which provide for a new civil wrong of harassment extending only to Scotland, as well as ss 1–7 which extend only to England and Wales. For perfectly understandable reasons, it was to the provisions relating to England and Wales that the judges in the courts below directed their attention. Overlooked by everybody (including, it appears, A Barron 'Vicarious Liability for Employees and Agents' 2006 SLT (News) 79 in his comments on this case from the Scottish viewpoint at p 82), until attention was drawn to it in the course of Mr Turner's very attractive oral argument, is a phrase which appears in s 10(1) of the 1997 Act which deals with the limitation of actions of harassment in Scotland. This subsection provides:

> 'After section 18A of the Prescription and Limitation (Scotland) Act 1973 there is inserted the following section—
>
> "**18B Actions of harassment**
>
> (1) This section applies to actions of harassment (within the meaning of section 8 of the Protection from Harassment Act 1997) which include a claim for damages.
>
> (2) Subject to subsection (3) below and to section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after—(a) the date on which the alleged harassment ceased; or (b) the date, (if later than the date mentioned in paragraph (a) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to have become, aware, that the defender was a person responsible for the alleged harassment *or the employer or principal of such a person.*
>
> (3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who is alleged to have suffered the harassment was under legal disability by reason of nonage or unsoundness of mind.' (My emphasis.)

[45] For reasons that I must now explain, it is impossible to avoid the conclusion that the effect of the phrase 'or the employer or principal of such a person' in s 18B of the 1973 Act is to show that it was the intention of Parliament that it was to be open to the court, in appropriate circumstances, to find an employer vicariously liable in damages to the victim of a course of conduct amounting to harassment in breach of the relevant provision of the 1997 Act where the person responsible was an employee.

SECTION 18B OF THE 1973 ACT: THE STATUTORY CONTEXT

[46] It is necessary first to explain how s 18B of the 1973 Act fits into the system for the prescription of obligations and limitation of actions in Scots law. It is clear that a decision had to be taken as to how the action for harassment was to be accommodated in the Scottish system. Section 6 of the 1997 Act contains the provision about limitation that was thought appropriate for England and Wales. It provides simply that in s 11 of the Limitation Act 1980 there was to be inserted a new sub-s (1A) to the effect that that section was not to apply to any action brought for damages under s 3 of the 1997 Act. The effect of that provision is that an action brought under s 3 of the 1997 in England and Wales is subject to a six-year time limit. It is unnecessary for this purpose to decide whether the action is to be classified as founded on tort and or is for a sum recoverable by statute, as the time limit in both of these cases is the same: ss 2 and 9 of the 1980 Act. Mr Turner submitted that the right to claim damages in s 3 of the 1997 Act did not create a new tort. In my opinion it did, just as the equivalent remedy which it created for Scotland is properly classified as a delictual one. But in any event the solution that was thought appropriate for England and Wales could not be fitted in to the system which limits the time within which claims may be brought in Scotland, as Scots law does not have a six-year time limit equivalent to that which is to be found in the 1980 Act.

[47] The rules by which a right or a claim is extinguished after the lapse of a given time limit in Scotland are to be found in what is known as the law of prescription. Until the law was reformed by the 1973 Act these rules were set out in a series of Acts of the pre-Union Scottish Parliament, of which the most important was the Prescription Act 1469 which introduced the long negative prescription of 20 years. On the one hand there is the positive prescription, by which rights to land are fortified and rendered unchallengeable by the exclusion of all objections thereto after the lapse of a given time limit. On the other there are the negative prescriptions, by which rights of various kinds are extinguished after the expiry of the relevant prescriptive period. But Scots law has also adopted from English law the concept of limitation, the effect of which is not to extinguish claims but to render them unenforceable after a stated period. This system was introduced into Scots law by the Law Reform (Limitation of Actions) (Scotland) Act 1954 for actions of damages for personal injury or death in consequence of personal injury. As its short title indicates, the 1973 Act has retained these two concepts. Part I of the Act reforms the law of prescription. Part II of the Act, as amended by s 2 of the Prescription and Limitation (Scotland) Act 1984, preserves the system of limitation of actions.

[48] For present purposes all that needs to be said is that the first choice that had to be made was whether actions of harassment should be subject to the five-year negative prescription or to the limitation system. Actions of damages for harassment of the kind contemplated by s 8 of the 1997 Act would have been subject to the five-year negative prescription provided in Pt I of the 1973 Act (see

s 6 read with para 1(d) of Sch 1), had it not been for the amendment which is contained in s 10(1) of the 1997 Act. The effect of that amendment is to bring these actions within the limitation system in Pt II of the 1973 Act, as amended.

[49] Once it had been decided that the limitation system was to be applied to these actions the draftsman had to decide how the amendment to the 1973 Act ought to be worded. Part II of that Act, as amended, already contained three separate limitation provisions. Section 17, as substituted by s 2 of the 1984 Act, applies to actions in respect of personal injuries not resulting in death. Section 18, as substituted by s 2 of the 1984 Act, applies to actions where death has resulted from personal injuries. Section 18A, which was inserted by s 12(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, introduced a three-year limitation on actions for defamation. The three-year period referred to in s 18A is not capable of being extended, except to allow for any time during which the person alleged to have been defamed was under legal disability by reason of nonage or unsoundness of mind. But the three-year periods referred to in ss 17 and 18 are capable of being extended so that the period runs from the date when the pursuer was, or should have been, aware of certain facts. The draftsman could have chosen an absolute limit of three years, subject only to an extension on the ground of legal disability, following the precedent set by s 18A. But he chose instead to follow the precedents set by ss 17 and 18 and to allow for a more generous extension of the three-year period of the kind for which they provide.

[50] Among the facts which are relevant to the question whether the three-year period in ss 17 and 18 of the 1973 Act should be extended are the identity of the person against whom the action should be brought. Section 17(2)(b)(iii) and s 18(2)(b)(ii) use the same formula to describe this fact. It is in these terms:

> 'that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.'

The new s 18B which s 10(1) of the 1997 Act inserts into Pt II of the 1973 Act for actions of harassment adopts, with modifications, the same formula in sub-s (2)(b). It provides for it in these terms: 'that the defender was a person responsible for the alleged harassment or the employer or principal of such a person.'

DOES THIS FORMULA CONTEMPLATE VICARIOUS LIABILITY?

[51] There is no doubt that the purpose of the formula which is to be found in ss 17(2)(b)(iii) and 18(2)(b)(ii) of the 1973 Act was to accommodate claims based on the employer's vicarious liability by permitting an extension of the limitation period to the date when the pursuer became aware, or it would have been reasonably practicable for him to become aware, of the identity of the employer of the person to whose act or omission the injuries were attributable. As Lord President Cooper explained in *Matuszczyk v National Coal Board* 1953 SC 8 at 17–18, a case based on the principle of vicarious liability which would have been hopelessly irrelevant so long as the defence of common employment was available had by then become a relevant one:

> '... now that common employment has been abolished, the law of Scotland must be back where it was in *Dixon v. Rankine* ((1852) 14 D 420), which was disapproved in the *Bartonshill* case ((1858) 3 Macq 266); and we

a can again rely after a prolonged eclipse upon the well-known judgment of Lord Justice-Clerk Hope from which I take this sentence in which his Lordship is referring to the victim's fellow servants: "For their careful and cautious attention to duty, for their neglect of precautions by which danger to life may be caused, he (the employer) is just as much responsible as for such misconduct on his own part, if he were actually working or present." b In other words, so far as regards conduct within the scope of the servant's employment, there is no limit in the general case to the rule *respondeat superior.'*

[52] There is no doubt that the principle of vicarious liability is available where c the employee is in breach of a duty owed by him to his fellow employee at common law. That fact provides a sufficient explanation for the use of the formula in ss 17(2)(b)(iii) and 18(2)(b)(ii) of the 1973 Act. The relief which is to be found in these provisions against a strict application of the three-year limitation period would have been incomplete without it. The use of the same formula in s 18B(2)(b) for actions of harassment seems to lead inevitably to the conclusion d that it was the intention that the principle of vicarious liability should be available in actions of harassment also. That is the conclusion which David Johnston draws in *Prescription and Limitation* (1999) (para 11.16) where in his analysis of s 18B he writes:

e 'These provisions bear a certain resemblance to those on the limitation of actions for personal injuries under sections 17 and 18 of the 1973 Act. They are, however, much simpler. First, there is only one 'normal' date for the start of the limitation period, namely the date when the harassment ceased. This seems reasonable, since by definition what is being complained of is a course of conduct. Second, it is awareness of only one fact, namely the f identity of the defender (whether liable personally *or vicariously*) which may be material in order to postpone the start of the limitation period.' (My emphasis.)

[53] The remedy which Parliament has provided in cases of harassment is, of g course, a statutory remedy. Nevertheless it recognised in s 10 of the 1997 Act that in harassment cases, as in a case of personal injury caused by a breach of the employee's duty at common law, the employer may be vicariously liable for conduct of the employee that amounts to harassment under the statute. At first sight this might seem surprising, in view of the paucity of authority to show that h the doctrine of vicarious liability applies to duties laid on the employee by statute. Reported examples of cases where the principle of vicarious liability has been applied, without express statutory authority, to a breach of a statutory duty laid on the employee personally are hard to find. Statutory provisions providing for the safety, health and welfare of employees in the work place normally include j provisions which impose a direct duty on the employer in such circumstances, of which reg 32(2) of the Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976, SI 1976/1019 is an example: see *MacMillan v Wimpey Offshore Engineers and Constructors Ltd* 1991 SLT 515. It provides:

'It shall be the duty of the employer of an employee employed by him for work on or near an offshore installation to ensure that the employee

> complies with any provision of these Regulations imposing a duty on him or expressly prohibiting him from doing a specified act.'

A provision to the same general effect was included, 'for the removal of doubts', in s 159 of the Mines and Quarries Act 1954.

[54] Questions as to whether the employer was vicariously liable had however been raised under the legislation relating to coal mines prior to the enactment of the 1954 Act. Sections 75 and 102(8) of the Coal Mines Act 1911 had the effect of absolving the owner of the mine from direct responsibility for any contravention or non-compliance with a provision of the Act if he could prove that he had taken all reasonable precautions to prevent it or that it was not reasonably practicable to avoid or prevent the breach. This left open the possibility that the only route by which a remedy could be obtained against the employer for breach of a statutory duty laid on the employee was by applying the strict doctrine of vicarious liability.

[55] In *Harrison v National Coal Board* [1951] 1 All ER 1102, [1951] AC 639 the question was raised, but not decided because an answer to it was unnecessary, whether the effect of the abolition of the doctrine of common employment was that a plaintiff could succeed against the owner on the basis of vicarious liability for a shot-firer's breach of his statutory duty not to fire without having first ascertained that all persons in the vicinity had taken proper shelter. Lord MacDermott said that vicarious liability was not confined to common law negligence:

> 'It arises from the servant's tortious act in the scope of his employment and there can be no doubt that [the servant] in breaking the shot-firing regulations committed a tort.' (See [1951] 1 All ER 1102 at 1120, [1951] AC 639 at 671.)

Although Lord MacDermott was alone in expressing that view, Lord Guthrie adopted and applied the same reasoning in another case where it was contended that the owner of the mine was liable vicariously for a shot-firer's breach of the regulations. In *Nicol v National Coal Board* (1952) 102 L Jo 357 he held that the fireman in doing his work as a shot-firer was acting in the course of his employment by the defenders and that the firing of the shots was the work which he was employed by the defenders to do:

> 'His failure to take the precautions that Parliament has required of him [in doing that work] did not take him outwith the scope of his employment. Accordingly, his acts were still within the area in which the vicarious liability of a master operates.'

[56] The issue was raised again in *Matuszczyk*'s case. In that case however the pursuer's case was based on duties said to have been owed to him by the shot-firer at common law. The defenders' argument was that these duties had been superseded by the duties laid down by statutory regulation, for which the employer was not vicariously liable. The argument that, if the regulation was not complied with, the failure was a duty in statutory duty only which could not also be a failure in common law duty was rejected. Lord President Cooper (at 18) found it unnecessary to discuss whether a case could be made against the owner

of the mine for a breach of the statutory duty laid upon the shot firer. But Lord Keith said (at 15) that his first impression was that the employers would be vicariously liable, whether the breach of duty was at common law or under statute. He observed that Lord MacDermott's observation to the same effect in *Harrison*'s case had attracted sympathetic comment from Lord Porter, and that Lord Reid said that he was not prepared to dismiss the argument as unworthy of consideration.

[57] In *National Coal Board v England* [1954] 1 All ER 546, [1954] AC 403, which was another shot-firing case, the House again reserved its decision on the issue. But Lord Porter said ([1954] 1 All ER 546 at 550, [1954] AC 403 at 416) that Lord Guthrie's opinion in *Nicol*'s case expressed the view which he held, which was that the shot firer's failure to take the precautions required of him by the regulation did not take him outwith the scope of his employment. Lord Oaksey said ([1954] 1 All ER 546 at 553, [1954] AC 403 at 421) that he agreed with Lord Guthrie's judgment in *Nicol*'s case. He added this comment:

> 'Unless there is something in the statute which creates the obligation indicating the intention that no action shall be brought at common law in respect of its breach, the ordinary rules of the common law of tort are applicable, including the doctrine respondeat superior.' (See [1954] 1 All ER 546 at 554, [1954] AC 403 at 422.)

This supports Lord Nicholls' conclusion, with which I agree, that employers are vicariously liable for wrongs having a statutory source unless the statutory provision expressly or impliedly excludes such liability: see para [17] of his speech.

[58] Against this background the decision to include a reference to the employer or principal of the person responsible for the harassment cannot be dismissed as based on a misunderstanding about the extent of the employer's vicarious liability. There is no rule in Scots law which precludes a finding that the employer is liable vicariously for a breach of a statutory duty imposed on his employee. So far as conduct within the scope of the employee's employment is concerned, the doctrine respondeat superior applies irrespective of whether the duty the employee has breached was laid on him by the common law or by statute. In Scots law too, therefore, the general rule applies in respect of wrongs having a statutory source unless it is displaced by the statute. Parliament could have chosen, had it wished, to exclude the application of the doctrine in the case of conduct by an employee amounting to harassment. But it chose not to do so. It provided expressly, and deliberately, in s 10(1) of the 1997 Act to the contrary. That subsection was included in the Bill from the outset of its passage through Parliament. We can take it that, according to the normal practice in those pre-devolution days, it would have been drafted in the Lord Advocate's department and that it would have been shown to the Parliamentary draftsman who was responsible for the part of the Bill that was to apply to England and Wales. It would have been removed from the Bill if it had been contrary to the instructions that had been given to the draftsman of that part.

SECONDARY, NOT VICARIOUS, LIABILITY?

[59] In a valiant attempt to meet this obstacle to his argument Mr Turner said that the purpose of s 10(1) of the 1997 Act was to deal only with situations where the employer was secondarily, and thus personally and not vicariously, responsible for conduct by his employee which amounted to harassment. He

referred to *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] EWCA Civ 887, [2004] 4 All ER 85, [2003] ICR 1335 as an example of that kind of liability. That was a case where the doorman at a nightclub, having been involved in a violent altercation with the claimant on the premises while performing his duties there, armed himself with a knife which he fetched from his flat a short distance away and attacked him in the street with it some time afterwards. The Court of Appeal held (at [32]) that the responsibility of the nightclub owner for the actions of his aggressive doorman was not extinguished by the separation in time and place from what had happened in the nightclub, and that vicarious liability was therefore established. But it went on to say that, although personal liability would not necessarily and always follow the establishment of vicarious liability, in that case it did. This was because the owner had chosen to employ the doorman, knowing and approving of his aggressive tendencies, which he had encouraged rather than curbed.

[60] It is by no means impossible to conceive of circumstances where an employer could be held to be secondarily liable for a course of conduct by an employee amounting to harassment. As the Court of Appeal indicated in *Mattis*'s case, the encouragement or approval by the employer of such conduct could lead to that result. Indeed, s 7(3A) of the 1997 Act, inserted by s 44(1) of the Criminal Justice and Police Act 2001, expressly provides for precisely such a situation. But I do not regard this a sufficient explanation for the reference to the employer in s 18B(2)(b) of the 1973 Act. The wording of that provision, when closely analysed, is a sufficient indication to the contrary. It refers to awareness that the defender was a person responsible for the alleged harassment *or* the employer or principal of such a person. The word 'or', which appears also in the corresponding provisions of ss 17 and 18, provides for the situation where the liability of the employer or the principal, as the case may be, comes in place of that of the employee. That is the essence of the doctrine of vicarious liability. So I would reject Mr Turner's argument that s 18B does not imply the existence of vicarious liability of the employer but provides merely for an extension of the limitation period in cases where a culpable employer is secondarily liable for the acts of a harassing employee.

THE 1997 ACT IN PRACTICE

[61] Among the arguments that persuaded Scott Baker LJ that the 1997 Act created a liability that was personal only to the perpetrator of the harassment was the fact that, if vicarious liability was imposed by it, this was done without any limitation as to the circumstances. As he said (at [111]), no statutory defence is provided. So the only control mechanisms on the employer's strict liability are those laid down by the common law, as explained in *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2001] 2 All ER 769, [2002] 1 AC 215, *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 1 All ER 97, [2003] 2 AC 366 and *Bernard v A-G of Jamaica* [2004] UKPC 47, [2005] IRLR 398. Mr Turner suggested that recognition that the employer could be vicariously liable would provide a strong incentive to the commencement of proceedings against employers, and that employers generally were particularly vulnerable to such claims for which their insurers might decline to provide cover.

[62] It may be worth noting however that there has been no sign of such a development in Scotland, despite the clear indication in the statute that employers may be vicariously liable in damages for harassment by their employees. This is not because opportunities which the statute provides for

obtaining a civil remedy under the 1997 Act have gone entirely unnoticed. But the eight cases which have been reported so far deal only with the use of non-harassment orders. These were orders sought in civil proceedings in the sheriff court (eg *McCann v McGurran* 2002 SLT 592, where the order was sought against a former husband, and *McGuire v Kidston* 2002 SLT (Sh Ct) 66, where the parties had previously had a relationship) or orders sought in criminal proceedings under s 234A of the Criminal Proceedings (Scotland) Act 1995 following a conviction for an offence involving harassment (eg *McGlennan v McKinnon* 1998 SLT 494, where the accused, who was convicted of a breach of the peace by shouting at the complainer, had previously had a relationship with her). There are no reported instances of claims made under the Act for damages against an employer for harassment by an employee. The practice appears to have been to continue to use the employment tribunal as the forum for the making of claims based on conduct amounting to harassment in the employment context.

CONCLUSION

[63] Although the provisions of the 1997 Act which apply to Scotland differ in various respects from those which apply to England and Wales (see Sam Middlemiss 'Liability of Employers under the Protection from Harassment Act 1997' [2006] Edin LR 307), it was not suggested that the intention of Parliament was that there was to be any difference in substance as between the two jurisdictions as to the scope of the civil remedy for harassment. On the contrary, the Home Secretary, Michael Howard, said when introducing the Bill at second reading that the aims of the Bill as it applied to England and Wales were identical to those for Scotland: 287 HC Official Report (6th series) col 785. The indication in s 10(1) that vicarious liability is available in Scotland where damages are claimed for conduct by an employee amounting to harassment within the meaning of the 1997 Act must be taken to apply to England and Wales also. I would dismiss the appeal.

BARONESS HALE OF RICHMOND.

[64] My Lords, if we had been the promoters of the Protection from Harassment Act 1997, we might have asked ourselves the policy question, 'Should the employers of people who harass others in the course of their employment be vicariously liable for any damages the court may order under the Act?' The legislators might have thought of a number of policy reasons why the answer should be 'no'.

[65] They might have considered that the principal purpose of the Act was prevention and protection rather than compensation. It begins with the prohibition of harassment in s 1. This is then made a criminal offence by s 2. Civil remedies, including damages and injunctions, are provided for in s 3. The aim, it might be thought, was to deter, to punish or to encourage the perpetrator to mend his ways by the wide range of criminal disposals available on summary conviction, including the restraining orders provided for in s 5, or by the sort of specific prohibitions which may be helpfully contained in an injunction.

[66] If this was the aim, it is easy to see why the definition of harassment was left deliberately wide and open-ended. It does require a course of conduct, but this can be shown by conduct on at least two occasions (or since 2005 by conduct on one occasion to each of two or more people): s 7(3). All sorts of conduct may amount to harassment. It includes alarming a person or causing her distress:

s 7(2). But conduct might be harassment even if no alarm or distress were in fact caused. A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour.

[67] If prevention and protection were the aim, it is also easy to see why the mental element was framed as it was. A person is guilty of harassment if he knows or ought to know that his course of conduct amounts to harassment: s 1(1)(b). He ought to know this if a reasonable person in possession of the same information would think that it amounted to harassment: s 1(2). There is no requirement that harm, or even alarm or distress, be actually foreseeable, although in most cases it would be. This broad formulation helps the courts to intervene to warn the perpetrator and encourage him to mend his ways.

[68] The promoters of the Act might well have thought that this intense focus on the perpetrator and getting him to stop would not be helped, and might even be hindered, by making the employer vicariously liable. Vicarious liability, as my noble and learned friend, Lord Nicholls of Birkenhead, has so clearly explained, does not depend upon the employer having done anything wrong or even having broken any legal duty imposed upon him. It merely requires that the enterprise pay for damage done by its employees in the course of their employment, a concept which now has a very broad meaning, and certainly embraces conduct which the employer was actively trying to deter and could have done nothing more to prevent. On the facts of this case, the employer had a grievance procedure which was designed to prevent workplace harassment and the perpetrator resigned as a result.

[69] The promoters might have considered that our law does not generally award damages for anxiety and injury to feelings unless these are so severe as to amount to a recognised psychiatric illness. Discrimination and harassment are statutory exceptions to this rule. But the rule has a sound policy basis in limiting the scope for claiming compensation. There is already concern amongst some of our legislators that the scope for claiming compensation, even for recognised physical injuries, has gone too far. The avowed purpose of the Compensation Bill currently before Parliament is to rein in the so-called 'compensation culture'. The fear is that, instead of learning to cope with the inevitable irritations and misfortunes of life, people will look to others to compensate them for all their woes, and those others will then become unduly defensive or protective.

[70] The promoters might have thought that employers already owe a duty of care towards their employees, to take reasonable steps to protect them from foreseeable harm to their physical or mental health. There has been a rapid expansion in claims for psychiatric injury resulting from stress at work. Liability turns on the foreseeability of such injury to the particular employee and what the employer might reasonably have been expected to do to avoid it. If employers can be vicariously liable for anxiety and distress caused without any breach of duty on their part, such claims will not only be routinely added to stress at work claims, they will also found a quite separate stream of, admittedly probably small, claims for harassment at work. The promoters might have thought that there were better ways than a myriad of new small claims to encourage better practice in the workplace if such were needed.

[71] The promoters did address their minds to the appropriate limitation period and deliberately disapplied the ordinary three-year period for personal injury claims: s 6. Harassment can take place over very long periods and they would not have wanted the earlier conduct to be left out of account.

[72] But these were policy questions for the legislators. As Mr Robin Allen QC for Mr Majrowski points out, floodgates arguments may assist the courts in deciding how to develop the principles of the common law. They are of little help to us in construing the language which Parliament has used. Mr Mark Turner QC, on behalf of the appellant NHS trust, accepts that it is a question of construction. He argues that there should be no general presumption one way or the other that a statute aimed at prohibiting the conduct of one person should or should not import vicarious liability if that conduct is committed in the course of employment. However, Parliament must be assumed to legislate in the knowledge of the general law, which includes the law of vicarious liability, so that one must look for indications that Parliament did not intend it to apply to the particular duties or prohibitions it was imposing.

[73] But in this case there can be no doubt, for the reasons explained by my noble and learned friend, Lord Hope of Craighead, that Parliament contemplated vicarious liability. Despite Mr Turner's valiant efforts, the Scottish limitation provisions can be explained in no other way. Although the Scottish limitation rules are different from the English, there is no indication that the substantive liabilities created by the Act were intended to be any different.

[74] As we are not policy-makers and legislators, but judges construing the language used by Parliament, in the context of the general law of vicarious liability of which Parliament must be presumed to have been aware, I am driven to conclude, in agreement with my noble and learned friends, Lord Nicholls and Lord Hope, that this appeal should be dismissed.

LORD CARSWELL.

[75] My Lords, three of the classic methods of interpretation of a statutory provision are construction of the language of the enactment, consideration of the mischief at which the provision was aimed and weighing of the consequences of the conflicting interpretations of the provision in question. All are designed to assist the object of the tribunal interpreting the provision, to determine the meaning which Parliament intended in enacting it.

[76] The wording of the enactment, not merely individual provisions, but the whole enactment, is the first resort of the interpreter, and in many, if not most, cases it will resolve the question. The Court of Appeal in the present case ([2005] EWCA Civ 251, [2005] IRLR 340, [2005] QB 848, [2005] 2 WLR 1503) did not find sufficient indications in the language of the Protection from Harassment Act 1997 to determine the question whether an employer was to be liable for harassment committed by his employee in the course of his employment. It therefore resorted to consideration of the statutory objective and the consequences of adopting either interpretation.

[77] All three members of the Court of Appeal held, on what they described as the broad issue, that an employer's vicarious liability can extend as a matter of principle to breaches of statutory duty by an employee. In common with your Lordships, I am in agreement with that conclusion. Where they differed was on the narrow issue, whether an employer would be liable under the 1997 Act for harassment committed by his employee in the course of his employment. In their judgments there was a thorough and penetrating discussion of the policy of the legislation, the statutory objective and the consequences of adopting either answer to the question posed. The majority, Auld and May LJJ, came down in favour of finding that the employer would be vicariously liable, while Scott Baker LJ's

consideration, particularly of the statutory policy, took him to the opposite conclusion.

[78] If we had no other aids to construction but these factors, I should myself regard them as very evenly balanced. I can see considerable force in the respective arguments which prevailed with the majority and the minority. The matter might be concluded by the operation of a presumption: on the existence of such a presumption I respectfully agree with the view expressed by my noble and learned friend Lord Nicholls of Birkenhead at paras [16] and [17] of his opinion. I would observe, however, that the 1997 Act is not confined in its scope to the workplace and, as its history shows, its original focus was not the workplace at all. One can envisage situations in which it is desirable in which there should be vicarious liability for the acts of an employee towards a member of the public, where the victim cannot identify the employee or obtain redress from him.

[79] Be that as it may, the question of construction is in my opinion determined by the terms of s 10, which inserted a new s 18B into the Prescription and Limitation (Scotland) Act 1973. This part of the Act, the significance of which had not been brought to the attention of the Court of Appeal, furnishes an indication of the statutory intention by resort to the primary source of interpretation, the wording of the enactment itself. It is quite apparent, as my noble and learned friend Lord Hope of Craighead has demonstrated, that in its use of the words in s 18B(2)(b) 'the defender was a person responsible for the alleged harassment or the employer or principal of such a person', Parliament envisaged that an employer would be vicariously liable for his employee's harassment of another person. I cannot suppose that it was contemplated that that should be the position only in Scotland and that the same should not apply to England and Wales (Northern Ireland has its own legislation, the material parts of which are virtually in identical terms to the 1997 Act, and the same interpretation will apply to that). It therefore seems to me the most direct and compelling indication of the intention of Parliament that there should be vicarious liability in a case such as the present. The other approaches accordingly recede into the background. As I have stated, I would myself regard the factors weighed up in consideration of these other approaches as evenly balanced; certainly, they cannot be said to point away from the conclusion indicated by the wording of the Act with sufficient strength to require one to question that conclusion.

[80] I accordingly agree with your Lordships that the appeal should be dismissed.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[81] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Nicholls of Birkenhead, Lord Hope of Craighead and Baroness Hale of Richmond. I respectfully agree with Lord Nicholls that the principle of vicarious liability is applicable where an employee commits a breach of a statutory obligation sounding in damages while acting in the course of his employment unless the statute expressly or impliedly indicates otherwise (para [17], above). That said, but for the virtually conclusive inference that the vicarious liability principle is indeed here applicable which arises from s 10 of the 1997 Act (identified by Lord Hope in the course of the hearing), I would have been strongly inclined to conclude, consistently with Scott Baker LJ's persuasive dissenting judgment in the court below ([2005] EWCA Civ 251, [2005] IRLR 340,

[2005] QB 848, [2005] 2 WLR 1503), that the Protection from Harassment Act 1997 *did* impliedly indicate otherwise. I agree, therefore, with Lord Hope that there seemed 'indeed powerful reasons for thinking that Parliament intended that liability in damages should be personal to the perpetrator of the harassment' (para [43], above), and I agree equally with Baroness Hale's suggested policy reasons as to why that might have been so. In the end, however, I too feel driven to conclude that that was not after all what Parliament intended and that this appeal, therefore, must be dismissed.

Appeal dismissed.

Kate O'Hanlon Barrister.

Bristol City Council v Hassan and another
Bristol City Council v Glastonbury

[2006] EWCA Civ 656

COURT OF APPEAL, CIVIL DIVISION

BROOKE, DYSON AND JACOB LJJ

2, 23 MAY 2006

Landlord and tenant – Recovery of possession – Order for possession – Secure tenancy – Suspended order for possession on conditions as to payment of arrears of rent – Whether date for possession having to appear on face of order – Appropriate form of order – Housing Act 1985, s 85(2).

The defendants were secure tenants of the claimant local authority. Each was in arrears of rent. The claimant sought suspended possession orders with conditions as to payment of arrears. Section 85(2)[a] of the Housing Act 1985 provided that on the making of an order for possession of a dwelling house let under a secure tenancy the court could stay or suspend the execution of the order, or postpone the date of possession for such period or periods as the court thought fit. The defendants did not oppose the granting of possession orders or the proposed conditions but contended that no date for possession should be fixed. The effect of a recent decision of the Court of Appeal was that when a local authority landlord had established that statutory grounds for making a possession order existed and that it was reasonable to make such an order, the standard form[b] in use in the county courts had the effect of terminating the tenant's secure tenancy on the date set out on the face of the order. If the court also directed that the possession order was not to be enforced so long as the tenant complied with the requirements set out in the order, the tenant enjoyed the status of a 'tolerated trespasser' and not of a secure tenant so long as he remained in possession of the premises after the date for giving possession had passed. In the first case, the district judge took the view that the court was required to fix a date for possession on the face of the order, and in the second case, the district judge made an order in the standard form, which required a date to be fixed. The defendants appealed, submitting that the status of 'tolerated trespasser' was unsatisfactory for both landlord and tenant. The court considered (i) whether a date for possession had to appear on the face of the order; and (ii) the lawful and appropriate form of the order.

Held – (1) A judge was not obliged to set an absolute date for possession on the face of the order. It followed that it was lawful for him to make an order which set out a date for possession but provided that the date would be postponed and the tenancy would continue so long as the conditions set out in the order continued to be satisfied. The court would be postponing the date of possession for a fixed period in the first instance and thereafter for such period as the tenant complied with his obligations under the order. That fitted naturally with the statutory language in s 85(2) of the 1985 Act (see [10], [29], [30], below);

a Section 85, so far as material, is set out in Appendix 2, below

b The standard form (Form N28), so far as material, is set out in Appendix 1, below

Harlow DC v Hall [2006] EWCA Civ 156 and *Sherrin v Brand (orse Phelps)* [1956] 1 All ER 194 considered.

(2) It was lawful and appropriate to make an order providing that: (i) the defendant was to give up possession of the property to the claimant; (ii) the date on which the defendant was to give up possession of the property was postponed to a date to be fixed by the court on an application by the claimant; (iii) the defendant had to pay the claimant a specified sum for rent arrears and a specified sum for costs; the specified total judgment debt was to be paid by instalments as specified; (iv) the claimant was not to be entitled to make an application for a date to be fixed for the giving up of possession and the termination of the defendant's tenancy so long as the defendant paid the claimant the current rent together with instalments of the specified sum per week towards the judgment debt; (v) the first payment of the current rent and the instalment had to be made on or before a specified date; (vi) any application to fix the date on which the defendant was to give up possession could be determined on the papers without a hearing (unless the district judge considered that such a hearing was appropriate) provided that (a) the claimant had written to the defendant at least 14 days before making its application giving details of the current arrears and its intention to request that a date be fixed; and (b) a copy of that letter and the defendant's response, if any, together with the rent account showing any transactions since the date of the order were attached to the application; and (vii) the order was to cease to be enforceable on a specified date/when the judgment debt was satisfied (see [37]–[40], below).

(3) In the instant cases, the district judges had fettered their discretion too narrowly. The appeals would therefore be allowed; in each case the district judge's order for possession and money judgment would stand but the claim would be remitted to the county court to determine what, if any, terms of postponement of possession were appropriate (see [45], below).

Notes

For extended discretion of the court in certain proceedings for possession, see 27(2) *Halsbury's Laws* (4th edn reissue) para 1172.

For the Housing Act 1985, s 85, see 21 *Halsbury's Statutes* (4th edn) (2005 reissue) 137.

Cases referred to in judgment

American Economic Laundry Ltd v Little [1950] 2 All ER 1186, [1951] 1 KB 400, CA.
Burrows v Brent London BC [1996] 4 All ER 577, [1996] 1 WLR 1448, HL.
Harlow DC v Hall [2006] EWCA Civ 156, [2006] All ER (D) 393 (Feb).
Lambeth LBC v O'Kane, Helena Housing Ltd v Pinder [2005] EWCA Civ 1010, [2006] HLR 21.
Manchester City Council v Finn [2002] EWCA Civ 1998, [2003] HLR 596.
Marshall v Bradford Metropolitan DC [2001] EWCA Civ 594, [2002] HLR 428.
McPhail v persons, names unknown, Bristol Corp v Ross [1973] 3 All ER 393, [1973] Ch 447, [1973] 3 WLR 71, CA.
Sheffield City Council v Hopkins [2001] EWCA Civ 1023, [2002] HLR 237.
Sherrin v Brand (orse Phelps) [1956] 1 All ER 194, [1956] 1 QB 403, [1956] 2 WLR 131, CA.
St Brice v Southwark London BC [2001] EWCA Civ 1138, [2002] LGR 117, sub nom *Southwark London BC v St Brice* [2002] 1 WLR 1537.
Stone (J&F) Lighting and Radio Ltd v Levitt [1946] 2 All ER 653, [1947] AC 209, HL.
Thompson v Elmbridge BC [1987] 1 WLR 1425, CA.

Cases referred to in skeleton arguments

Brent London BC v Knightley [1997] 3 FCR 7, CA.
Dunn v Bradford Metropolitan DC, Marston v Leeds City Council [2002] EWCA Civ 1137, [2003] HLR 154.
Gallagher v Castle Vale Action Trust Ltd [2001] EWCA Civ 944, (2001) 33 HLR 810.
Greenwich London BC v Regan (1996) 28 HLR 469, CA.
Lambeth London BC v Howard [2001] EWCA Civ 468, (2001) 33 HLR 636.
Lambeth London BC v Kay, Price v Leeds City Council [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 WLR 570.
Lambeth London BC v Rogers [2000] LGR 191, CA.
Manchester Corpn v Connelly [1970] 1 All ER 961, [1970] 1 Ch 420, CA.
Newham London BC v Hawkins [2005] EWCA Civ 451, [2005] LGR 750, CA.
Pemberton v Southwark London BC [2000] 3 All ER 924, [2000] 1 WLR 1672, CA.
Raeuchle v Laimond Properties Ltd [2001] 33 HLR 113.
Swindon BC v Aston [2002] EWCA Civ 1850, [2003] 2 P & CR 309, CA.
Tanfern Ltd v Cameron-MacDonald [2000] 2 All ER 801, [2000] 1 WLR 1311, CA.

Appeals

Bristol City Council v Hassan and another

Mr Hassan appealed from the decision of District Judge Exton in the Bristol County Court making a possession order with a fixed date for possession in proceedings brought by Bristol City Council as local authority landlord against Mr Hassan and Mr Abdillahi the joint secure tenants of premises in Barton Hill, Bristol. The facts are set out in the judgment of the court.

Bristol City Council v Glastonbury

Ms Glastonbury appealed from the decision of District Judge Frenkel in the Bristol County Court making a possession order with a fixed date for possession in proceedings brought by Bristol City Council as local authority landlord against her as the secure tenant of premises in Dove Street, Bristol. The facts are set out in the judgment of the court.

Jan Luba QC and *Robert Latham* (instructed by *South West Law*, Bristol) for the appellants.
Kelvin Rutledge and *Genevieve Screeche-Powell* (instructed by *Bristol City Council Legal Services*) for the council.

Cur adv vult

23 May 2006. The following judgment of the court was delivered.

BROOKE LJ.

[1] This is the judgment of the court. These two appeals from orders made by District Judge Exton and District Judge Frenkel in the Bristol County Court in January and February of this year have been transferred for hearing to this court because they raise issues which are at present perplexing housing law practitioners and the judiciary in county courts up and down the country.

[2] The problem arises in this way. When a court decides that a local authority landlord has established that statutory grounds for making a possession order exist and that it is reasonable to make such an order, the standard form

currently in use in the county courts has the effect of terminating the tenant's secure tenancy on the date set out on the face of the order. If the court also directs that the possession order is not to be enforced so long as the tenant complies with requirements set out in the order, the tenant enjoys the status of a 'tolerated trespasser', and not of a secure tenant, so long as he remains in possession of the premises after the date for giving possession has passed. This is the effect of the recent decision of this court in *Harlow DC v Hall* [2006] EWCA Civ 156, [2006] All ER (D) 393 (Feb).

[3] The standard form to which we have referred is Form N28. We have set out its salient provisions in Appendix 1 to this judgment. It is not obligatory for the court to use this form in any given case. Section 74A of the County Courts Act 1984 empowered the Lord Chancellor to make or to approve directions as to the practice and procedure of county courts, and CPR Pt 4 and its practice direction deal with court forms in a very general way. In the present context Form N28 appears in the table that heads para 3.1 of that practice direction under the general description of a form 'required by CPR Pts 1–75'. CPR 4, for its part, provides:

> '(1) The forms set out in a practice direction shall be used in the cases to which they apply.
>
> (2) A form may be varied by the court or a party if the variation is required by the circumstances of a particular case.'

[4] Although the current version of Form N28 was introduced in 2001 at the same time as CPR Pt 55 (which provides generally for practice and procedure in connection with possession proceedings) came into effect, there is no reference to Form N28 (or indeed to any other prescribed form) in CPR Pt 55. At best, therefore, it should be treated as the form to be used when a court wishes to make a possession order that is postponed to a fixed date but to suspend its execution so long as certain requirements are fulfilled.

[5] This, however, is not the only order a court may make if it decides that a local authority landlord has established that statutory grounds for making a possession order exist and that it is reasonable to make such an order. The relevant statutory provisions are to be found in ss 82(2) and 85 of the Housing Act 1985, the terms of which are set out in Appendix 2 to this judgment. By the combined effect of those two sections, the tenant's secure tenancy will end on the date on which the tenant is to give up possession in pursuance of the possession order (see s 82(2)), and the court on making the possession order has the power to postpone the date of possession for such period or periods as it thinks fit (see s 85(2)(b)). On such a postponement the court must impose conditions with respect to the payment by the tenant of arrears of rent (if any) and rent unless it considers that one of the criteria identified in s 85(3)(a) is satisfied, and it may also impose such other conditions as it thinks fit (see s 85(3)(b)). By s 85(4), if the conditions are complied with the court may, if it thinks fit, discharge or rescind the order for possession.

[6] The facts of the two cases with which we are concerned are fairly typical. Mr Hassan and Mr Abdillahi were Bristol City Council's joint secure tenants of premises in Barton Hill, Bristol. Mr Abdillahi went off to Denmark, and because he was responsible for paying half the rent, arrears accumulated following his departure to the extent that they amounted to £1,628·61 at the date of the hearing on 9 January 2006. The full current net rent was now being paid by the housing benefit authorities, but a weekly payment of £4·77 was due from Mr Hassan in

respect of a heating charge. The council sought a suspended possession order on terms that Mr Hassan, who was in receipt of benefits, continued to pay this sum and also instalments of £2·85 towards the arrears, this being the standard sum for a tenant on benefits. There was no dispute that a possession order could be made, or that it was other than reasonable to make an order. What had to be resolved at the hearing was the form of the order the court should make.

[7] Ms Glastonbury was the council's secure tenant of an eleventh floor flat in Dove Street, Bristol. Her problems arose after payment of housing benefit ceased on 11 April 2005. At that time her account was £60 in credit. Because she received income support she was entitled to housing benefit, but she failed to provide information required by the council's verification procedures, and this led to her housing benefit being stopped. It was reinstated on 5 September 2005, and the possession proceedings were originally adjourned twice to see whether payments of housing benefit could be backdated to cover the gap between April and September 2005. Eventually the housing benefit authorities decided not to take this course. At the time of the hearing before District Judge Frenkel on 13 February 2006 the rent arrears were £885·13. The housing benefit authorities were paying the full current rent, and since 10 January 2006 the Department of Work and Pensions (DWP) had been deducting £2·85 per week at source from Ms Glastonbury's other benefits and paying them directly to the council four weeks in arrears. The council's final stance at the hearing was that it asked the court to make a possession order suspended on terms that Ms Glastonbury paid £2·85 per week towards the arrears.

[8] The solicitor advocate who appeared for both these tenants did not oppose the granting of a possession order on the proposed conditions. He contended, however, that no date for possession should be fixed. He suggested that an order should be made in these terms:

> '1. The claimant is entitled to possession described in the claim form.
>
> 2. The defendant do deliver to the claimant possession of the premises on a date to be fixed on application by the claimant.
>
> 3. The claimant shall not be entitled to apply for an order fixing the date for possession and termination of the defendant's tenancy for so long as the defendant: pays the current rent as it falls due in accordance with the terms of the tenancy agreement and in addition discharges arrears amounting to £ [. . .] as at the date of this order by monthly instalments of £ [. . .].
>
> 4. Any application to fix the date on which the defendant is to give up possession shall be made to the district judge in private on seven days' notice to the defendant.
>
> 5. There be no order as to costs.'

[9] In the first of these cases District Judge Exton said that her colleagues in Bristol, and other colleagues nationwide, took the view that a court could not make an order in these terms, because they were required to fix a date for possession on the face of their order. In the second case District Judge Frenkel, after hearing argument, said that he was going to make an N28 order, and that he was not going to change the usual practice of the court unless there was a successful appeal. A particular feature of the second case was that it was apparently accepted that the flat was unsuitable for one of the defendant's sons, and that it would be problematic whether a mutual exchange of tenancies with

another council tenant could be achieved if the defendant was reduced to the status of a 'tolerated trespasser'.

[10] The first issue we have to decide is whether the district judges' belief that a date for possession had to appear on the face of their orders was soundly based. If it was not, then we have to go on to consider whether variant forms of order which we were shown could lawfully be made. We were told that following the decision in *Harlow DC v Hall* [2006] All ER (D) 393 (Feb) on 28 February 2006 the Department for Constitutional Affairs appointed a working party, which includes two experienced judges, to advise on the alternative form(s) of order template the courts should adopt in those cases in which the judge making a possession order against a secure tenant did not wish the tenancy to terminate so long as the conditions set out in the order were fulfilled. The working party is understandably anxious to consider our judgment in this case. In the meantime the courts have been advised to delete para 5 and to substitute a new para 1 in Form N28 (for which see Appendix 1):

> '1. The defendant give the claimant possession of (address of the property) on or before (date) provided that the date for possession will be postponed and the defendant's tenancy of the premises will continue, so long as the defendant pays the claimant the current rent and in addition the rent arrears and costs by the instalments set out below.'

The title of the order was also to be changed from 'Order for possession (rented premises) (suspended)' to 'Order for possession (rented premises) postponed'.

[11] At the hearing of the appeal Mr Rutledge, who appeared for the council, submitted that a court could not lawfully make an order in this form. Mr Luba QC, who appeared for the appellants, maintained that it could, although for reasons which we will explain later in this judgment, he proffered a more sophisticated form of order for our consideration.

[12] The judgment of Lord Denning MR in *McPhail v persons, names unknown, Bristol Corp v Ross* [1973] 3 All ER 393 at 396–397, [1973] Ch 447 at 457–458 contains a scholarly analysis of the history of possession orders. In short, although an owner of land which was being occupied by squatters was entitled to take the remedy into his own hand, he was encouraged to go to a common law court and obtain an order that he 'do recover' the land, and to issue a writ of possession immediately. The sheriff would execute the writ, although once the owner had obtained his order he was entitled to take possession at once by his own hand. Because he could lawfully take possession at once without the help of the court, the courts of common law never suspended the order for possession. Lord Denning added that he was also satisfied that a court of equity would never intervene in aid of someone wrongfully in possession of land so as to suspend an order for possession. Under the Supreme Court of Judicature Act 1875 the old action of ejectment was replaced by an action for the recovery of land, but the practice remained the same. The judgment, as before, was that the plaintiff 'do recover' possession. No time was mentioned, and no date given, and the plaintiff could at once issue a writ of possession which could be executed immediately.

[13] When Lord Denning came to consider the position of tenants ([1973] 3 All ER 393 at 398–399, [1973] Ch 447 at 458–460), he said that an owner of land was obliged to obtain an order for possession if he was to avoid being charged with the offence of forcible entry. This position was at that time regularised by s 32(1) of the Rent Act 1965. Lord Denning continued:

'Seeing that in the case of a tenancy the owner is not entitled to regain possession himself by his own self-help, and that he is bound to come to the court to recover possession, it follows that the courts are able to fix a date on which possession shall be recovered. At any rate, the House of Lords has proceeded on that assumption (see *J & F Stone Lighting and Radio Ltd v Levitt* [1946] 2 All ER 653 at 655, [1947] AC 209 at 216); and Parliament has done likewise. Thus in s 138 of the County Courts Act 1888 Parliament said that at the end of a tenancy the judge may order possession to be given "either forthwith or on or before such day as the judge shall think fit to name". That section was repealed by the County Courts Act 1934, and replaced by a simple provision in s 48 that: "A county court shall have jurisdiction to hear and determine any action for the recovery of land . . ." But the 1934 Act was a consolidating Act. It did not alter the previous law. It certainly did not take away the power given by s 138 of the 1888 Act. It proceeded on the assumption that at the end of a tenancy a court has power to fix a date on or before which possession should be given. All the textbook writers, without exception, say that the county court has this power. Likewise in the Protection from Eviction Act 1964 Parliament, in s 2(1), said that when the court made an order for possession by the owner against the occupier—"the court may suspend the execution of the order for such period, not exceeding 12 months from the date of the order, as the court thinks reasonable." That section was repealed by the Rent Act 1965 [s 52 and Sch 7, Pt 1], but Parliament cannot thereby have intended to take away the power of the court at the end of a tenancy to suspend the execution of its order. It simply left intact its previous power.

If the county court has the power at the end of the tenancy to fix a date, then the High Court must have the like power. The County Courts Acts have always provided for the transfer of actions from the county court to the High Court, and vice versa, as for instance ss 49 and 50 of the County Courts Act 1959. It cannot be that, on such a transfer, the High Court has less power than the county court.

In my opinion, therefore, when a tenancy has come to an end, the landlord is not entitled to take possession except by an order of the court; and, on making the order, the court has power to fix a date for possession.'

[14] Lord Denning went on to say ([1973] 3 All ER 393 at 399, [1973] Ch 447 at 460) that the way in which the power was to be exercised was a matter for the discretion of the court, but in the ordinary way, where the defendant had no statutory right to remain, the usual order was from four to six weeks.

[15] It followed from this analysis that, whereas as against squatters owners of land who obtained an order for possession were entitled to enforce it immediately, in the case of a former tenant the courts had a power (but not a duty) to fix a date for possession, thereby postponing the effect of the order, although courts would not in practice postpone the effect of the order for a period longer than six weeks.

[16] These, then, were the general rules, largely untrammelled by statute. In the present case, however, the courts' powers are identified by statute, and the resolution of the first issue we have to decide depends on the proper interpretation of s 85 of the 1985 Act (for which see Appendix 2).

[17] A similar statutory scheme was also to be found in the Rent Acts, with the important difference that once the original contractual tenancy had ended a statutory Rent Act tenant would retain the status of statutory tenant until

possession was actually obtained: that scheme contained nothing similar to s 82(2) of the 1985 Act (see Appendix 2) whereby the tenant's secure tenancy ended on the date on which the tenant was to give up possession in pursuance of the order, and not on the date of actual possession.

[18] In *American Economic Laundry Ltd v Little* [1950] 2 All ER 1186, [1951] 1 KB 400 an unconditional order for possession was made against a statutory tenant, and execution of the order was then suspended by the court from time to time pursuant to powers contained in s 5(2) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. Somervell LJ distinguished ([1950] 2 All ER 1186 at 1189, [1951] 1 KB 400 at 406) two different forms of order which might be made under those powers: (i) (as in *American Economic Laundry Ltd v Little*) an absolute order, the execution of which is suspended; (ii) a conditional order. When a conditional order is made, Somervell LJ said that the order for possession did not become 'operative' so long as certain conditions were fulfilled. These conditions might relate to payment of rent or the abatement of a nuisance.

[19] In *Sherrin v Brand (orse Phelps)* [1956] 1 All ER 194, [1956] 1 QB 403, another case involving a Rent Act statutory tenant, the county court judge had made a consent order in Form 138 in the appendix to the County Court Rules 1936. Its salient terms were:

> 'It is adjudged that the plaintiff do recover against the defendant possession of the land ... It is ordered that judgment for possession shall not be enforced for 28 days and for so long thereafter as the defendant punctually pays to the plaintiff ... the arrears of rent, mesne profits and costs by instalments of £10 forthwith and 13s 7d per week in addition to the current rent ... And it is further ordered that the judgment shall cease to be enforceable when the arrears of rent, mesne profits and costs referred to above are satisfied.'

A question then arose as to the status of the tenancy after the tenant had fallen into arrears under this order but the landlord had taken no steps to enforce the order before the tenant died.

[20] Sir Raymond Evershed MR interpreted the consent order ([1956] 1 All ER 194 at 196, [1956] 1 QB 403 at 411) as meaning that the tenant was to remain on as tenant subject to the added obligation that he had to pay off the arrears by instalments—'and subject also to this, that if default was made, the plaintiff could then take the appropriate steps mentioned by getting a warrant to execute the order without further or separate proceedings'.

[21] In *Sherrin v Brand (orse Phelps)* the court was concerned with the powers contained in s 4(2) of the Rent and Mortgage Interest Restrictions Act 1923 (set out at [1956] 1 All ER 194 at 197–198, [1956] 1 QB 403 at 412–413), which are in terms remarkably similar, although differently arranged, to those now appearing in s 85 of the 1985 Act. The Master of the Rolls said authoritatively ([1956] 1 All ER 194 at 198, [1956] 1 QB 403 at 413):

> 'It is always within the jurisdiction of the court, in my judgment (assuming that the conditions for the exercise of the jurisdiction have arisen) to make an order for possession, but to postpone the effectiveness of the order by making the continued occupation of the tenant conditional, for example, on his paying arrears of rent and costs in such manner as is provided by the order—such a provision being within the language which I have read from s 4(2)—or to postpone the date of possession for such period or periods as it thinks fit, and

subject to such conditions in regard to payment by the tenant of arrears of rent and otherwise as the court thinks fit. That indeed is, as I think, plainly the effect of the order of 2 December 1953; and if that is the effect of the order, it certainly does not necessarily involve the result (as I read s 15(1)) that, during the period of the postponement of possession, the so-called statutory tenancy ceases altogether, and the tenant wholly ceases to have the protection of the Act.' a b

[22] Birkett LJ, for his part, placed stress ([1956] 1 QB 403 at 424) on the extremely wide powers conferred on the county court judge by s 4(2) of the 1923 Act:

'[T]he widest possible discretion is given to the county court judge, and one can understand why it is done. He is told: "You can postpone possession if the facts warrant it; you can postpone the date for possession for such time as you think proper; and, moreover, you can lay down such conditions as you think proper." Then at the end of the section come the all-important words: "and, if such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such order or judgment." c d

What the Act of Parliament was clearly intending to do was to invest the county court judge with the widest possible powers, because of the infinite variety of circumstances in which people are placed in regard to their housing, and in which they are compelled to go to the county court either as landlords or as tenants. The statute says: "You can adjourn it if you wish when the facts are such that, if you do adjourn it, that may be an end of the whole matter. If the facts indicate that it is the proper thing to do, you may make an order for possession. If it is a reasonable thing to do, make it. It is quite true that you may suspend the order"—and, as the county court judge pointed out, during that period of suspension, there may be any number of applications to the court for a suspension of the order; that, at any rate, is in a category by itself. Then the third matter is the wide discretion vested in the court for postponing the date of possession as it thinks fit for such period as it thinks fit and on such terms as it thinks fit; and if those conditions are fulfilled, the court may also, if it thinks fit, discharge the order altogether.' e f

[23] The Housing Act 1980 introduced for the first time the concept of a statutory secure tenancy enjoyed by the tenant of a local authority landlord (and, originally, the tenants of other social landlords as well), and its terms are now to be found in the 1985 Act, which was a consolidation Act. What is now s 82(2) of the 1985 Act formed part of that scheme from the outset, and in *Thompson v Elmbridge BC* [1987] 1 WLR 1425 this court identified an important respect in which this scheme was different from the Rent Act scheme. g h

[24] In that case a local authority had obtained a possession order in the then current terms of prescribed form N28. Its salient provisions were (see [1987] 1 WLR 1425 at 1428):

'It is adjudged that the plaintiff do recover against the defendant possession of the [identified] land . . . It is ordered that the judgment for possession shall not be enforced for 28 days in any event, and for so long thereafter as the defendant punctually pays . . . [the arrears of rent . . . and] costs by instalments of £10 per week in addition to the current rent. j

And also that the judgment shall cease to be enforceable when the [arrears of rent . . . and] costs referred to above are satisfied.'

[25] Russell LJ (with whom Sir Denys Buckley agreed) commented ([1987] 1 WLR 1425 at 1428):

> 'It is to be observed that on the face of the order it does not purport to terminate the tenancy. The tenancy, in my judgment, plainly continues and is recognised by the order as continuing. The judgment for possession, however, is suspended so long as the current rent is paid in addition to the arrears. If that were not the true interpretation of the order, then plainly the words "the current rent" to which I have adverted, would not appear as they do.'

He went on to hold, however ([1987] 1 WLR 1425 at 1430–1431), that—

> 'once the defendant in proceedings of this kind where there is a suspended order for possession, ceases to comply with the conditions of the order, namely, "the punctual payment of the current rent and arrears," and there is a breach of the terms of the order, the tenancy, whatever it may be, from that moment comes to an end.'

[26] The decision in *Thompson v Elmbridge BC* led to a certain amount of disquiet (see, for instance, Jim Driscoll, 'Rent Arrears, Suspended Possession Orders and the Rights of Secure Tenants' (1988) 51 MLR 371 and an authoritative suggestion for different wording for a suspended possession order, Judge John Platt and Nic Madge, 'Suspended Possession Orders' (1991) NLJ 853). However, the revised version of Form N28 that was issued in 1993 did not adopt this suggestion. Instead, it was in these 'user-friendly' terms:

> '1. The court has decided unless you make the payments set out in paragraph 2 you must give the plaintiff possession of (premises) on . . . [insert date] . . .
>
> 3. You must pay the plaintiff the total amount of £ [. . .] by instalments of £ [. . .] per [. . .] in addition to the current rent . . . When you have paid the total amount mentioned, the plaintiff will not be able to take any steps to evict you as a result of this order.
>
> 4. If you do not pay the money owed and costs by the dates given and the current rent, the plaintiff can ask the court bailiff to evict you and remove your goods to obtain payment . . .'

This was followed by the 2001 revision (for which see Appendix 1).

[27] Although the 1993 version of Form N28 could reasonably be interpreted as postponing possession after the date mentioned in para 1 so long as the tenant complied with the condition set out in the order, the stark language of the 2001 revision permitted no such interpretation. Possession was postponed until the date fixed in para 1 and the tenancy would then come to an end through the operation of s 82(2) of the 1985 Act. Thereafter execution of the order would be suspended so long as the conditions set out in the order were complied with (see the judgment of Sir Andrew Morritt C in *Harlow DC v Hall* [2006] All ER (D) 393 (Feb) at [13]):

> 'In my view the possession order and its effect is clear. Paragraph 1 of the order required Mr Hall to give possession on 9 February 2005. As the order was made on 12 January 2005 it was suspended in the sense that it was to take effect on a specified future date, but the obligation to give possession on or before 9 February was not qualified by the postponement of its enforcement in the event of compliance with para 5. The distinction between suspending the

execution of the order and postponing the date for possession is also made in s 85(2). Accordingly it is, in my view, plain that the date on which the tenant "is to give up possession [of the dwelling house] in pursuance of the order" for the purposes of s 82(2) was 9 February 2005 whether or not the conditions prescribed by para 5 for the postponement of its enforcement were observed. It follows that the secure tenancy had ended before the bankruptcy order was made on 10 February 2005.'

[28] In his concurring judgment Chadwick LJ observed (at [23]) that when a court is considering the exercise of its powers under s 85(2) of the 1985 Act, it must first decide (under para (b)) whether to postpone the date for possession, and then decide (under para (a)) whether execution of the order for possession should be stayed or suspended for a further period. He went on to say (at [25]) that when construing a possession order made under Pt IV of the 1985 Act the object was to ascertain whether the court, when making the order, had specified a date in the future—and, if so, what date—when possession had to be given by the tenant.

[29] It will have been noticed that it was not until the 1993 revision of the prescribed form (see [26], above) that a date for possession was set out at the start of the order (albeit in conditional terms in that version of the form). In our judgment there is nothing in s 85 of the 1985 Act that fetters the discretion of a district judge to make such order for postponement of possession as he thinks fit. This statutory provision is the lineal successor, in a different context, of the provision which this court interpreted in *Sherrin v Brand (orse Phelps)* [1956] 1 All ER 194, [1956] 1 QB 403 (see [19]–[22], above), and the width of the discretion available to the judge is precisely the same.

[30] The answer to the first question we have to decide is therefore that a judge is not obliged to set out an absolute date for possession on the face of his order. There is, indeed, a vivid contrast between the expression 'for such period or periods as the court thinks fit' in s 85(2) of the 1985 Act and the phrase 'a date specified in the order' in ss 82(3), 82A(3), 83(3) and 84(4). In our judgment, given that the judge is not obliged by statute to specify a date in this type of order, it is lawful for him to make an order in the revised form suggested at [10], above. This sets out a date for possession but provides that the date will be postponed and the tenancy will continue so long as the conditions set out in the order continue to be satisfied. The court will be postponing the date of possession for a fixed period in the first instance and thereafter for such period as the tenant complies with his obligations under the order. This fits naturally the statutory language in s 85(2).

[31] We turn to consider the second issue in the appeal. As we foreshadowed at [11], above, Mr Luba championed a form of order in rather more sophisticated terms:

'*Conditional possession order*

1. The D is to deliver up to C possession of [address].

2. The date on which the D is to deliver possession of premises to the C is postponed to a date to be fixed by this court on application by the C.

3. The D must pay the C £ [. . .] for rent arrears calculated up to [date] and £ [. . .] for costs. The total judgment debt is £ [. . .] to be paid by instalments specified in para 4 below.

4. The C shall not be entitled to apply for an order fixing the date for possession and termination of the D's tenancy for so long as D pays C the current rent, in respect of which the next payment shall be made on or before [date] together with instalments of £ [. . .] per [week/fortnight/month]

towards the judgment debt. In respect of which the first payment must be made on or before [. . .]

5. Any application to fix the date on which the D is to give up possession shall be made to a district judge on 7 days notice to the D and shall be heard in private.

6. The order shall cease to be enforceable when the judgment debt is satisfied.'

[32] He said that such a form of order would expunge at a stroke all the difficulties that have been encountered in this field since the effect of s 82(2) of the 1985 Act was illuminated by this court in *Thompson v Elmbridge BC* [1987] 1 WLR 1425. Under the rule in that case, *any* breach of a condition of a postponement order will terminate the tenancy, however innocent the tenant may be: a failure by the housing benefit authorities that cannot be ascribed to any shortcoming by the tenant, for instance, or even arrangements made between the DWP and the landlord which provide for payments four-weekly in arrears when a failure to pay each week will represent a breach of the order such as to terminate the tenancy.

[33] In an annex to his written submissions Mr Luba set out very clearly a number of reasons why the status of 'tolerated trespasser' is profoundly unsatisfactory. This status will arise after a secure tenancy has been terminated (whether because the date stated for possession to be given has passed or because the conditions of a conditional order have been breached), and when the former landlord will not necessarily evict the former tenant but may be content to allow him/her to remain in occupation, paying mesne profits and a contribution towards the accumulated arrears. Although the former secure tenant would be entitled to apply for a further postponement of the date for possession he/she will not always be successful in that respect. For authoritative descriptions of the legal position see *Burrows v Brent London BC* [1996] 4 All ER 577 at 584, [1996] 1 WLR 1448 at 1455 per Lord Browne-Wilkinson and *Marshall v Bradford Metropolitan DC* [2001] EWCA Civ 594 at [35], [2002] HLR 428 at [35] per Chadwick LJ.

[34] Mr Luba has listed nine reasons why the status of 'tolerated trespasser' is unsatisfactory for both landlord and tenant: (i) he/she cannot enforce any covenant to repair or any other contractual term of the former tenancy. This will be equally true of any statutory rights contingent on 'tenant' status, such as the statutory right to buy, to effect a mutual exchange of tenancies, or to assign the tenancy. (ii) It is not clear whether he/she has a 'right to occupy . . . by virtue of any enactment' for the purposes of s 33 of the Family Law Act 1996. (iii) No statutory rights of succession can arise if he/she were to die. (iv) An application to resurrect a previous joint tenancy by postponing the date of possession can only be made under s 85(2) of the 1985 Act if both former joint tenants agree, and this may give rise to practical difficulties if one of the former joint tenants cannot be traced. (v) If a tenant clears the outstanding arrears before making a s 85 application, he/she will have no standing to reinstate the tenancy and sue for breach of a repairing covenant in that tenancy (see *Marshall v Bradford Metropolitan DC*). (vi) The landlord cannot enforce any covenant with regard to the former tenant's behaviour or any other covenant of the former tenancy agreement (e g 'to maintain the garden'). See *Sheffield City Council v Hopkins* [2001] EWCA Civ 1023 at [29], [2002] HLR 237 at [29] per Lord Woolf CJ and *Manchester City Council v Finn* [2002] EWCA Civ 1998, [2003] HLR 596 for some of the difficulties that may result. (vii) The statutory framework for increasing the rent payable by a secure tenant does not apply once the occupier has become

a trespasser. (viii) It has now been established that a secure tenancy will be lost by a breach of the conditions in a possession order, and that it will only revive if there is an application pursuant to s 85 of the 1985 Act (see *Marshall v Bradford Metropolitan DC* [2002] HLR 428 at [29] and *Lambeth LBC v O'Kane, Helena Housing Ltd v Pinder* [2005] EWCA Civ 1010 at [58], [2006] HLR 21 at [58] per Arden LJ. (ix) Problems arise in respect of a stock transfer between a local housing authority and a registered social landlord, because it is only the rights of *tenants* which survive the transfer.

[35] Mr Luba told us that there are now tens of thousands of occupants living in this 'twilight zone' because they have breached suspended orders for possession, often because of housing benefit delays. A much smaller number of occupants remain in occupation after immediate orders for possession have been made.

[36] Although the Law Commission has now recommended the steps to be taken whereby this very unsatisfactory position may be corrected (see *Renting Homes: The Final Report, Vol 1* (2006) (Law Com no 297), p 75 (paras 4.54–4.56)), by the very nature of things, even if its recommendation were accepted, it would take time for a new legislative solution to come into effect. In the meantime it appears to us to be appropriate to make it clear that even under existing legislation the courts possess more flexible powers for setting the terms of a postponed possession order than is generally appreciated.

[37] But we do not consider it necessary or appropriate to give a fair wind to any procedure which will require a further hearing before a date for possession can be fixed, with all the attendant expense and delay that this might involve. It would in our judgment be sufficient for possession to be postponed on the terms that if a claimant landlord wishes a date to be fixed, it must write to the defendant giving details of the current arrears and its intention to request a date to be fixed at least 14 days before it makes that application. If the tenant does not respond, or if the landlord wishes to apply for a date to be fixed notwithstanding the tenant's response, it will then be at liberty to apply to the court on a 'without notice' basis requesting a date to be fixed. With its application the landlord must submit to the court a copy of its letter (and the tenant's response, if any), together with a copy of the rent account since the date of the order postponing possession. Other evidence will seldom be required.

[38] If the landlord knows that the DWP pays amounts towards the arrears as a matter of practice four-weekly in arrears it will no doubt desist from applying for a date on that ground alone, because it will know that even if the tenant does not mention this in his response (if any), the tenant is likely to apply to have the court's order set aside if the apparent failure to comply strictly with the terms of the order has occurred for this reason alone.

[39] It is, in our judgment, both lawful and appropriate to make an order along the following lines:

> '1. The defendant is to give up possession of [address] to the claimant.
>
> 2. The date on which the defendant is to give up possession of the property to the claimant is postponed to a date to be fixed by the court on an application by the claimant.
>
> 3. The defendant must pay the claimant £ [. . .] for rent arrears and £ [. . .] for costs. The total judgment debt is £ [. . .] to be paid by instalments as specified in para 4 below.
>
> 4. The claimant shall not be entitled to make an application for a date to be fixed for the giving up of possession and the termination of the defendant's

tenancy so long as the defendant pays the claimant the current rent together with instalments of £ [. . .] per week towards the judgment debt.

5. The first payment of the current rent and the instalment must be made on or before [date].

6. Any application to fix the date on which the defendant is to give up possession may be determined on the papers without a hearing (unless the district judge considers that such a hearing is appropriate) provided that: (a) the claimant has written to the defendant at least 14 days before making its application giving details of the current arrears and its intention to request that a date be fixed; and (b) a copy of that letter (and the defendant's response, if any) together with the rent account showing any transactions since the date of this order are attached to the application.

7. This order shall cease to be enforceable [on [date]] [when the judgment debt is satisfied].'

[40] In his very helpful submissions Mr Rutledge told us that what his clients and other local authority landlords desire is certainty, together with the avoidance of the expense and delay that would necessarily be associated with a two-stage procedure. The form of order which we have suggested will provide certainty in the sense that it will be clear to everyone that the tenancy will continue until the court fixes the date on which the defendant is to give up possession. On the second point, his clients will obtain a fixed date as soon as the court is satisfied, from perusing the documents filed with the court, that the tenant has defaulted on the terms on which possession was postponed and that there is no good reason not to fix the date for possession (and termination of the tenancy) forthwith.

[41] It would, in our judgment, be consistent with good practice if the landlord were to notify the tenant of the adverse consequences of the termination of his/her tenancy when embarking on the process that may lead to a possession order. Skilled housing lawyers may understand the legal consequences of the tenancy being terminated, but not everyone is a skilled housing lawyer, and in the interests of transparency it would be useful if they were stated clearly to the tenant as an additional spur to ensuring that arrears do not continue to accumulate.

[42] It goes without saying that when the court receives the landlord's request to fix a date it will have no jurisdiction to revisit the question whether it was reasonable to make a possession order at all (compare, in a different context, *St Brice v Southwark London BC* [2001] EWCA Civ 1138 at [17], [18], [40], [2002] LGR 117 at [17], [18], [40], [2002] 1 WLR 1537).

[43] In this judgment we have been concerned only to identify the terms of an order for postponement of possession that a court has power to make. What order the court will in fact make in any case will be a matter for the discretion of the judge on that occasion, although the working party (and in due course the Civil Procedure Rules Committee) will no doubt wish to prescribe or recommend simple forms of alternative order for the use of courts. If a tenant has a particularly bad record of payment, for instance, but is not yet deserving of an outright possession order, the court might wish to make an order along the lines of the current Form N28, although the use of the phrase 'in addition to your current *rent*' would be inapposite since the contractual tenancy would have been brought to an end by the making of the order.

[44] It will be for the working party and the Rules Committee to consider whether it might be desirable to alter the provisions of CCR Ord 26, r 17(2) (which forms part of Sch 2 to the CPR). On the proper construction of this rule it is

currently not permissible for a landlord to make a combined application to fix a date and request a warrant for possession, and it may be thought desirable for the landlord to make such an application in an appropriate case.

[45] So far as the present appeals are concerned, we are satisfied that for very understandable reasons the district judges fettered their discretion too narrowly. For the reasons set out in this judgment the court will therefore allow the appeals and order that in each case the district judge's order for possession and money judgment shall stand but the claim will be remitted to the county court to determine what, if any, terms of postponement of possession are appropriate.

Appeals allowed.

Kate O'Hanlon Barrister.

APPENDIX 1

Operative parts of Form N28

'**and the court orders** that

1. The defendant give the claimant possession of [. . .] on or before [. . .].
2. The defendant pay the claimant £ [. . .] for [. . .].
3. The defendant pay the claimant's costs of the claim £ [. . .].
4. The defendant pay the total of £ [. . .] to the claimant on or before [. . .].
5. This order is not to be enforced so long as the defendant pays the claimant the rent arrears and the amount for use and occupation [and costs, totalling] £ [. . .] by the payments set out below in addition to the current rent.

Payments required

[£ [. . .] on or before [. . .] and]

£ [. . .] per [. . .], the first payment being made on or before [. . .].'

APPENDIX 2

Housing Act 1985

'**82.** . . . (2) Where the landlord obtains an order for the possession of the dwelling-house, the tenancy ends on the date on which the tenant is to give up possession in pursuance of the order . . .

85.—(1) Where proceedings are brought for possession of a dwelling-house let under a secure tenancy . . . the court may adjourn the proceedings for such period or periods as it thinks fit.

(2) On the *making of an order for possession* of such a dwelling-house on any of those grounds, or at any time *before the execution of the order*, the court may—(a) stay or *suspend the execution of the order*, or (b) *postpone* the *date of possession*, for such period or periods as the court thinks fit.

(3) On such an adjournment, stay, suspension or postponement the court—(a) shall impose conditions with respect to the payment by the tenant of arrears of rent (if any) and rent or payments in respect of occupation after the termination of the tenancy (mesne profits), unless it considers that to do so would cause exceptional hardship to the tenant or would otherwise be unreasonable, and (b) may impose such other conditions as it thinks fit.

(4) If the conditions are complied with, the court may, if it thinks fit, discharge or rescind the order for possession.' (Our emphasis.)

Hilali v Central Court of Criminal Proceedings No 5 of the National Court, Madrid and another

[2006] EWHC 1239 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

SCOTT BAKER LJ AND OPENSHAW J

26, 27 APRIL, 26 MAY 2006

Extradition – Extradition hearing – Initial hearing – Identity of person arrested – Appropriate judge deciding issue of identity at initial hearing – Different judge at extradition hearing determining issue afresh – Whether judge at extradition hearing having jurisdiction to review finding of identity made at initial hearing – Extradition Act 2003, s 7.

Spain sought the extradition of the appellant under a European arrest warrant issued by the first respondent court. The proceedings fell within Pt 1 of the Extradition Act 2003. The appellant was arrested and brought before the district judge. The district judge at that initial hearing was required by s 7(2)[a] of the 2003 Act to decide on the balance of probabilities whether the person brought before him was the person in respect of whom the warrant was issued. The district judge concluded that the appellant was the person named in the warrant. At the extradition hearing a different district judge decided he had power to review that decision, but reached the same conclusion as the district judge at the initial hearing. He made an extradition order and the appellant appealed, contending, inter alia, that his identity had not been proved as required by s 7. The first respondent raised the question as to whether the district judge at the extradition hearing had had any jurisdiction to review the decision.

Held – It was doubtful whether a district judge at an extradition hearing had jurisdiction to review a finding of identity under s 7 of the 2003 Act made at an initial hearing. Under Pt 1 of the 2003 Act the question of identity fell to be resolved at an initial hearing. There was no right of appeal against a decision under s 7(2) that the person brought before the judge was the person in respect of whom the warrant was issued. In the absence of such jurisdiction the appropriate route for challenging the decision would be judicial review. In the instant case, however, the district judge at the initial hearing had been entitled to conclude on the balance of probabilities that the appellant was the person named in the warrant. None of the other grounds of appeal being made out, the appeal would, accordingly, be dismissed (see [16]–[20], [36], [44], [58], [91], [106], [115], below).

Nikonovs v Governor of Brixton Prison [2006] 1 All ER 927 considered.

Notes

For the initial hearing: identity of person arrested, see Supp to 17(2) *Halsbury's Laws* (4th edn reissue) para 1408.

a Section 7, so far as material, is set out at [16], below

For the Extradition Act 2003, s 7, see 18 *Halsbury's Statutes* (4th edn) (2005 reissue) 813.

Cases referred to in judgment

Boudhiba v Central Examining Court No 5 of the National Court of Justice, Madrid [2006] EWHC 167 (Admin), [2006] 3 All ER 574.
Cruz Varas v Sweden (1991) 14 EHRR 1, [1991] ECHR 15576/89, ECt HR.
Dabas v High Court of Justice, Madrid, Spain [2006] EWHC 971 (Admin), [2006] All ER (D) 47 (May).
Dehwari v Netherlands (2001) 29 EHRR CD 74, E Com HR.
Drozd v France (1992) 14 EHRR 745, [1992] ECHR 12747/87, ECt HR.
Einhorn v France App No 71555/01 (16 October 2001, unreported), ECt HR.
Faraj, Re [2004] EWHC 2950 (Admin), [2004] All ER (D) 137 (Dec).
Fernandez v Government of Singapore [1971] 2 All ER 691, [1971] 1 WLR 987.
Government of Belgium v Postlethwaite [1987] 2 All ER 985, sub nom *R v Governor of Ashford Remand Centre, ex p Postlethwaite* [1988] AC 924, [1987] 3 WLR 365, HL.
Government of Denmark v Nielsen [1984] 2 All ER 81, [1984] AC 606, [1984] 2 WLR 737, HL.
Government of the United States of America v Montgomery (No 2) [2004] UKHL 37, [2004] 4 All ER 289, [2004] 1 WLR 2241.
Ismail, Re [1998] 3 All ER 1007, [1999] 1 AC 320, [1998] 3 WLR 495.
Nikonovs v Governor of Brixton Prison [2005] EWHC 2405 (Admin), [2006] 1 All ER 927.
Office of the King's Prosecutor, Brussels v Cando Armas [2005] UKHL 67, [2006] 1 All ER 647, [2005] 3 WLR 1079.
R (on the application of Bermingham) v Director of the Serious Fraud Office, Bermingham v Government of the United States of America [2006] EWHC 200 (Admin), [2006] 3 All ER 239.
R (on the application of Bleta) v Secretary of State for the Home Dept [2004] EWHC 2034 (Admin), [2005] 1 All ER 810, [2005] 1 WLR 3194.
R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 AC 323, [2004] 3 WLR 23.
Ramda v Secretary of State for the Home Dept [2005] EWHC 2526 (Admin), [2005] All ER (D) 223 (Nov).
Razaghi v Sweden App No 64599/01 (11 March 2003, unreported), ECt HR.
Rey v Government of Switzerland [1999] 1 AC 54, [1998] 3 WLR 1, PC.
Schtraks v Government of Israel [1962] 3 All ER 529, [1964] AC 556, [1962] 3 WLR 1013.
Serbeh, Re [2002] EWHC 2356 (Admin), [2002] All ER (D) 468 (Oct).
Soering v UK (1989) 11 EHRR 439, [1989] ECHR 14038/88, ECt HR.
Tomic v UK App No 17837/03 (14 October 2003, unreported), ECt HR.
Vilvarajah v UK (1992) 14 EHRR 248, [1991] ECHR 13163/87, ECt HR.

Appeal

Farid Hilali appealed under s 26 of the Extradition Act 2003 against the extradition order made by Senior District Judge Workman on 1 June 2005 in the Bow Street Magistrates' Court under s 21(3) of the 2003 Act ordering his extradition to Spain. The respondents to the appeal were the Central Court of Criminal Proceedings No 5 of the National Court, Madrid, which had issued a European arrest warrant on 29 April 2004 and the Senior District Judge. The facts are set out in the judgment of the court.

Alun Jones QC and *Osama Daneshyar* (instructed by *Arani & Co*, Southall) for the appellant.

John Hardy and *Clair Dobbin* (instructed by the *Crown Prosecution Service*) for the first respondent.

The second respondent did not appear.

Cur adv vult

26 May 2006. The following judgment of the court was delivered.

SCOTT BAKER LJ.

[1] This is the judgment of the court. There is before the court an appeal by Farid Hilali brought under s 26 of the Extradition Act 2003. The appeal is against an extradition order made by Senior District Judge Workman on 1 June 2005 in the Bow Street Magistrates' Court under s 21(3) of the 2003 Act ordering his extradition to Spain. Spain seeks his extradition under a European arrest warrant (EAW) issued by the Central Court of Criminal Proceedings, Madrid, on 29 April 2004.

[2] The appeal is concerned with Pt 1 of the 2003 Act. This Act created a new extradition regime. The origins of Pt 1 are to be found in the Council Framework Decision (on the European arrest warrant and the surrender procedures between member states) (OJ 2002 L190 p 1). As Laws LJ pointed out in *R (on the application of Bermingham) v Director of the Serious Fraud Office, Bermingham v Government of the United States of America* [2006] EWHC 200 (Admin), [2006] 3 All ER 239, Pt 1 of the 2003 Act contains provisions dealing with extradition from the United Kingdom to 'category 1' territories, namely territories designated by the Secretary of State that are, in effect European Union countries which operate the EAW.

[3] The preamble to the Framework Decision refers to the objective for the European Union to become an area of freedom, security and justice and the abolition of extradition between member states and its replacement by a system of surrender between judicial authorities. The new system is said to be designed to remove the complexity and potential for delay inherent in the previous extradition procedures. Reference is made to 'a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions within an area of freedom, security and justice'. In our judgment it is important to keep in mind the objectives of speed and simplicity when interpreting Pt 1 of the Act, albeit those desirable objectives must be balanced against the legitimate rights of the individual.

[4] Extradition is sought on the basis that the appellant's conduct falls within the framework list offence of participation in a terrorist organisation. The EAW sets out particulars of the conspiracy and the appellant's alleged role in it. In summary, what is alleged is that there was a group of conspirators within Europe who were involved in the preparation for the attacks on 11 September 2001 in the United States and that the conspirators all collaborated in those attacks either directly or indirectly.

[5] Barakat Yarkas was initially alleged to be a key figure within the conspiracy in Spain and he had links with the leadership of Al Qa'ida. The appellant is a former Mujahedeen who was in contact with Yarkas. Yarkas is said to be linked to Bahaji, a member of the unit led by Atta, the leader of the 11 September atrocities.

[6] The allegations against the appellant are in summary as follows. He arrived in the United Kingdom in 1987 and remained here for ten years. At the end of 1998 he went to Saudi Arabia, Pakistan and Afghanistan using forged documentation. He was arrested in 1999 in the United Arab Emirates and deported to Morocco. He left Morocco and returned to the United Kingdom via Spain. On 6 November 1999 he returned to Spain. In 2001 he was living in Grenada with Jasem Mahboule with the support of other parties to the conspiracy who were under the leadership of Yarkas. Yarkas lived in Spain and had an address in Madrid.

[7] On 6 August 2001 there was a telephone conversation between Yarkas and the appellant. In it the appellant told Yarkas that he was cutting off his old communications and that he did not want anyone to know of him. He thanked him for his support and made reference to having 'a month to go'.

[8] This was followed up by another telephone call on 27 August 2001 in which the appellant stated he was 'taking very good lessons' and that he had now 'entered the aviation sector'. He went on to say that they had 'slit the throat of the bird'. He referred to suspicions that his phone was being tapped.

[9] There were two further conversations between Yarkas and the appellant after 11 September. There was a veiled reference to their being watched by the police. There was also a reference to the possibility of the appellant going to another country.

[10] Given these links to Yarkas and others within the conspiracy and the references within the recorded telephone calls to the effect that the appellant was part of a unit training in aircraft linked to the attacks of 11 September the respondent sought the extradition of the appellant in the following terms:

> 'During the 45 days previous to the terrorist attacks of 11 September, the members of the group ("commando") that committed the attacks travelled constantly in aeroplanes in order to analyse them and to be prepared for the day of action. It is precisely during this period of time when the conversations of 6 August and 27 August 2001 took place. In these conversations, SHAKUR/SHUKRI (FARID HILALI) tells Abu Dahdah that he had a month to go and that he had some important matters to do, that he had ordered threads and things that Abu Dahdah (Yarkas) was going to like, that everything was going to be fine and that he had cut off all his old conversations . . . that he had entered the aviation sector, that he had slit the throat of the bird, that he was taking good lessons and that it would take him more or less a month.'

[11] It was submitted on behalf of the first respondent that had this conduct taken place in the United Kingdom it would have amounted to the offences of: (1) conspiring, between 1 January 2000 and 12 September 2001, in Spain with Yarkas and others to pursue a course of conduct that would necessarily amount to or involve the commission of an offence of murder of persons in America; (2) directing the activities of an organisation, namely Al Qa'ida, which is concerned in the commission of acts of terrorism; (3) destroying, damaging or endangering the safety of an aircraft; (4) terrorist bombing. This is how the case was initially put by the first respondent but, as will become apparent, it was argued more narrowly on the appeal.

[12] Following the extradition order against the appellant on 1 June 2005, on 26 September 2005 the first respondent gave judgment in the trial of 24 other

individuals accused with the appellant of being part of an Islamic terrorist network in Spain. A number of those individuals had been trained in Mujahedeen training camps in Bosnia, Indonesia and Afghanistan and upon return to Spain became involved, so it was alleged, in supporting or participating in terrorist activity. Yarkas was described as being at the 'top of the pyramid' and as being 'fully integrated' into Al Qa'ida. Twelve of those were convicted of the offence of 'integration in a terrorist group'. These included Mahboule, Mohamed Zaher Asade, Yarkas and Gahaleb Kalaje Zouaydi (individuals who are referred to in the EAW).

[13] A further five of those accused were found guilty of the lesser offence of 'collaboration with a terrorist group'. Yarkas was further convicted of 'conspiracy to commit terrorist killing'. He was, however, found not guilty of 'terrorist homicide'.

[14] It is an important plank in the argument of Mr Alun Jones QC, who has appeared for the appellant, that Yarkas has an appeal pending in the Spanish Supreme Court against his Spanish conviction on 26 September 2005 for conspiracy to commit terrorist killing and that his appeal is supported by the prosecution on the basis that the evidence against him on that offence is too weak. His argument, as we understand it, is that if the case against Yarkas on conspiracy to commit terrorist killing cannot stand there is no case against the appellant either. It should be noted, however, that this is not accepted by the Spanish authorities and, even if acquitted of conspiracy to commit terrorist killing, Yarkas would remain convicted of 'integration in a terrorist group'. It is also to be observed that the Spanish court has not yet, as we understand it, made a decision on the Yarkas appeal. We shall return to this aspect of the case later.

[15] The appellant's grounds of appeal are contained under seven headings. It is convenient to deal first with ground 5, proof of identity.

PROOF OF IDENTITY

[16] The appellant contends that his identity was not proved as required by s 7 of the 2003 Act. Section 7 is headed 'Identity of person arrested'. The material parts of the section are as follows:

> '(1) This section applies if—(a) a person arrested under a Part 1 warrant is brought before the appropriate judge under section 4(3) . . .
>
> (2) The judge must decide whether the person brought before him is the person in respect of whom—(a) the warrant referred to in subsection (1)(a) was issued . . .
>
> (3) The judge must decide the question in subsection (2) on a balance of probabilities . . .'

[17] What happened was this. On his first appearance before the court the appellant came before District Judge Pratt who considered the issue of identification under s 7 as he was obliged to do. The appellant acknowledged that he was Farid Hilali and Judge Pratt concluded, on balance of probabilities, that he was the person being sought in the EAW. It appears highly likely, although it is impossible to be certain, that the district judge had before him a witness statement of Detective Sergeant Flood in the following terms:

> 'On Monday 28th June 2004 I was on duty at Paddington Green Police Station when a man who I now know as Farid HILALI was brought into the

secure area. I approached him and identified myself to him by showing him my warrant card. I said to him "can you tell me your full name?" He said "Farid HILALI" I said "and your date of birth" He said "21/08/1962". I said "Mr HILALI I am arresting you under a European Arrest Warrant issued by the Government of Spain and certified by the UK authority. This warrant alleges Terrorist offences against you and the Spanish authorities are seeking your extradition on those matters" I then cautioned him at 9.15 am to which he made no reply. I said "Do you understand why you have been arrested" He replied "Yes". I then gave Mr HILALI a copy of the European Arrest Warrant in both English and Spanish as well as the certificate.'

The date of birth on the EAW corresponded as to day and month but not year with the date given by the appellant; the warrant gave the year as 1968.

[18] The question is whether District Judge Pratt was entitled to conclude on balance of probabilities that the appellant was the person named in the warrant. In our judgment on the basis of the material that we have described, and in the absence of any evidence to the contrary, he was so entitled.

[19] In the event, when the extradition hearing took place in January 2005 Senior District Judge Workman decided he had power to review the decision albeit it was not suggested the person brought before him was different from the person before Judge Pratt. Judge Workman reached the same conclusion as Judge Pratt. Mr Hardy, who has appeared for the first respondent, rightly raised the question whether Judge Workman had any jurisdiction to review the decision and submits that it is at least arguable that he did not. Under Pt 1 of the Act (in contradistinction to Pt 2) the question of identity falls to be resolved at an initial hearing. There is no right of appeal by the appellant against a decision under s 7(2). The right of appeal lies only against an order of extradition (see s 26 and *Nikonovs v Governor of Brixton Prison* [2005] EWHC 2405 (Admin) at [9]–[15], [2006] 1 All ER 927 at [9]–[15]).

[20] We have considerable doubt whether Judge Workman did have jurisdiction to review the finding of identity, although we can well understand why he was anxious to ensure that there had been no error. In the absence of such jurisdiction the appropriate route for challenging Judge Pratt's decision would, in our judgment, be judicial review. Had we thought there was any substance in Mr Alun Jones's submission we would have been prepared to grant permission to apply for judicial review out of time in respect of Judge Pratt's decision. In the event, however, we have no doubt that he was entitled to reach the decision that he did. As Judge Workman pointed out, when one considers the whole of the EAW it is plainly being said that Hilali, Shukri and Shakur are one and the same person.

[21] The person named in the warrant appears immediately under the heading 'information on the identity of the requested person:' as follows:

Last name: Hilali

First name: Farid

Alias (if any): Shukri and Shakur

[22] Mr Alun Jones's submission is that the warrant contains insufficient evidence to establish that the appellant, who admittedly identified himself in court as 'Farid Hilali', is the person referred to in the warrant. We cannot accept this submission. While it is true that when arrested the appellant gave his year of birth as 1962 whereas it is stated as 1968 in the warrant, it is of much more significance, that both the day and month he gave corresponded with the day and

month stated in the arrest warrant. Nor is it a case, as it appears to us, where there was any dispute before Judge Pratt as to the identity of the appellant. The first respondent was simply put to proof on the balance of probabilities under s 7. Accordingly, we conclude there is no substance in this ground.

WAS THE APPELLANT 'ACCUSED' OF AN OFFENCE?

[23] By ground 3 it is alleged that the appellant was not 'accused' of an offence. Section 64 provides that a person (ie the appellant) must be 'accused' of an offence. Mr Alun Jones's argument is that merely being suspected of the offence is insufficient, the higher threshold of an accusation is required. He submits that the EAW does not cross that threshold.

[24] Lord Steyn had this to say about the meaning of 'accused' in *Re Ismail* [1998] 3 All ER 1007 at 1011, [1999] 1 AC 320 at 326:

> 'It is common ground that mere suspicion that an individual has committed offences is insufficient to place him in the category of "accused" persons. It is also common ground that it is not enough that he is in the traditional phrase "wanted by the police to help them with their inquiries". Something more is required. What more is needed to make a suspect an "accused" person? There is no statutory definition. Given the divergent systems of law involved, and notably the differences between criminal procedures in the United Kingdom and in civil law jurisdictions, it is not surprising that the legislature has not attempted a definition. For the same reason it would be unwise for the House to attempt to define the word "accused" within the meaning of the 1989 Act. It is, however, possible to state in outline the approach to be adopted. The starting point is that "accused" in s 1 of the 1989 Act is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an "accused" person. Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition: see *Government of Belgium v Postlethwaite* [1987] 2 All ER 985 at 991–992, [1988] AC 924 at 946–947. That approach has been applied by the Privy Council to the meaning of "accused" in an extradition treaty: see *Rey v Government of Switzerland* [1999] 1 AC 54 at 62, [1998] 3 WLR 1 at 7.'

Lord Steyn was speaking of the Extradition Act 1989, but his words apply equally to the 2003 Act, as Latham LJ noted in *Dabas v High Court of Justice, Madrid, Spain* [2006] EWHC 971 (Admin), [2006] All ER (D) 47 (May) to which we shall refer in more detail in a moment.

[25] In *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67 at [53], [2006] 1 All ER 647 at [53], [2005] 3 WLR 1079 Lord Scott of Foscote observed that the grounds on which a member state can decline to execute an EAW issued by another member state are very limited but that arts 3 and 4 of the Framework Decision set out the grounds on which execution must or may be refused. He went on:

> '[53] ... None of these grounds enable the merits of the proposed prosecution or the soundness of the conviction or the effect of the sentence

to be challenged. There is one qualification that should, perhaps, be mentioned. The execution of an arrest warrant can be refused if, broadly speaking, there is reason to believe that its execution could lead to breaches of the human rights of the person whose extradition is sought (see recitals 12 and 13).

[54] These features of the Framework Decision explain, I think, the inclusion in the 2003 Act of the requirement that if an arrest warrant is issued for the purpose of prosecuting the person named in the warrant, the arrest warrant must so state (see s 2(3)(b)). Extradition for the purpose of interrogation with a view to obtaining evidence for a prosecution, whether of the extradited individual or of anyone else, is not a legitimate purpose of an arrest warrant. But the judicial authority in the requested state cannot inquire into the purpose of the extradition. It is therefore necessary for there to be an unequivocal statement of that purpose in the arrest warrant itself. Hence the requirement in s 2(3)(b). It is to be noted that the opening words of the form of arrest warrant set out in the annex to the Framework Decision refer to a request that—

> "the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."

It is presumably intended that the inapplicable alternative be deleted. The person in question is surely entitled to know which of the alternatives apply to him.'

[26] Against that background we turn to consider the terms of the warrant. Mr Hardy submits that, read as a whole, it is clear that the EAW was issued for the purpose of prosecuting the person named in it, ie the appellant. The question is what message does the warrant give to the appellant or any other reader?

[27] Considerable assistance is to be obtained from the judgment of Latham LJ, with whom Jack J agreed, in the Divisional Court's decision in *Dabas v High Court of Justice, Madrid, Spain* [2006] All ER (D) 47 (May), a case which, as its title illustrates, is another Spanish extradition case. The warrant in that case contained a similar, but not identical preamble to that in the present case. This is hardly surprising because the form of the warrant is, as Lord Scott pointed out in *Armas*'s case, set out in the annex to the Framework Decision. Any differences may be due to translation. The wording of the preamble in the present case is:

> 'This warrant has been issued by a competent judicial authority. I request to arrest and deliver to the judicial authorities the following person in order to be criminally tried or to execute a penalty of imprisonment or a preventative measure or imprisonment.'

[28] Latham LJ, having considered the observations of Lord Steyn in *Re Ismail*, went on to say (at [12]):

> 'The courts have not so far had to consider the meaning of the word "accused" in s 2(3) of the 2003 Act: but I cannot believe that the general approach should be any different to that adumbrated by Lord Steyn in relation to its meaning in the 1989 Act . . .'

He found support in the approval of Crane J in *R (on the application of Bleta) v Secretary of State for the Home Dept* [2004] EWHC 2034 (Admin), [2005] 1 All ER

a 810, [2005] 1 WLR 3194 and Lord Hope of Craighead in *Armas*'s case [2006] 1 All ER 647 at [48] and concluded (at [14]):

> 'In the present case, whilst I accept that the pro forma wording in the preamble to the warrant is not necessarily determinative of the issue of whether or not the requirements of s 2(2)(a)(b) have been met, it seems to me that the court could only properly conclude that they did not mean what they say if the context throws clear doubt upon their prima facie meaning. In my view nothing in the warrant itself could possibly justify the conclusion that they did not. The court out of which the warrant was issued was the "Court for Committal Proceedings". The decision identifies "Alleged offence of collaboration with Islamic terrorist organisations" in terms which do not suggest that the procedure was merely part of the process of investigation. The particulars provided in relation to the offence show that there is substantial evidence against the appellant, and not merely suspicion.'

b

c

[29] We return to the opening words of the EAW in the annex to the Framework Decision:

d

> 'This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.'

e Mr Hardy submits that they contemplate but two options, prosecution or sentence, the latter including detention. The wording of the request in the EAW in the present case is slightly different:

> 'I request to arrest and deliver to the judicial authorities the following person in order to be criminally tried or to execute a penalty of imprisonment or a preventive measure of imprisonment.'

f

Mr Jones submits this suggests there could be a third option contemplated namely preventive detention. In our judgment however the opening words of the EAW in the present case should be read in the light of the pro forma. We would regard any difference as likely to be attributable to translation. On any g realistic reading the EAW in the present case can only have been issued for one of two purposes, either trial or the serving of a sentence of imprisonment. Having concluded that the EAW could only have been issued for one of two mutually exclusive purposes one then turns to box (b) to see which purpose it serves. Box (b) is headed: 'Grounds for arrest: the warrant'. It continues:

h

> '1. Arrest warrant or executive's judicial resolution of equivalent level: Resolution decreeing the arrest and provisional imprisonment of the person in order to be at the disposition of Central Court of Criminal Proceedings number 5 of the national court . . .'

We take 'resolution' as being equivalent to an order of commitment.

j [30] Further comparison between the pro forma and the EAW is revealing. In the pro forma box, (b) is headed 'Decision on which the warrant is based'; in the EAW the words are 'Grounds for the arrest warrant'. The difference in wording is of no significance. There follow two alternatives numbered 1 and 2 but 2 has been omitted in the EAW. The distinction between 1 and 2 is to reflect whether the person sought to be extradited is required as here, to be tried or whether there

is already a judgment against him which is sought to be enforced ie sentence. The omission of the second alternative in the EAW plainly indicates that the appellant was wanted in order to be prosecuted rather than to execute or enforce a sentence against him.

[31] Some further assistance is also to be found in box (c). This is headed in the pro forma 'Indications on the length of the sentence' and in the EAW 'Information on the extension of the penalty'. The pro forma then gives two headings: '1. Maximum length of the custodial sentence or detention order which may be imposed for the offence(s)' and '2. Length of the custodial sentence or detention order imposed', with a sub-heading: 'Remaining sentence to be observed.' The EAW provides under 1. 'Maximum extension of the penalty of imprisonment or the preventive measure of imprisonment that may be issued based on the *imputed* crime(s): 30 years' (our emphasis). The reference to an 'imputed' crime seems to us to be entirely consistent with the accusation of an offence rather than mere suspicion. Also, as was pointed out during argument, 30 years cannot realistically be considered to relate to pre-trial detention.

[32] The EAW continues by giving a good deal more by way of particulars than was strictly necessary. The core of it comes in para 4 at p 5 of the warrant:

> 'The conversations (the appellant) made on the 6th and 27th August 2001 show that he is isolated from his previous contacts, that he is participating in a commando that is being trained on aircrafts, a few days before the attacks of the 11th of September 2001 which leads to the conclusion that he was one of the men who participated in the attacks although it is clear he was not one of the suicidal pilots since there are telephone calls to IMAD EDDIN BARAT YARKAT after said date of the attacks.'

[33] It seems to us plain from the EAW that the appellant is wanted for trial in Spain because he is accused of one or more offences. The threshold between mere suspicion and accusation is comfortably crossed.

[34] If any fortification of our view is required it is to be found in the observation of Smith LJ with whom Newman J agreed, in *Boudhiba v Central Examining Court No 5 of the National Court of Justice, Madrid* [2006] EWHC 167 (Admin) at [21], [2006] 3 All ER 547 at [21], that the opening words of the EAW that the individual is wanted in order to be criminally tried would not be applicable absent a decision to prosecute having been taken.

[35] Mr Alun Jones submits that the language of the warrant is the language of suspicion rather than of accusation. We cannot agree; it seems to us that the fallacy in Mr Jones's submissions on this as with other of his submissions in this appeal is that we are not permitted to descend into an examination of the evidence or the strength of the case that the Spanish authorities may or may not have against the appellant.

[36] In our view the appellant is accused in a category 1 territory of the commission of an offence and the requirement in s 64(1)(a) of the 2003 Act is met.

THE APPELLANT IS NOT ACCUSED OF AN 'EXTRADITION OFFENCE'

[37] By ground 4 it is contended that the appellant has not been accused of an extradition offence. Section 10(2) of the 2003 Act requires the judge to decide whether the offence specified in the Pt 1 warrant is an extradition offence.

Section 64(2) sets out the conduct that constitutes an extradition offence. It is in these terms:

> 'The conduct constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied—(a) the conduct occurs in the category 1 territory and no part of it occurs in the United Kingdom; (b) a certificate issued by an appropriate authority of the category 1 territory shows that the conduct falls within the European framework list; (c) the certificate shows that the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 3 years or a greater punishment.'

Section 64(3) provides:

> 'The conduct also constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied—(a) the conduct occurs in the category 1 territory; (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom; (c) the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 12 months or a greater punishment (however it is described in that law).'

Section 64(4) provides:

> 'The conduct also constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied—(a) the conduct occurs outside the category 1 territory; (b) the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 12 months or a greater punishment (however it is described in that law); (c) in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment.'

It is unnecessary to recite the remaining provisions of the section.

[38] The appellant submits that the particulars of conduct set out in the EAW do not disclose any extradition offence. Section 64(2) does not apply because the appellant is alleged to have been in the United Kingdom when he took part in part of the conspiracy. Judge Workman however concluded that the provisions of sub-s (3) were satisfied. He said of the details given in the warrant:

> 'There are references in the description to a large number of countries. Many of the allegations against (the appellant) involve international telephone calls and in some instances it is difficult to be sure whether the person that (the appellant) is alleged to be speaking to is in Spain. I am however satisfied that the centre of the conspiracy revolves round a man named Abu Dahdah or Yarkas, whose home address was in Madrid. Those conversations link the (appellant) with Yarkas in Spain and with the conspiracy to the attack on the World Trade Centre and the Pentagon on 11 September 2001.
>
> If that conduct had occurred in England it would have constituted the offence of conspiracy to pursue a course of conduct that would necessarily amount or have amounted to or involve the commission of the offence of

murder of persons in America—I am therefore satisfied that the conduct alleged amounts to an extradition offence under s 64(3).' a

[39] The judge went on to reject the further submission that if there was no conduct in Spain there was nevertheless an extra-territorial offence in English law arising from the conduct alleged and that accordingly s 64(4) applied. The basis of this argument was that the aircraft were flying bombs and that there was an b intent to cause explosions within the meaning of the Explosive Substances Act 1883.

[40] In our judgment the judge was right to conclude that s 64(3) applies. The focus here was on conspiracy to murder. The conspiracy must be founded or maintained in Spain (the requesting jurisdiction). It is sufficient that any overt act c in furtherance of the conspiracy occurred in Spain. In fact a number of overt acts were alleged to have taken place in Spain. The EAW contends that the Yarkas group, of which the appellant was said to be a member, was involved in preparation for the attack on 11 September and that the appellant lived for a time in Spain. There were telephone calls to Yarkas in Spain on 6 and 27 August and 28 September. Thus s 64(3)(a) is satisfied. d

[41] As Mr Hardy points out, the origins of s 64(3) are to be found in *Government of Denmark v Nielsen* [1984] 2 All ER 81, [1984] AC 606 and the earlier extradition legislation. The degree of level of inquiry into international foreign law was in issue in that case. Nomenclature of the offence in the foreign state e does not matter. Lord Diplock said ([1984] 2 All ER 81 at 91, [1984] AC 606 at 625):

> 'So it is the facts proved before the magistrate at the hearing of committal proceedings against the fugitive criminal under ss 9–10 [of the Extradition Act 1970], and not whatever section of the Danish Criminal Code that may f be referred to in the original Danish warrant for arrest, that determine the only crime or crimes under Danish law for which the fugitive criminal who has been surrendered can be tried in Denmark without being given an opportunity of returning to the United Kingdom.'

[42] The next step is to transpose the alleged conduct to the United Kingdom g and ask whether in terms of English law, if the conduct were proved to have occurred here, it would constitute an offence. We have been referred to s 1A of the Criminal Law Act 1977 which covers conspiracy to commit offences outside the United Kingdom. Mr Hardy makes the point that the words 'if it occurred' in sub-s (b) mean 'if it is proved to have occurred'. We are looking at the conduct h of which the appellant is accused and not at issues of evidence as to whether the conduct alleged may or may not be established. The conduct alleged would constitute the offence of conspiracy to commit murder abroad if it occurred in this country and in our view the condition in s 64(3)(b) is met.

[43] That leaves s 64(3)(c). The conduct is punishable in Spain by up to j 30 years imprisonment. This comfortably exceeds the minimum period of 12 months specified in the subsection.

[44] Accordingly, this case falls within s 64(3) and in our judgment Judge Workman was right so to conclude. It is accordingly unnecessary for us to express any view upon whether this case is also covered by s 64(4).

SPECIALTY ARRANGEMENTS

[45] The appellant submits by ground 2 that there are no specialty arrangements within the meaning of s 11(1)(f) and s 17 of the 2003 Act and that specialty arrangements should not only exist but also be effective (see Laws LJ in *Bermingham's* case at [135]). Specialty is the term used in extradition law to describe the rule that an extradited person may only be tried in the requesting state for the crime or crimes for which he has been extradited. As Laws LJ pointed out in *Bermingham's* case, the 2003 Act refers to speciality rather then specialty. Like Laws LJ we shall continue to use the time-honoured word specialty. Under the 2003 Act the issue of specialty falls for consideration by the district judge in Pt 1 cases and by the Secretary of State in Pt 2 cases. Whilst the wording of ss 17 and 95 is not identical, the same considerations apply.

[46] Section 11 is headed 'Bars to extradition'. Various bars are then set out, one of which is specialty. The detailed provisions are to be found in s 17. Nothing turns on the detailed provisions of s 17 in the present case. The issue is whether there are practical and effective arrangements in Spain to ensure that the appellant will only be tried for the offence for which he has been extradited or others disclosed by the same facts.

[47] The bar of specialty was not raised before the district judge but that does not prevent the point being taken before us (see s 27). The fact however that the point was not taken before the district judge, despite the appellant's representation by experienced lawyers in the extradition field, is perhaps an indication that there is force in Mr Hardy's submissions that the point is wholly misconceived.

[48] The thrust of Mr Alun Jones's submission is that nothing in the papers in the present case enables the United Kingdom courts to be satisfied that there are the requisite specialty arrangements in Spain; we cannot be satisfied that there are practical and effective arrangements.

[49] In our judgment the basic question is whether the rule of specialty is catered for in Spanish law. Mr Jones seems in effect to be suggesting that every EAW should recite the specialty arrangements in place.

[50] Mr Hardy submits that specialty arrangements have always been integral to the working of extradition. The rationale behind the rule is the exercise and preservation of sovereignty of the requested state over the person who is returned to the requesting territory. Spain and the United Kingdom are both signatories to the the European Convention on Extradition 1957 (Paris, 13 December 1957; TS 97 (1991); Cmnd 1762) which imposes on signatories the obligation to observe the rule of specialty (see art 14). They are also bound by the terms of the Framework Decision (see paras 2 and 3 of art 27).

[51] Mr Hardy further makes the point that, as with all bars to extradition under s 11 of the 2003 Act, the burden is on the appellant to establish that his extradition is barred.

[52] It seems to us a surprising submission that Spain is likely to act in breach of the international obligations to which it has signed up. There is no evidence before us that it has done so in the past and in these circumstances we would need compelling evidence that it is likely to do so in the future. By art 34 of the Framework Decision member states were requested to take the necessary measures to comply with its provisions by 31 December 2003. It is not suggested that Spain has failed to meet this implementation provision. It seems to us

therefore that it is to be inferred that the specialty arrangements referred to in s 17(2) of the 2003 Act are in place.

[53] Against that background we turn to see how the appellant's case is put. In essence what it comes to is this. It is intended to prosecute him for murder and that would be a breach of the specialty rule. It is certainly true that prosecuting the appellant for murder would breach the specialty rule. We were referred to a letter dated 7 April 2006 written by Judge Fernando Marlaska Gomez from the Preliminary Investigating Court in Madrid in which there is a passage:

> 'With reference to the second offence included in the EAW which is a terrorist murder related to the famous 11s attacks of 2001 in the USA, the EAW must be also maintained for the second offence irrespective of the report issued by the Public Prosecutor of the Supreme Court, because of the following considerations . . .'

The considerations that follow are: (1) there is nothing to stop the appellant admitting his participation in those attacks; and (2) only the Supreme Court has the jurisdiction to assess the evidence against Yarkas; there is also referred to the 'degree of conspiracy' on his part.

[54] This letter was written as a result of questions whether the EAW against the appellant was to be maintained following the prosecution position on the appeal of Yarkas, to which we have referred in [14], above. It is clear that the EAW is maintained against the appellant and in its original form. We agree with Mr Hardy's submission that conspiracy to murder precisely replicates what the appellant will be tried for under Spanish law. It has never been suggested that the appellant was one of the suicide pilots (he would not be here today if he was) or that he was as a participant in all or any of the murders.

[55] What seems to us to be crucial are the facts upon the basis of which the appellant's return is sought. He is said to be one of a number of conspirators; that has not changed since the warrant was issued. Nor is it affected by the outcome of proceedings against Yarkas.

[56] In our view there is no evidence to suggest that the Spanish government is seeking the appellant's return for other than bona fide reasons or that they are asking for his return for other than the purpose requested.

[57] We entirely reject Mr Alun Jones's submission that the Spanish authorities probably have no idea about the provisions of s 17 and that they are going to prosecute him for an offence namely murder, for which he cannot be extradited. That seems to us to be tantamount to saying the Spanish authorities have no idea of their obligations under the Framework Decision. This is something we cannot accept.

[58] In our judgment the appellant's specialty argument is, as Mr Hardy submits, misconceived.

EXTRANEOUS CONSIDERATIONS AND HUMAN RIGHTS

[59] In ground 6 the appellant alleges that his extradition is barred by extraneous circumstances and in ground 7 that if he is extradited his human rights will be violated. There is a good deal of overlap between these two grounds. His essential complaint is that in Spain Arabs accused of committing Islamic terrorist offences are liable to be mistreated and will not—or at least may not—receive a fair trial.

EXTRANEOUS CONSIDERATIONS

[60] Section 13 of the Extradition Act 2003 provides:

> 'A person's extradition to a category 1 territory is barred by reason of extraneous considerations if (and only if) it appears that—(a) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.'

[61] These provisions reflect s 6(1)(c) and (d) of the Extradition Act 1989; therefore the principles established under those provisions continue to apply.

[62] The burden is on the appellant to show a causal link between the issue of the warrant, his detention, prosecution, punishment or the prejudice which he asserts he will suffer and the fact of his race or his religion. He does not have to prove on the balance of probabilities that the events described in s 13(b) will take place, but he must show that there is a 'reasonable chance' or 'reasonable grounds for thinking' or a 'serious possibility' that such events will occur (see *Fernandez v Government of Singapore* [1971] 2 All ER 691, [1971] 1 WLR 987).

[63] It has long been established (since *Schtraks v Government of Israel* [1962] 3 All ER 529, [1964] AC 556) that the court in considering these matters is not bound by the ordinary rules of evidence; the appellant may rely on any material in support of a submission based on s 13.

HUMAN RIGHTS

[64] Ground 7 asserts that the appellant's surrender would not be compatible with his human rights; this is based on s 21(1) of the 2003 Act, which provides that:

> 'If the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.'

[65] We turn to the relevant principles to apply. In *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 AC 323, Lord Bingham said this:

> '[24] While the Strasbourg jurisprudence does not preclude reliance on articles other than art 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to art 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: see *Soering v UK* (1989) 11 EHRR 439 at 468–469 (para 91), *Cruz Varas v Sweden* (1991) 14 EHRR 1 at 33–34 (para 69), *Vilvarajah v UK* (1992) 14 EHRR 248 at 286–287 (para 103). In *Dehwari v Netherlands* (2001) 29 EHRR CD 74 at 75 (para 61) (see [15], above) the Commission doubted whether a real risk was enough to resist removal under art 2, suggesting that the loss of life must

be shown to be a "near-certainty". Where reliance is placed on art 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: see *Soering v UK* (1989) 11 EHRR 439 at 479 (para 113) (see [10], above), *Drozd v France* (1992) 14 EHRR 745 at 793 (para 110), *Einhorn v France* App No 71555/01 (16 October 2001, unreported) (para 32), *Razaghi v Sweden* App No 64599/01 (11 March 2003, unreported), *Tomic v UK* App No 17837/03 (14 October 2003, unreported). Successful reliance on art 5 would have to meet no less exacting a test. The lack of success of applicants relying on arts 2, 5 and 6 before the ECtHR highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as arts 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown.'

[66] In *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37, [2004] 4 All ER 289, [2004] 1 WLR 2241, Lord Carswell said this:

'[24] The Court of Human Rights has affirmed on a number of occasions the existence in principle of the possibility in a suitable case of invoking art 6. The context has generally been that of extradition or expulsion of aliens seeking admission to the country concerned, but in my opinion it is capable of being applied to the enforcement in a convention state of a judgment obtained in another state, whether or not the latter is an adherent to the convention. No decision was cited to your Lordships in which the court went so far as to hold that an act of extradition or expulsion amounted to a breach of art 6, and in all of the reported cases the court has strongly emphasised the exceptional nature of such a jurisdiction and the flagrant nature of the deprivation of an applicant's rights which would be required to trigger it.'

[67] In support of his submissions, the appellant relies on two reports, one by Angel Montoya and the other by Eion McGirr.

[68] Angel Montoya is a Spanish lawyer, practising in Biscay. He has experience of the National Criminal Court of Spain (the Audiencia Nacional) in dealing with persons suspected and charged with terrorist offences. In a long report, he claims that Muslim detainees held in police cells in Spain can be ill-treated and even tortured to obtain confessions; that detainees can be held incommunicado for up to 13 days; that detainees are not permitted access to legal advice, or if they are, that they are denied access to lawyers of their own choice, and that the whole investigative and trial process is loaded against North African Muslims, charged with terrorism offences.

[69] Eion McGirr was called to the Bar in England; he did a pupillage but never practised. He has since worked principally as an interpreter. His report is to the same effect. He focuses particularly on the long period of detention—up to four years—to which he claims terrorism cases in Spain are routinely subject; he also claims that the regime to which they are subject is harsh and oppressive. He also complains about the quality of legal representation.

[70] Of course, appellants may rely on the way in which others in similar circumstances have been treated but the court must focus on the particular circumstance attending the particular individual and assess, as best it can from the information available, whether there is any real substance in the risks of

prejudice, abuse and unfairness which he claims to face upon extradition because of his race or religion.

[71] In evaluating these reports, we note that the authors deal only in generalities; neither makes any attempt to deal with the particular circumstances of this case. Neither has commented on the lengthy trial of the appellant's co-appellant Yarkas, still less have they made any criticism of the conduct of the case, or of the quality of the legal representation, or of the procedures or fairness of the trial or of the conditions in which Yarkas was detained or questioned. Neither report has shown any acknowledgment or appreciation of the position, status and protection which the appellant would have if he was to be returned to Spain under the EAW. Nor has any attempt been made to respond to the points made by the Spanish authorities. In our judgment these factors considerably undermine the weight to be given to these reports.

[72] However, they make very grave allegations and if we thought that there was real substance in them, then plainly it would be quite wrong to authorise the appellant's extradition. We must therefore examine these complaints in some detail.

[73] We have read with care, the responses of the Spanish authorities. We refer to the statement made by Judge Fernando Marlaska Gomez on 3 March 2005 under the seal of the Central Court for Committal Proceedings in Madrid (we have already referred to his further statement of 7 April 2006, when reviewing the issue of specialty) and to the depositions of the prosecution counsel Pedro Rubira Nieto made on 7 February, 11 April 2005 and 24 April 2006. It is strongly argued by the Spanish authorities that the laws and procedures in place in Spain would provide effective protection to this appellant.

[74] Of course, the mere fact that Spain has laws and procedures which purport to safeguard the human rights of detainees is not sufficient. The English courts must be vigilant to ensure that those rights provided by the 2003 Act and by [the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the European Convention of Human Rights)] are 'interpreted and applied so as to make [their] safeguards practical and effective' (to use the words of the European Court of Human Rights in *Soering v UK* (1989) 11 EHRR 439 at 467 (para 87)).

GOOD FAITH

[75] We have been alerted by the Human Rights Watch paper entitled 'Empty Promises: diplomatic assurances no safeguard against torture' to the danger that assurances by diplomatic and legal authorities in the requesting state may prove to be illusory and the courts may be impotent to protect persons detained on terrorist offences. However, we have not been given particulars of any person who has claimed to have been unfairly treated in Spain following surrender under an EAW. Furthermore, in the absence of a record of non-compliance in any such case, the best guarantee of compliance with the appellant's human rights is knowledge that, if violated, future co-operation would be imperilled and the presumption of good faith would be displaced.

[76] Moreover, we have been impressed by the paper by the Foreign Office entitled 'Counter Terrorism Legislation and Practice: a Survey of Selected Countries' which suggests that human rights are protected by the Spanish courts in the context of extradition and expulsion cases.

[77] It seems to us that the courts should give great weight to the fact that Spain is a western democracy, subject to the rule of law, a signatory of the European Convention of Human Rights and a party to the Framework Decision; it is a country which has and which applies the same human rights standards and is subject to the same international obligations as the United Kingdom. These surely are highly relevant matters which strongly militate against refusing extradition on the grounds of the risk of violating those standards and obligations.

[78] We think that there must be, as Kennedy LJ put it in *Re Serbeh* [2002] EWHC 2356 (Admin) at [40], [2002] All ER (D) 468 (Oct) at [40])—

> 'a fundamental assumption that the requesting state is acting in good faith. If there is a reason in the particular case to call that assumption into question, then the reason can be examined, and if appropriate acted upon . . .'

[79] With these principles in mind, we seek to deal with the points raised one by one.

INCOMMUNICADO DETENTION AND TORTURE

[80] It is claimed on behalf of the appellant that if he is returned to Spain accused of terrorist offences, he will be held incommunicado, perhaps for as long as 13 days, without his friends or family being told of his detention or whereabouts, without any access to a lawyer—let alone private and confidential access; without recourse to the courts and that he would be subject to prolonged, oppressive and uncontrolled interrogation by the police. Various other claims are made as to the harsh regime in which the appellant would be held including solitary confinement, in an underground cell, without natural light, without the opportunity to wash and without exercise or recreation. It is further suggested that appellants held in this regime are routinely subjected to torture.

[81] Self-evidently, if an appellant was to be held incommunicado in these circumstances and conditions there would be grave violations of his human rights. It is said that the examining judges are sceptical about such claims and that the judicial system has proved an inadequate safeguard against such abuses in the past.

[82] Some support for these allegations in terrorist cases in the past (but not in respect of those surrendered pursuant to an EAW) is to be found in the reports from Amnesty International, from the United Nations Human Rights Committee Special Rapporteur to which Senor Montayo refers. We have also read with care the Human Rights Watch paper 'Setting an Example? Counter-Terrorism Measures in Spain' (January 2005 Vol 17, No 1(D)).

[83] It is true that in some cases there can be a system in Spain of detention 'incommunicado'. Terrorism in Spain is not a new phenomenon. The Basque separatist movement ETA has over the years committed many outrages in Spain. The government and the Spanish legal system have had to develop systems to deal with the many problems presented. Because of the known risks that some lawyers cannot be trusted not to pass information on to terrorist organisations, some persons detained in Spain for terrorist offences can, in some situations, be held for some days incommunicado and without access to lawyers, or with access only to lawyers authorised by the state. After such detention has ended, then the detainee can retain a lawyer of his choice.

[84] There is power in exceptional cases to hold a person incommunicado for up to 13 days; we were told that there is no recent example of detention in these circumstances for longer than five days. The UN Commission on Human Rights resolved in 2003 that 'prolonged incommunicado detention may facilitate the perpetration of torture and can, in itself, constitute a form of cruel, inhuman and degrading treatment or even torture'.

[85] If an appellant faced the possibility of extradition from this country to Spain and if he might be held there incommunicado, then the legality and the propriety of the extradition would need carefully to be examined.

[86] We are, however, quite satisfied from what we have read from the Spanish authorities that the appellant faces no possibility of detention incommunicado. An EAW is a request made by a judicial authority; if the appellant is returned to Spain, pursuant to extradition following the issue of an EAW, then his case, his detention and interviewing will be held subject to immediate, continuing and effective judicial supervision. Indeed upon his arrival in Spain the appellant must be brought immediately before a judge, who must determine whether he is to be kept in custody. He will not be held incommunicado or in solitary confinement. He will have unimpeded access to a lawyer of his choice; the lawyer has a right to be present at all judicial hearings and to challenge any adverse findings, including the decision to hold him in custody at all, by way of appeal, or by way of application for habeas corpus, to higher courts, and if necessary all the way up to the Spanish Constitutional Court. The appellant has the right to medical examination and treatment. He will have all the protection accorded to him by the Spanish constitution, which fully protects all the rights accorded by the European Convention of Human Rights to which Spain is a signatory. There is, in our judgment, no reason at all to think that the Spanish courts will be unable—still less unwilling—to protect the appellant's rights.

[87] We reject therefore the claim that there is a real risk the appellant will be held incommunicado, or that he will be tortured.

LENGTH OF PRE-TRIAL DETENTION

[88] It is claimed that persons are frequently detained in Spain for a long time—even up to four years—before trial. The Human Rights Watch paper provides a number of examples of such delays in terrorism cases. It should however be borne in mind that the Spanish judicial system is inquisitorial in nature. Sometimes the complexity of the crimes alleged does result in the investigation taking a long time; there is always a tension between thoroughness and delay. This was, of course, a highly complex case; the eventual indictment was 692 pages long; there were 41 appellants; there were 133 volumes of evidence. However, here the investigative phase has long finished; there has already been one trial on the same facts.

[89] There is no reason whatsoever to think that there will be any undue delay in the appellant's trial starting. Even if there was to be a delay, then the appellant's lawyers may challenge the need for his continued detention and he must then be released unless the authorities can justify his detention to the court. Accordingly, we reject this part of the appellant's case also.

CONDITIONS OF PRE-TRIAL DETENTION

[90] It is claimed that the appellant may be detained in a 'closed regime'. Every state must make provisions for the safe and secure confinement of those

prisoners who are accused of grave terrorist offences, or who are unable or unwilling to comply with the normal prison regime. Furthermore there is an obligation on the prison authorities to keep such prisoners safe from other prisoners; after the terrorist outrages in Madrid, some themselves asked for the protection of the 'closed regime'. There is no reason to think that the appellant himself would be held in such conditions; and even if he was, it would not be on account of his race or religion. Further complaint is made that terrorist suspects are dispersed throughout the Spanish prison system. Again, this may be a prudent way in which to manage and control those who may, if held together, collectively form a serious security threat. We do not think that there is anything in these points.

[91] For the reasons we have already given, we reject the claims that the appellant's detention in Spain will amount to any breach of art 5: his arrest and detention will be lawful, and he will be brought before a competent legal authority, which will exercise a continuing and effective control over such detention as it may authorise.

SECRETIO DE SUMARIO

[92] The appellant complains that he might be further prejudiced by the Spanish procedures known as the 'secretio de sumario', by which, in some terrorist cases, some part of the investigative process is held in secret. It should be remembered that Spain has an inquisitorial system of criminal justice, which covers the process of investigation as well as the process of trial. It is obvious that in the search for those responsible for terrorist offences, much of the investigative process must be and must remain confidential and even secret. But in the present case the investigative phase is already over. There is no risk that this appellant will be subject to the process of 'secretio de sumario'. We need say no more about it.

LEGAL REPRESENTATION

[93] The Spanish legal system grants legal representation to anyone accused of serious crime. Unless subject to the regime of incommunicado (which—as we have already explained—does not apply to this case), appellants in Spain have a right to be represented by a lawyer of their choice. It is, however, claimed that the rates of pay are very poor and that there is little incentive to do the work well. It is claimed that in the result, the lawyers retained are low grade and unable properly to protect the appellant's interests. We consider that these assertions are vague, unspecific and at best anecdotal. Furthermore, a consideration of the papers in the trial of Yarkas and others suggests that the lawyers representing the defendants were of high quality; indeed the reports filed by the appellant do not assert the contrary. We reject this criticism also.

TELEPHONE EVIDENCE

[94] We turn then to another separate complaint. As is clear from what we have already said, part of the case against the appellant consists of what he is alleged to have said over the telephone to Yarkas. It is said that during his trial, neither he nor his co-appellants were allowed to hear the recordings of the calls on which the prosecution relied; it is therefore suggested that the trial of the appellant also would be unfair in that he would not have the opportunity to listen to the recordings.

[95] An examination of the judgment of the court in the case of Yarkas and others shows that this allegation is simply not true. At pp 114–118 (we refer to the internal numbering of the English translation, pp 574–578 of our bundle), the court details the lengths to which they went to ensure fairness. Since there were many hundreds of master tapes, all of conversations in Arabic, it was not sensible—or indeed feasible—for all the tapes to be translated and transcribed. The court invited the prosecution and the defence to identify those passages to which they wished to refer: if these were relevant, then they were indeed translated and transcribed. The defence had access to all the relevant tapes. No doubt the same will apply at the trial of the appellant. This is entirely fair. There is nothing in this point.

EXPULSION OR DEPORTATION TO MOROCCO

[96] We turn to the claim that the real reason behind the request to extradite the appellant to Spain is to deport him on to Morocco.

[97] Following the terrorist explosions in Madrid on 11 March 2004, it is said that the Spanish authorities decided to expel from Spain any foreign national suspected of involvement in terrorism. It is argued on the appellant's behalf that if he is extradited to Spain, he will be deported to Morocco, where—it is claimed—he may be detained, tortured and abused without any recourse to a legal system able—or even willing—to give any effective protection to him. The case is put in alternative ways: first, it is said that the Spanish authorities do not intend to try him at all but intend to deport him straight to Morocco. Alternatively, if he is tried but acquitted, he will be freed from custody only to be deported to Morocco.

[98] These claims advanced on behalf of the appellant must be examined in the light of what the Spanish authorities say on the topic. The Spanish prosecutor Senor Nieto wrote in his statement of 7 February 2005 that 'if extradition to Spain were to be agreed, extradition to another state would never be agreed without the consent of the United Kingdom'.

[99] It is said on behalf of the appellant that this response is limited to the assertion that the appellant would not be *extradited* from Spain to Morocco; it is asserted that they say nothing about the risk that he might be *deported* (our emphasis). It was to address this specific concern that Senor Nieto wrote a further statement dated 26 April 2006; in this he writes in terms that 'the only purpose of the extradition request is to secure the surrender of (the appellant) in order that he can be tried for grave offences of terrorism, including conspiracy to murder. There is no other purpose behind the request. In particular I can say that the suggestion that (the appellant's) extradition is sought at the behest of the authorities in the UK so that he can be deported to Morocco is absurd'. This is very clear.

[100] A similar claim was made in the case of *Re Faraj* [2004] EWHC 2950 (Admin), [2004] All ER (D) 137 (Dec), where it was claimed in this court that the real reason behind a request by Italy to extradite the appellant was an intention to pass him on to Libya. Tuckey LJ observed in that case (at [12]) that—

> 'the Italian government has gone to great lengths, no doubt at great expense also, to get the claimant back to Italy so that he can be tried there. It makes no sense to have gone to those great lengths in order to expel him from Italy before he is tried and overlooks the fact that the claimant is alleged to be one of the principals involved in this conspiracy.'

This seems to us to be an observation of powerful common sense.

[101] In our judgment, there is no reason whatsoever to think that the Spanish authorities have any intention of deporting the appellant to Morocco; indeed, it is quite obvious that their intention is to try him in Spain.

[102] Even if he is acquitted after a trial, then he will be able to claim asylum in Spain.

[103] In the further alternative, if he is tried, convicted and sentenced, it is claimed that he will be deported to Morocco immediately upon his release after his sentence. The position is the same as in *Ramda v Secretary of State for the Home Dept* [2005] EWHC 2526 (Admin), [2005] All ER (D) 223 (Nov) where the appellant claimed that there was a risk that his extradition to France would be followed by expulsion to Algeria. Keene LJ giving the judgment of the lower court dealt with this point (at [60]):

> 'Moreover, if the claimant were convicted of the grave offences for which his extradition to France is sought, it can be anticipated that he would receive a lengthy custodial sentence. We understand from Miss Blunden's witness statement that Bensaid on conviction received sentences of life imprisonment and 30 years' imprisonment. If that is any guide in the claimant's case, and given his alleged role as paymaster it may well be, a conviction would seem likely to mean a considerable time in prison, despite the years he has spent in custody in this country. In those circumstances, any allegation that, on release, he would be deported to Algeria relates to a situation some time in the future. The Secretary of State can scarcely be expected to refuse the claimant's return on the speculative basis that there might be a real risk to his art 3 rights at some unknown date well into the future. Certainly there was no evidence before the Secretary of State to establish any such real risk.'

[104] The position facing the appellant here is the same. Any expulsion after trial, conviction and sentence would be many years ahead; we regard this later possibility as being far too remote to be relevant at this stage.

[105] We should make clear that the appellant, in a lengthy statement, alleges that he has been unlawfully detained and tortured by the police in Dubai and Morocco. He asserts that in both countries, he was interviewed by officers from MI6. For reasons pointed out by the first respondent, there are serious factual problems with the chronology suggested by the appellant but having rejected the appellant's case that he will be returned to Morocco from Spain, it is unnecessary further to examine his own claims.

[106] For all these reasons we are not persuaded that the appellant has shown that the issue of the warrant, or his detention or his prosecution in Spain or that any punishment which might follow conviction are the result of his race or his religion; nor indeed do we think that he will suffer any prejudice at all on account of his race or religion. Furthermore, we are confident that his human rights will be observed by the authorities in Spain and will be properly protected by the Spanish courts. We discount the possibility that this extradition is merely a cloak for his onward deportation to Morocco. Accordingly, neither ss 13 nor 21 provides any bar to his extradition.

ABUSE OF PROCESS

[107] We have left until last the appellant's first ground of appeal that it would be an abuse of the process of the court to allow the extradition to proceed. Although Mr Jones put this in the forefront of his argument it seems to us that

this ground has to be considered against the context of all the other grounds. If we are unpersuaded there is substance in any of the other grounds would it nevertheless be an abuse of process to extradite the appellant to Spain?

[108] As will be apparent we are unpersuaded that there is anything in the other grounds of appeal either individually or collectively. We do not doubt that abuse of process could in appropriate circumstances lie notwithstanding there was no other bar to extradition: see eg the observations of Laws LJ in *Bermingham's* case. But we think such circumstances are likely to be rare and there would have to be bad faith or something of that kind.

[109] Many of Mr Jones's abuse of process arguments are linked to other grounds of appeal. Having dealt with the other grounds of appeal we ask rhetorically what is left?

[110] The remaining argument on abuse of process seems to us to centre around the following contentions. First, the prosecutor in Spain is seeking to impugn Yarkas's conviction on the basis that the evidence is too vague. Take away Yarkas as a conspirator and any case against the appellant falls too. Secondly the Spanish authorities do not know the identity of the appellant. It is at best speculative that he was the person communicating with Yarkas. Third, the Americans have never made any allegation against the appellant of involvement in events of 11 September 2001.

[111] As to the first point, we have to remind ourselves that it is not for us to try the case in Spain. In the event that one conspirator is acquitted the case against others may well depend on different evidence. It certainly does not in our view follow that if Yarkas is acquitted there is necessarily no case against the appellant. It is to be noted that the terms of the EAW are maintained. There has been no change in the first respondent's position. There is nothing to suggest the requesting state is not acting in good faith.

[112] It seems to us that the high water mark of Mr Jones's argument relates to a passage in the translation of the public prosecutor's submission to the Supreme Court. This report is a lengthy document relating to the appeal of Yarkas. It is not all entirely easy to follow. The passage relied upon is at p 1270 of the bundle. It runs as follows:

> 'In relation to the participation of (Yarkas) the Court concludes in reference, days before the attempts of: 25 August 2001, he received the call of an unknown individual, and for identification purposes, named previously, called SHAKUR, where he cryptically told him: that he was involved in an aviation course, that he had "slaughtered the bird" and that he had ended all his old contacts, telling him not to tell anyone the content of the conversation.
>
> The Court concluded with the deduction shown that: "In this way IMAD EDDIN BARAKAT YARKAS, was being informed (told) by 'SHAKUR' about the familiarization and reconnaisance flights regarding the imminent objectives which the suicidal pilots were carrying out."'

Great emphasis is laid on the word 'unknown' and what is said is that this passage illustrates that the Spanish authorities do not know the identity of the man they are seeking and it is therefore an abuse of process to extradite the appellant.

[113] The author of this statement (which is in any event a translation) is not the judicial authority who issued the arrest warrant. Further, the statement was directed to the appeal of Yarkas and not the case against Hilali. Mr Hardy submits

that it is important to keep in mind that the critical document is the EAW and the vital question is whether the apparent inconsistency raised by this document at p 1270 undermines what is asserted in the warrant, to the extent that compliance with the request in the warrant would be an abuse of process. a

[114] This court cannot usurp the trial court's function. It is possible that there may be issues of identity at the trial, but this court is nowhere near being in the position to say that Spain is seeking to extradite the appellant despite knowing full well they cannot establish it was he who was making the phone calls is [sic] Yarkas. Mr Hardy also refers to the appellant's own witness statement from which it is plain that he was wanted in Spain because the authorities thought he was the person known or sometimes known as SHAKUR. b

CONCLUSION c

[115] None of the seven grounds advanced for allowing the appeal is made out. None of the reasons put forward by Mr Jones either individually or collectively amounts to a ground reason why the appellant should not be extradited. Accordingly the appeal is dismissed.

Appeal dismissed.

Dilys Tausz Barrister.

Onasanya v Newham London Borough Council Newham London Borough Council v Onasanya

[2006] EWHC 1775 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)
MAURICE KAY LJ AND MITTING J
14 JUNE, 14 JULY 2006

Street trading – Offence – Displaying for sale notice in private vehicle – Private vehicle parked in road – Test for determining whether statutory defence satisfied – London Local Authorities Act 1990, s 38(2).

The defendant owner of two vehicles, one a Volvo and the other a Rover, was prosecuted by the local authority for offences of unlawful street trading contrary to s 38(1)(a)[a] of the London Local Authority Act 1990. On each occasion one of the vehicles had been parked on public highways within the area of the local authority displaying a notice advertising the car for sale. The cases in respect of each car were heard separately by different district judges. The district judge found that the defendant used the Volvo as his own private motor vehicle and that the car was parked on the street outside the surgery of his doctor with whom he had an appointment. The district judge concluded that as one of the purposes for which the defendant had brought the vehicle into the street remained the offer for sale of the vehicle, the statutory defence in s 38(2)[b] of the 1990 Act was not established. That subsection provided that where it was shown that any article was displayed in any street the article was to be presumed to have been offered for sale unless it could be proved that the article was brought into that street for some purpose other than street trading. The defendant appealed by way of case stated. The district judge trying the three informations in respect of the Rover found that that vehicle had been loaned by the defendant to a friend on the expectation that it would be garaged and that the defendant had been out of the country when two of the offences were alleged to have been committed. She also found that the defendant had been unaware of the warning notices which had been affixed to the vehicle, which had been parked near the friend's house, and which informed the keeper of the vehicle that 'for sale' notices constituted trading or exposing the vehicle for sale without a street trading licence. She concluded that the defendant had adequately addressed the evidential burden to satisfy the provisions of s 38(2) in that the vehicle had been in the vicinity of the friend's address for some purpose other than for sale. She therefore dismissed all three informations. The authority appealed by way of case stated. The authority submitted that the defendant could only avail himself of s 38(2) if the vehicle was in the street entirely for a purpose unrelated to street trading.

Held – For the purposes of s 38(2), the question that had to be asked when deciding whether an article 'was brought into that street for some purpose other than street trading' was why was it in 'that street' and nowhere else at the material time. Whilst there might be a duality of purpose, that did not mean that

a Section 38(1), so far as material, is set out at [5], below
b Section 38(2), so far as material, is set out at [7], below

wherever there was so s 38(2) of the 1990 Act would not avail a defendant. The fundamental question was as to why the article or thing was brought into that street. In the instant cases, having regard to the findings of fact, the defendant had been wrongly convicted in respect of the Volvo, and rightly acquitted in respect of the Rover. Furthermore, it was not possible to establish that the defendant had engaged in street trading on the days when the Rover had been in the possession and control of his friend; there was nothing in the 1990 Act which deemed the registered keeper to be responsible for his car when it was in the possession and control of someone else. Accordingly, the defendant's appeal would be allowed and the authority's appeal would be dismissed (see [12], [13], [15]–[18], below).

Notes

For unlicensed street trading, see 29(2) *Halsbury's Laws* (4th edn reissue) para 1159.

For the London Local Authorities Act 1990, s 38, see 26 *Halsbury's Statutes* (4th edn) (2002 reissue) 976.

Cases referred to in judgments

Haringey London BC v Michniewicz [2004] EWHC 1728 (Admin), DC.

R v Aziz [1995] 3 All ER 149, [1996] AC 41, [1995] 3 WLR 53, HL.

R v Duncan (1981) 73 Cr App R 359, CA.

Appeals by way of case stated

Onasanya v Newham London Borough Council

The defendant, Johnson Onasanya, appealed by way of case stated against the decision of District Judge Gott, made on 27 September 2005 in the Stratford Magistrates' Court, whereby he was convicted on an information laid by the respondent authority, Newham London Borough Council, alleging that on or about 2 February 2005, the defendant, being a person not the holder of a street trading licence, engaged in street trading, namely exposing or offering for sale a Volvo motor vehicle registration mark Y453HCP from the public highway, contrary to s 38(1)(a) of the London Local Authorities Act 1990. The question for the opinion of the court is set out at [9], below. The facts are set out in the judgment of Maurice Kay LJ.

Newham London Borough Council v Onasanya

Newham London Borough Council appealed by way of case stated against the decision of District Judge Sims, made on 28 September 2005 in the Stratford Magistrates' Court, whereby she dismissed three informations laid by the authority against the defendant, Johnson Onasanya, alleging that on 27 November 2004, 19 December 2004 and 7 January 2005, the defendant, being a person not the holder of a street trading licence, engaged in street trading, namely exposing or offering for sale a Rover motor vehicle registration mark LD510LT from the public highway contrary to s 38(1)(a) of the London Local Authorities Act 1990. The question for the opinion of the court is set out at [10], below. The facts are set out in the judgment of Maurice Kay LJ.

Philip Rule (instructed by *Fairweather Whillis & Toghill*, High Wycombe) for the defendant.

Suzanne Palmer (instructed by *Helen Sidwell*) for the authority.

Cur adv vult

14 July 2006. The following judgments were delivered.

MAURICE KAY LJ.

[1] These two appeals by way of case stated are a graphic illustration of what can happen when a prosecutor, in this case the London Borough of Newham, becomes overzealous. In each case Newham prosecuted Mr Onasanya in Stratford Magistrates' Court for an offence or offences of unlawful street trading. It is not and never has been suggested that Mr Onasanya is in any sense a professional street trader. Indeed, he is a local government officer employed by a neighbouring London borough.

[2] The first of the two cases to be heard concerned a Volvo motor car. The information laid by Newham alleged that on or about 2 February 2005, Mr Onasanya, 'being a person who was not the holder of a street trading licence did engage in street trading, namely exposing or offering for sale a Volvo motor vehicle registration mark Y453 HCP from the public highway known as Greengate Street, London E13'. The allegation was of an offence contrary to s 38(1)(a) of the London Local Authorities Act 1990 (as amended). The facts found by the district judge were as follows:

> 'Johnson Onasanya was the owner and registered keeper of the Volvo purchased in about July or August of 2004. It was used by him as his own private motor vehicle. On a date prior to 2 February 2005 Mr Onasanya fixed a notice in the rear window of the car advertising the car for sale. This notice contained Mr Onasanya's mobile telephone number. The purpose of so doing was to attract potential purchasers of the vehicle who would then be able to contact Mr Onasanya. On 2 February 2005 Mr Onasanya was driven in the said motor car by his wife and parked the vehicle in Greengate Street, E13. The reason for that particular journey was that Mr Onasanya had an appointment to see his general practitioner at his surgery at 94 Greengate Street. The notice advertising the car for sale remained fixed in the rear window and visible to passers-by.'

[3] The district judge concluded that, despite Mr Onasanya's attendance at his doctor's surgery, one of the purposes for which he brought the vehicle into Greengate Street remained the offer for sale of the vehicle. Mr Onasanya was convicted.

[4] The facts of the second case had occurred earlier but came for trial a day later than the Volvo case. The second case concerned a Rover motor vehicle. Three informations alleged that Mr Onasanya had engaged in unlawful street trading, 'namely exposing or offering for sale a blue Rover motor vehicle registration mark LD51 0LT from the public highway known as High Street, London E13'. The three informations related to the dates of 27 November 2004, 19 December 2004 and 7 January 2005. The district judge (not the same district judge as on the previous day) found the following facts:

> '(a) The vehicle was parked in High Street E13 on each of the three occasions stated. (b) There were "For Sale" notices displayed in the vehicle

on each of the three occasions. (c) The warning notices affixed to the vehicle [by council officials] informed the keeper of the vehicle that the "For Sale" notices constituted trading or exposing the vehicle for sale without a street trading licence. (d) Mr Onasanya was out of the United Kingdom for a period of three weeks from 19 December 2004 to 7 January 2005. (e) The vehicle had been loaned by Mr Onasanya to Mr Ahyde. (f) It was Mr Onasanya's expectation that the vehicle would be garaged by Mr Ahyde. (g) On each of the three occasions the vehicle was situated in the vicinity of Mr Ahyde's address and the purpose for which it was so situated was as a result of Mr Onasanya lending the vehicle to Mr Ahyde. (h) Although Mr Onasanya had driven past the parked vehicle on a number of occasions and had seen the "For Sale" notices displayed, he believed that the vehicle must have been parked there for an innocent purpose other than for sale as his expectation had been that the vehicle would be garaged by Mr Ahyde. (i) Mr Onasanya had not been aware of the fact that the warning notices had been affixed to the motor vehicle on the relevant dates. (j) There was no evidence to contradict the account given by Mr Onasanya in interview with the council officials.'

[5] The relevant offence is defined in s 38(1) of the London Local Authorities Act 1990 (as amended) in the following terms:

'A person who—(a) is not the holder of a street trading licence or a temporary licence and who engages in street trading in a borough [whether or not from a stationary position] . . . shall be guilty of an offence . . .'

[6] 'Street trading' means '(a) the selling or the exposure or offer for sale of any article . . . in a street for gain or reward' (s 21).

[7] Section 38(2) then provides:

'In any proceedings for an offence under this section . . . where it is shown that—(a) any article or thing was displayed (whether or not in or on any receptacle) in any street . . . the article [or] thing . . . concerned shall be presumed to have been exposed or offered for sale . . . unless it can be proved to the satisfaction of the court that the article or thing . . . was brought into that street for some purpose other than street trading.'

[8] In the Volvo case the district judge concluded that:

'The statutory defence provided by s 38(2) . . . was not established as it was not proved to the satisfaction of the court that the vehicle was brought into that street for some purpose other than street trading.'

[9] The question posed for the opinion of this court in the Volvo case is in the following terms:

'Was I right to conclude that in the circumstances a purpose for which the vehicle was brought into Greengate Street remained the offer for sale of the vehicle and accordingly the statutory defence provided by s 38(2) . . . was not established as it was not proved to the satisfaction of the court that the vehicle was brought into that street for some purpose other than street trading?'

[10] In the Rover case, the findings to which I have referred were based to a significant extent upon what Mr Onasanya had said to the council officials in

interview. Although he did not give evidence at trial the district judge concluded that there was no evidence to contradict the account given in interview. In these circumstances the district judge concluded that Mr Onasanya had 'adequately addressed the evidential burden to satisfy the provisions of s 38(2) in that the vehicle had been in the vicinity of Mr Ahyde's address for some purpose other than for sale' and, on that basis, she dismissed the three informations. The question posed for this court in the Rover case is in these terms:

> 'On the facts as found by me, was I entitled to hold the view that [Mr Onasanya] had discharged his evidential burden of establishing that the vehicle had been in the vicinity for some purpose other than for sale?'

[11] It is perhaps worth adding that the positions in High Street where the Rover was seen were very close indeed to Mr Ahyde's address but a mile or so away from the address of Mr Onasanya.

[12] The approach of Newham to these cases and the central submission of Miss Palmer is that, at all material times, there was more than one 'purpose' relating to the presence of the cars in the streets in question. On the one hand, the car was being driven or used for a journey or was parked for convenience. On the other hand, because the 'for sale' sign was still in the window, there was the additional purpose of street trading. The suggestion is that a defendant can only avail himself of s 38(2) if the vehicle is in the street entirely for a purpose unrelated to street trading. I have no hesitation in saying that, in my judgment, this approach is simply wrong. What the court has to be satisfied about in s 38(2) is that the article 'was brought into that street for some purpose other than street trading'. The question that must be asked, therefore, is: why was it in '*that* street' and nowhere else at the material time? It is abundantly clear on the findings of fact that the Volvo was in Greengate Street because Mr Onasanya was attending an appointment with his general practitioner in 'that street'. It is equally clear, on the findings of fact, that the Rover was in High Street because Mr Onasanya had lent it to Mr Ahyde who had parked it for convenience virtually outside his house. Of course, there may be a duality of purpose but I do not accept that, wherever there is so, s 38(2) will not avail a defendant. The fundamental question, I repeat, is as to why the article or thing was brought into *that street*.

[13] In my judgment it follows that, having regard to the findings of fact, Mr Onasanya was wrongly convicted in respect of the Volvo but rightly acquitted in respect of the Rover.

[14] So far as the Rover is concerned, the question posed by the case stated relates to the discharge of an evidential burden. It seems that there was an issue as to whether the findings of fact were open to the district judge in circumstances where Mr Onasanya had not given evidence. I have no doubt that the findings of fact were open to the district judge. Mr Onasanya had given a full account in interview. The evidence of the interview was adduced, not least because the prosecution relied upon it to prove that Mr Onasanya was the owner of the car, that he had displayed the 'For Sale' notices in it, that the telephone number on the notices was his, and that he had seen the car on a number of occasions parked in High Street after he had lent it to Mr Ahyde. On the other hand, the parts of the interview concerning the loan to Mr Ahyde, the expected garaging and the absence of Mr Onasanya from the country from 19 December 2004 were matters relied upon by the defence. In other words, the interview was both inculpatory and exculpatory. It is well established that, in such circumstances, it is all of evidential value, the respective weight to be attached to each part being a matter

for the tribunal of fact, which will no doubt bear in mind the inherent likelihood of inculpatory statements starting from a higher level of credibility than exculpatory statements. However, it was clearly open to the district judge to conclude that, as there was no evidence to contradict the exculpatory parts, he could place reliance upon them. In my judgment, this approach was entirely consistent with authorities such as *R v Duncan* (1981) 73 Cr App R 359 and *R v Aziz* [1995] 3 All ER 149, [1996] AC 41.

[15] What I have said so far deals with the questions posed by the cases stated and the central submissions made on behalf of the parties. I am bound to say that, in relation to the Rover case, there is in my view another issue which received little or no attention in the magistrates' court or in counsels' submissions in this court. In the light of the findings of fact that it was Mr Ahyde who was in possession and control of the car in the days in question and who had parked it in High Street, it seems to me that it was not possible to establish that Mr Onasanya had 'engaged in street trading' on those days in any event. When challenged on this point, Miss Palmer sought to counter it by arguing that the finding of fact that Mr Onasanya had seen the car parked in High Street with the 'For Sale' notices displayed was sufficient to fix him with liability because it was his car that contained his notices. For my part I do not think that this submission is correct. There is nothing in the 1990 Act which deems the registered keeper to be responsible for his car when it is in the possession and control of someone else. It seems to me that this is another example of just how overzealously Newham seek to approach this particular legislation.

[16] I do not lose sight of the fact that this is important legislation administered by local authorities for the public good nor that it must be difficult for a local authority to deal with some of the manoeuvrings of the more unscrupulous street traders. In some ways, their difficulties are alleviated by the fact that the offence is not limited to professional street traders and can be committed by a private individual selling a single item: see *Haringey London BC v Michniewicz* [2004] EWHC 1728 (Admin). However, the control mechanism is limited by the terms of the statute and where, as here, a person puts forward a credible explanation against which there is no contradictory evidence it seems to me that prosecution is an excessive response.

[17] It follows from what I have said that Mr Onasanya's appeal must be allowed and that of Newham dismissed. I have indicated the answers to the questions posed by the cases stated, namely 'No' in the Volvo case and 'Yes' in the Rover case. The quashing of Mr Onasanya's conviction carries with it the quashing of the order for costs that was made against him. I am unsure as to whether he incurred personal costs in his unsuccessful defence in the Volvo case in the magistrates' court. If he did it seems to me that he should now be relieved of that burden and we shall consider an appropriate application. As to the costs of these appeals, we raised this issue at the end of the hearing and the matter stands resolved subject to some fine tuning as to quantum, failing agreement as to which there will have to be an assessment.

MITTING J.

[18] I agree for the reasons given.

Order accordingly.

Dilys Tausz Barrister.

Crehan v Inntrepreneur Pub Co (CPC) and another (Office of Fair Trading and another intervening)

[2006] UKHL 38

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD RODGER OF EARLSFERRY AND LORD WALKER OF GESTINGTHORPE

6–8, 12 JUNE, 19 JULY 2006

European Community – Rules on competition – Agreements preventing, restricting or distorting competition – Claimant bringing proceedings in England for breach of European Community law prohibition on such agreements – Claimant contending that judge should treat as binding factual assessment made by European Commission in deciding proceedings between different parties in same market – Whether judge required to do so – Article 81 EC.

The claimant entered into agreements to take leases of two public houses from the defendant. They were in standard form, containing ties which obliged him to buy his beer from a specified company at its list prices. Both businesses failed because the claimant could not compete with other public houses which were able to buy their beer at lower prices and accordingly he did not have enough trade to cover the rent he had agreed to pay. He surrendered his two leases, having lost a substantial sum of money. Subsequently, he brought proceedings for damages against the defendant, alleging that his losses had been caused by a tie agreement which was unlawful under art 81[a] EC—the provision of the EC Treaty which prohibited agreements preventing, restricting or distorting competition between member states. The European Commission, which was the central institution responsible for the administration of European competition policy, had power to decide whether an agreement was in breach of art 81, but national courts had concurrent jurisdiction to decide the same question because art 81 was directly applicable in all member states. Under European Community law, a beer supply agreement was prohibited by art 81 if two cumulative conditions were met. Although the Commission never decided whether the agreement between the claimant and the defendant infringed art 81, it had concluded in a previous case involving other parties that the United Kingdom beer market satisfied the first of the two conditions. At trial, the claimant contended that the judge should adopt that finding and proceed with the rest of the case on the footing that the first condition was satisfied. The judge rejected that contention, concluded that the first condition was not satisfied on the evidence before him and accordingly dismissed the claim. His decision was reversed by the Court of Appeal which held that the judge should have followed the Commission's decision in the previous case on the applicability of the first condition because the duty of sincere co-operation, imposed upon the institutions of member states by the EC Treaty, required him not to entertain a submission that the view of the Commission in that case had been wrong. The defendant appealed to the House of Lords.

a Article 81 is set out at [16], below

Held – Where an action before the English court for breach of art 81 of the EC Treaty raised a question of fact which had already been decided by the Commission in proceedings relating to other participants in the same market, the English court was free to reach a different conclusion. The correct position was that, when there was no question of a conflict of decisions (in the sense of an inconsistency between the legal effects of a decision of the Commission and that of the English court concerning the same agreement between the same parties), the decision of the Commission was simply evidence properly admissible before the English court which, given the expertise of the Commission, might well be regarded by that court as highly persuasive. As a matter of law, however, it was only part of the evidence which the court would take into account. If, upon assessment of all the evidence, the judge came to the conclusion that the view of the Commission was wrong, he could not, consistently with his judicial oath, say that, as a matter of deference, he proposed nevertheless to follow the Commission. Thus in the instant case the judge had been right to conclude that he could decide for himself whether the first condition was satisfied. Accordingly, the appeal would be allowed (see [1], [11]–[14], [44], [45], [49]–[56], [69], [71], [72], [75], [76], below).

Delimitis v Henninger Bräu AG Case C-234/89 [1991] ECR I-935 and *Masterfoods Ltd v HB Ice Cream Ltd, HB Ice Cream Ltd v Masterfoods Ltd (t/a Mars Ireland)* Case C-344/98 [2001] All ER (EC) 130 considered.

Notes

For agreements preventing, restricting or distorting competition between member states, see 47 *Halsbury's Laws* (4th edn) (2001 reissue) paras 341–345.

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Banks (HJ) & Co Ltd v British Coal Corp Case C-128/92 [1994] ECR I-1209, ECJ.

Coal Authority v HJ Banks Co Ltd, HJ Banks and Co Ltd v Coal Authority [1997] EuLR 610.

Courage Ltd v Crehan Case C-453/99 [2001] All ER (EC) 886, [2002] QB 507, [2001] 3 WLR 1646, [2001] ECR I-6297, ECJ.

Delimitis v Henninger Bräu AG Case C-234/89 [1991] ECR I-935, ECJ.

Deutsche Grammophon GmbH v Metro-SB-Grossmärkte GmbH & Co KG Case 78/70 [1971] ECR 487, ECJ.

Eco Swiss China Time Ltd v Benetton International NV Case C-126/97 [1999] 2 All ER (Comm) 44, [1999] ECR I-3055, ECJ.

Iberian UK Ltd v BPB Industries plc [1997] ICR 164.

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Morgan Stanley Dean Witter Bank Ltd v Visa International Service Association [2001] All ER (D) 18 (May).

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Atkinson v Newcastle and Gateshead Waterworks Co (1877) 2 Ex D 441, [1874–80] All ER Rep 757.

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Blue Shield of Virginia v McCready (1982) 457 US 465, US SC.

Brasserie de Haecht SA v Wilkin Case 23/67 [1967] ECR 127, ECJ.

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Brunswick Corp v Pueblo Bowl-o-Mat Inc (1977) 97 S Ct 690, US SC.

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Crehan v Courage Ltd, Byrne v Inntrepreneur Beer Supply Co Ltd, Langton v Inntrepreneur Beer Supply Co Ltd, Smith v Greenalls Management Ltd, McCaughey v Walker Cain [1999] EuLR 834, CA.

Cabour SA and Nord Distribution Automobile SA v Arnor Soco SARL Case C-230/96 [1998] ECR I-2055, ECJ.

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Joynson v European Commission Case T-231/99 [2002] ECR II-2085, CFI; *affd* Case C-204/02 P [2003] ECR I-14763, ECJ.

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Appeal and cross-appeal

The defendants, Inntrepreneur Pub Company (CPC) and Brewman Group Ltd, appealed with permission of the Court of Appeal (Peter Gibson, Tuckey LJJ and Sir Martin Nourse) from its decision on 21 May 2004 ([2004] EWCA Civ 637, [2004] EuLR 693) allowing an appeal by the claimant, Bernard Crehan, from the decision of Park J on 26 June 2003 ([2003] EWHC 1510 (Ch), [2003] EuLR 663) dismissing his claim against the defendants for damages for breach of art 81 EC. The claimant cross-appealed with permission on the measure of damages awarded by the Court of Appeal. The Office of Fair Trading (OFT) and Visa Europe Ltd and Visa UK Ltd (Visa) intervened on the appeal. The facts are set out in the opinion of Lord Hoffmann.

Iain Milligan QC, Nicholas Green QC, James Flynn QC, Martin Rodger and *Dinah Rose* (instructed by *Sprecher Grier Halberstam*) for the defendants.
David Vaughan CBE QC, Mark Brealy QC, Marie-Eleni Demetriou and *Michael Bools* (instructed by *Maitland Walker*) for Mr Crehan.
Sir Jeremy Lever QC, Jon Turner and *Ronit Kreisberger* (instructed by the *Office of Fair Trading*) for OFT.
Stephen Morris QC, Helen Davies and *Colleen Hanley* (instructed by *Freshfields Bruckhaus Deringer*) for Visa.

Their Lordships took time for consideration.

19 July 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I agree with his analysis and conclusions and would make the orders which he proposes. His summary of the facts (already the subject of detailed recitation by Park J and the Court of Appeal: [2003] EWHC 1510 (Ch), [2003] EuLR 663; [2004] EWCA Civ 637, [2004] EuLR 693) and of the relevant materials enables me to express my reasons for concurring without repetition. Like my noble and learned friend I shall for convenience refer to the current numbering of the Treaty articles.

[2] The sharpness of the issue between the parties to this appeal tends to conceal the bedrock of common ground which underlies the case. I think it is

worth drawing attention to a number of important matters which are not contentious.

[3] There is, first of all, no question about the importance of art 81 EC prohibiting, as incompatible with the Treaty, agreements and practices which prevent, restrict or distort competition between member states. As the Court of Justice of the European Communities observed in *Eco Swiss China Time Ltd v Benetton International NV* Case C-126/97 [1999] 2 All ER (Comm) 44, [1999] ECR I-3055 (para 36) and repeated in *Courage Ltd v Crehan* Case C-453/99 [2001] All ER (EC) 886, [2001] ECR I-6297 (para 20):

> 'Article 81 EC constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.'

It is indeed clear that without effective competition transcending national boundaries there can be no effective common market.

[4] It is also clear, secondly, that art 211 EC imposes a duty on the Commission of the European Communities to ensure the proper functioning and development of the common market. That duty applies in the field of competition as in other fields, as is made clear by art 85 EC. In *Delimitis v Henninger Bräu AG* Case C-234/89 [1991] ECR I-935 (para 44), the court stressed the responsibility of the Commission for the implementation and orientation of Community competition policy, a point reiterated in *Masterfoods Ltd v HB Ice Cream Ltd, HB Ice Cream Ltd v Masterfoods Ltd (t/a Mars Ireland)* Case C-344/98 [2001] All ER (EC) 130, [2000] ECR I-11369 (para 46). English decisions have recognised the primary responsibility of the Commission and its specialist expertise in determining competition questions: see *Iberian UK Ltd v BPB Industries plc* [1997] ICR 164 at 181, [1997] EuLR 1 at 16; *Coal Authority v HJ Banks Co Ltd, HJ Banks and Co Ltd v Coal Authority* [1997] EuLR 610 at 620; *Morgan Stanley Dean Witter Bank Ltd v Visa International Service Association* [2001] All ER (D) 18 (May) per Toulson J.

[5] But, thirdly, it is well established that art 81 is directly enforceable. This means that national competition authorities and courts share, and have always shared, with the Commission the duty to give effect to the prohibition in art 81(1), and the legal consequences of automatic avoidance under art 81(2) have always been a matter for determination by national courts alone. Article 9(1) of Council Regulation (EEC) 17/62 (first regulation implementing [arts 81 and 82 EC]) (OJ 1962 L13 p 204 (S Edn 1959–62 p 87)) conferred sole power on the Commission to make declarations of inapplicability under art 81(3) of the Treaty, and it was for the Commission to grant negative clearance under art 2. But in general the Community competition regime has rested on a duty of wholehearted (or sincere) co-operation owed by member states to the Community (and, presumably, each other). The source of this duty is found in art 10 of the Treaty, imposing as it does both positive and negative duties on member states. They are duties comparable with those which English law readily implies into contracts: see *Mackay v Dick* (1881) 6 App Cas 251 at 263; *Stirling v Maitland* (1864) 5 B & S 840 at 852, [1861–73] All ER Rep 358 at 360–361. The Court of Justice has invoked these duties on many occasions: in *Deutsche Grammophon GmbH v Metro-SB-Grossmärkte GmbH & Co KG* Case 78/70 [1971] ECR 487 (para 5), it recognised the provision as laying down 'a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme'.

The particular importance of wholehearted co-operation between national courts and the Commission in the field of competition is reflected in the Commission's 1993 'Notice on Co-operation between National Courts and the Commission in applying arts 81 and 82 of the EC Treaty' (OJ 1993 C39 p 6), in Council Regulation (EC) 1/2003 (on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty) (OJ 2003 L1 p 1) (the modernisation regulation) and in the Commission's 'Notice on co-operation within the Network of Competition Authorities' (2004/C 101/03).

[6] It is common ground, fourthly, that under art 249 of the Treaty a Commission decision is legally binding in its entirety upon those to whom it is addressed. The converse is also true: such a decision is not legally binding on those to whom it is not addressed. That is important, since it is not suggested that any relevant decision of the Commission was addressed to Inntrepreneur, the effective appellant before this House.

[7] Thus the divisive question arises: should the trial judge in this case have treated the Commission's factual assessment of the United Kingdom beer market in its Whitbread, Bass and Scottish and Newcastle decisions (see Commission Decision (EC) 1999/230 (relating to a proceeding pursuant to art [81] of the EC Treaty (Case No IV/35.079/F3—Whitbread)) (OJ 1999 L88 p 26), Commission Decision (EC) 1999/473 (relating to a proceeding pursuant to art 81 of the EC Treaty (Case IV/36.081/F3—Bass)) (OJ 1999 L186 p 1) and Commission Decision (EC) 1999/474 (relating to a proceeding pursuant to art 81 of the EC Treaty (Case IV/35.992/F3—Scottish and Newcastle)) (OJ 1999 L186 p 28)) as effectively binding upon him although not formally so? This was the burden of the closing submission made by Mr Crehan's counsel, as recorded by the judge ([2003] EuLR 663 at [156]):

> 'So in this case was it difficult, because of beer ties and similar agreements, for aspiring entrants to gain access to the relevant UK market? Mr Vaughan and Mr Brealey have presented several different arguments on the basis of which they say that I should answer the question: yes. I think that logically their first argument is that in *Whitbread* the Commission decided that the answer was yes, and that that ought to be good enough to determine the issue for me. They point out that the Commission has had much experience of matters involving the UK pub and beer markets. It has a staff of skilled economists. It has itself investigated aspects of the market from time to time over the years. It has a special understanding of the concepts which underlie the competition principles of Community law, including in particular Art. 81. Mr Vaughan and Mr Brealey say that I should not take on the task of deciding for myself whether I share the view of the Commission. I should simply say that the body best qualified to decide the question has decided it, and I should not second guess that body. I should adopt the findings which the Commission made in *Whitbread* and proceed with the rest of the case on the footing that *Delimitis* condition 1 is satisfied.'

As my noble and learned friend observes, the judge recognised the obvious attractions of following this course but concluded he ought not to do so. To have done so without himself addressing the facts would not, I think, have been a judicial response to the case as presented to him.

[8] In the Whitbread decision, which may fairly be treated as the leading example, the Commission reviewed in some detail the market (the 1989 Monopolies and Mergers Commission's Report, the Beer Orders, supply factors,

competition between brewers, market entry at brewing level, market entry at retail level, changes in arrangements between pub tenants and their landlords) and the particular agreements under consideration. It then made its legal assessment, first on *Delimitis 1*, and then on *Delimitis 2* and other issues. It concluded that art 81(1) applied but granted exemption under art 81(3).

[9] In his particulars of claim in this action dated 10 June 2002, Mr Crehan's pleading turned (at para 122) to *Delimitis 1* and foreclosure of the market. Facts were then pleaded to show that the *Delimitis 1* condition was satisfied and the market foreclosed. At para 128 it was pleaded:

> 'Mr Crehan will further rely on the facts and matters in the Commission Decisions (referred to in paragraph 119 above) in support of this contention: in particular *Whitbread* (paragraphs 108–127), *Bass* (paragraphs 125–144), *Scottish & Newcastle* (paragraphs 95–114). He will further rely on the MMC Reports referred to below.'

This appears to suggest that Mr Crehan would rely on the facts found by the Commission, as he was of course entitled to do, but not that those facts, even if persuasive, were effectively binding on the judge.

[10] This, as I understand, is how Inntrepreneur understood the issue. It denied (in para 57 of its amended defence and counterclaim of 19 December 2002) that art 81(1) applied. Paragraph 67 of this pleading read:

> 'The decisions of the Commission in relation to Bass, Whitbread and Scottish & Newcastle (S&N) are not binding on the court, and, in so far as they conclude that the United Kingdom market was foreclosed, misapply the guidance of the European Court in *Delimitis* and are vitiated by inadequate and incorrect analysis. Notably the Commission failed to give any or adequate attention to the possibilities of expansion for existing players in the market, but focussed on the possibilities of entry to the market for overseas competitors. Furthermore, the Commission's analysis in these decisions should be reassessed in the light of its own later views in [sic] the correct scope and application of Article 81, as referred to in paragraph 64 above. It is averred that the fact that the Commission's conclusions on foreclosure were not appealed to the CFI is irrelevant.'

Thus, as it seems to me, issue was squarely joined on the foreclosure issue and the reliability of the Commission's assessment in Whitbread and the other decisions. To address that issue the parties adduced very detailed factual evidence from over 30 witnesses, supplemented by a large number of experts, culminating in a very lengthy trial. This was not an appropriate procedure if it was to be said that the judge should not look beyond the Commission reports. As it was, I consider that the judge was bound to address the evidence adduced before him, analyse it in a conscientious judicial manner and express his conclusions, giving particular attention to those points on which he differed from the Commission.

[11] If the procedural course adopted for trial of this case had led to a decision incompatible with the law of the Community, the plain duty of a national court would of course be to give effect to the latter. Community law prohibits the making by national courts of decisions which contradict decisions of Community institutions on the same subject matter between the same parties, and strongly discourages the making by national courts of decisions which may be inconsistent with decisions which may yet be made by Community institutions on the same

subject matter between the same parties. But it does not, as my noble and learned friend's analysis of the relevant authorities shows, go the length of requiring national courts to accept the factual basis of a decision reached by a Community institution when considering an issue arising between different parties in respect of a different subject matter. Were this otherwise, the Commission's letter and enclosure of 24 November 1997 to Mr Crehan's solicitors, written nearly two months after its art 19(3) notice to Whitbread, would have been very misleading if not disingenuous, since whether or not art 81(1) was applicable to Mr Crehan's agreement would not in any real sense have been a question which the national court would be in a position to decide.

[12] The judge had either to accept the Commission's assessment, which (unless required) would have been an abdication of the judicial function, or form his own opinion, giving such weight to the Commission's assessment as in his judgment the evidence merited. He chose the latter course, and save on one limited point (on which it regarded his view as tenable) the Court of Appeal did not criticise his findings. Its difference was one of approach, holding that he was effectively bound to adopt the Commission's conclusions. As already explained, I do not, with respect, accept the Court of Appeal's approach as correct. I would accordingly uphold the judge's decision on *Delimitis 1*, and would make the orders which my noble and learned friend proposes.

LORD NICHOLLS OF BIRKENHEAD.

[13] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann. For the reasons they give, with which I agree, I would allow this appeal.

LORD HOFFMANN.

[14] My Lords, the Commission of the European Communities is the central institution responsible for the administration of European competition policy. It has power, among other things, to decide whether an agreement prevents, restricts or distorts competition in breach of art 81 EC. Since art 81 is directly applicable in all member states, national courts have concurrent jurisdiction to decide the same question. If an action before a national court raises a question of fact which has already been decided by the Commission in proceedings relating to other participants in the same market, ought the national court to follow the Commission or is it free to reach a different conclusion? Park J, after hearing evidence, rejected a finding by the Commission that in 1991–1993 it was difficult for sellers to enter the English on-the-premises beer market ([2003] EWHC 1510 (Ch), [2003] EuLR 663). The Court of Appeal ([2004] EWCA Civ 637, [2004] EuLR 693) held that he should have followed the Commission and reversed his judgment. In my opinion Park J was entitled to decide for himself and his judgment should be restored.

[15] The proceedings have been long and complex but only a brief sketch is needed to explain the point which the House has to decide. A full and admirably lucid narrative is given in the judgment of Park J. In 1991 the claimant Mr Crehan entered into agreements to take leases of two public houses in Staines from the defendant Inntrepreneur Pub Company (CPC) (Inntrepreneur). They were in standard form containing ties which obliged him to buy his beer from Courage Ltd (Courage) at its list prices. Both businesses failed because, as the judge found, Mr Crehan could not compete with other public houses who were able to buy their beer at lower prices and he therefore did not do enough trade to

cover the rent he had agreed to pay. Mr Crehan surrendered his two leases in March and September 1993, having lost a substantial sum of money.

[16] In 1993 Courage sued Mr Crehan for £15,226 outstanding on the beer account and Mr Crehan counterclaimed against Courage and Inntrepreneur for damages, alleging that his losses had been caused by a tie agreement which was unlawful under what was then art 85 of the EC Treaty and is now art 81 EC, to which, for convenience, I shall refer to throughout my speech as art 81:

> '1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . .
>
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:—any agreement or category of agreements between undertakings,—any decision or category of decisions by associations of undertakings,—any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'

[17] The central role of the Commission in administering this article (and art 82 EC, which deals with abuse of a dominant position) is created by regulations made under art 83 EC (formerly art 87 of the EC Treaty). This article gives the Council of Ministers power to make regulations to 'give effect to the principles set out in Articles 81 and 82', including in particular regulations which 'ensure compliance with the prohibitions laid down in Article 81(1)', 'lay down detailed rules for the application of Article 81(3)', 'define the respective functions of the Commission and of the Court of Justice' in applying the regulations and 'determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this Article'.

[18] At the relevant time, the applicable regulation was the Council Regulation (EEC) 17/62 (first regulation implementing [arts 81 and 82 EC]) (OJ 1962 L13 p 204 (S Edn 1959–62 p 87)). It has since been revoked with effect from 1 May 2004 and replaced by Council Regulation (EC) 1/2003 (on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty) (OJ 2003 L1 p 1) .

[19] Regulation 17/62 granted the Commission extensive powers. Under art 2 it could grant an applicant 'negative clearance', that is to say, a statement certifying that, on the basis of the facts in the possession of the Commission, an agreement gave no grounds for action under art 81(1). Under art 3, anyone having a 'legitimate interest' could apply for a decision that an agreement infringed art 81(1) and an order, backed by the possibility of a fine, that the undertaking bring the infringement to an end. Under art 9, the Commission had sole power to declare art 81(1) inapplicable pursuant to art 81(3). Subject to certain exceptions in art 4(2), anyone who wanted to apply for an exemption

under art 81(3) had, by art 4(1), first to notify the agreement in question to the Commission. The Commission had power under art 6(1) to backdate an exemption but, in the case of an agreement which had to be notified, not to a date earlier than the date of notification.

[20] Regulation 17/62 also dealt with the procedure for granting negative clearance or an exemption under art 81(3). By art 19(1) the party seeking the clearance or exemption had to be given an opportunity to be heard and by art 19(3), if the Commission was disposed to grant the clearance or exemption, it had to publish a notice to this effect and invite observations from all interested third parties.

[21] Pursuant to art 83, the Council also made Regulation (EEC) 19/65 (on application of [art 81(3) EC] to certain categories of agreements and concerted practices) (OJ P36 p 533 (S Edn 1965–66(I) p 35)) which conferred upon the Commission power to make regulations specifying in general terms, pursuant to art 81(3), that art 81(1) would not apply to certain specified categories of agreement. Such regulations made by the Commission are called 'block exemptions' and by Title II of Commission Regulation (EEC) 1984/83 (on the application of [art 81(3) EC] to categories of exclusive purchasing agreements) (OJ 1983 L173 p 5) a block exemption was granted for beer supply agreements which satisfied certain specified conditions.

[22] Even before Mr Crehan launched his counterclaim in 1993, Inntrepreneur was well aware that its tie agreements might be said to contravene art 81. Mr Crehan was by no means the first to complain of the terms of the Inntrepreneur lease, which was something of an innovation in the trade. The background to its introduction was that in 1991 Courage and Grand Metropolitan plc entered into an agreement by which Grand Metropolitan transferred its brewing interests to Courage and the two companies set up Inntrepreneur as a jointly owned company to which they transferred the ownership of all their tied public houses. As a result, Inntrepreneur acquired the ownership of some 7,355 tied public houses. It was decided that Inntrepreneur would re-let its public houses on new 20-year leases, much longer than had previously been customary, with ties requiring the tenants to buy their beer from Courage.

[23] The agreement for merging the public house estates of Courage and Grand Metropolitan was subject to the consent of the Secretary of State for Trade and Industry, as United Kingdom competition authority. As a condition of consent the Secretary of State required undertakings that the number of tied public houses would be reduced to 4,350 by 31 October 1992 and that all the tenants would be released from the ties by 28 March 1998.

[24] The undertaking to reduce the number of tied houses by 31 October 1992 reflected a general United Kingdom policy of opening up the market which had been given effect by the Supply of Beer (Tied Estate) Order 1989, SI 1989/2390, and the Supply of Beer (Loan Ties, Licensed Premises and Wholesale Prices) Order 1989, SI 1989/2258 (the Beer orders). These orders required breweries or brewery groups owning more than 2,000 retail outlets substantially to reduce their holdings by sales or releases from tie by 1 November 1992. The result was that in the few years between the making of the orders and November 1992, a great many public houses came on the market or were released from ties. The orders did not apply to Inntrepreneur because it was not a brewery or brewery group. But the undertakings made it subject to the same rules and, in respect of the 1998 limit, went even further.

[25] More or less from the inception of the Inntrepreneur tied estate, some of its tenants complained that the tie in its standard form of lease infringed art 81(1). In an attempt to put this question to rest, Inntrepreneur on 17 July 1992 notified the agreements to the Commission pursuant to art 4(1) of Regulation 17/62 and applied for negative clearance pursuant to art 2, or alternatively a decision that the agreements fell within the beer supply block exemption or, in the further alternative, an exemption under art 81(3). There followed lengthy negotiations between Inntrepreneur and the Commission, which were in progress when Mr Crehan launched his proceedings and which I shall in a moment describe in more detail. While they continued, Mr Crehan and a large number of similar claimants agreed to their actions being informally stayed.

[26] Although Inntrepreneur had applied for negative clearance on the ground that their agreements did not infringe art 81, the Commission was extremely unreceptive to this argument. In *Delimitis v Henninger Bräu AG* Case C-234/89 [1991] ECR I-935 at 995 the Court of Justice had given authoritative guidance, in the context of a German beer supply agreement, on the conditions which had to be satisfied for art 81 to apply:

> 'A beer supply agreement is prohibited by Article 85(1) of the . . . Treaty if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in issue must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.'

[27] These two conditions are commonly called '*Delimitis 1*' and '*Delimitis 2*'. Inntrepreneur took the view that neither condition was satisfied: they considered that, in the upheaval which had been caused by the Beer orders (and their own undertakings to the Secretary of State), it was not difficult to gain access to the market (in the common shorthand, the market was not 'foreclosed') and if it was, their agreements did not make a significant contribution. But the Commission was unwilling to hear argument on these points. Nor was it impressed by the submission that the agreements fell within the block exemption order.

[28] The Commission was however sympathetic to granting an individual exemption under art 81(3). On 30 July 1993 it published a notice pursuant to art 19(3) of Regulation 17/62. The notice described the market and said (in para 6):

> 'As a result of the above characteristics, foreign brewers or indeed new brewers who own few or no on-licensed premises still have difficulty selling substantial quantities of draught or bottled beer independently in the United Kingdom . . .'

[29] It went on to say that many foreign brewers therefore licensed major United Kingdom brewers to brew and distribute their products. That might be

taken as expressing the opinion that the market was foreclosed. The notice ended by saying that the Commission intended to grant a retroactive exemption pursuant to art 81(3).

[30] The notice stirred up a hornets' nest of disaffected Inntrepreneur tenants. They not only opposed the grant of an exemption but applied under art 3 of Regulation 17/62 for a decision that art 81(1) was infringed and for appropriate action by the Commission. Among the applicants was Mr Crehan. On 19 December 1994 the Commission wrote to Inntrepreneur saying that in the light of the objections they were having second thoughts about granting an exemption. There followed further negotiations between Inntrepreneur and the Commission, in the course of which Inntrepreneur put forward a new scheme of looser ties under the name of RetailLink, which was put into effect on 25 February 1997. The Commission indicated that it was likely to grant an exemption for RetailLink and on 26 March 1997 Inntrepreneur formally notified it under art 4(1). This led eventually to another art 19(3) notice saying that the Commission was disposed to grant exemption and finally to a 'comfort letter' dated 24 January 2000 in which the Commission said that the agreements notified in 1997 appeared to contain restrictions infringing art 81(1) but that the requirements of art 81(3) appeared to be satisfied.

[31] The question which arose after Inntrepreneur had elected to pursue an exemption for its new agreements was what should be done about the applications relating to the period before RetailLink was adopted. They were, on the one hand, Inntrepreneur's application for negative clearance, application of the block exemption or individual exemption, and, on the other, the tenants' applications under art 3 of Regulation 17/62 for a determination that they infringed art 81(1).

[32] The Commission was distinctly unenthusiastic about proceeding with any of these applications which, so far as it was concerned, were now only of historical interest. Mr Mensching, the senior DG IV official who had been involved in the case from the beginning, suggested that Inntrepreneur withdraw its 1992 notification. On 14 October 1997 Inntrepreneur did so. That left the art 3 applications by the tenants. The Commission dealt with them by a letter dated 24 November 1997 addressed to the complainants, including Mr Crehan, saying that they proposed to reject the applications. The reasons given in an annex to the letter are important and need to be quoted at some length. The Commission noted that there were proceedings on foot in England claiming damages, which raised the question of whether art 81(1) had been infringed and in which this issue could be decided. While Inntrepreneur were seeking exemption under art 81(3), the Commission had to remain seised of the case because only the Commission could grant an exemption. But now that Inntrepreneur had withdrawn its application, there was nothing that the Commission could decide which could not equally be decided by the national court. Accordingly there was no Community interest in the Commission proceeding with the case:

> '35. . . . There is . . . no more request for exemption pending for the "old" Lease. This means that the only remaining question with regard to the application of Community competition law to the "old" Lease, is whether or not Article [81](1) is applicable.
>
> 36. This is a question which the national court is in a position to decide. It can be added that the national court can take into account some factual and legal elements which the Commission has made public on earlier occasions.

With regard to a general market description, reference can be made to the earlier mentioned 19(3) notice [of 30 July 1993] and to similar such notices in the Bass and Whitbread cases. As to the legal point of the applicability of article [81](1), indirect guidance can be taken from the Commission's intention indicated in the earlier mentioned Inntrepreneur 19(3) notice to grant an exemption to the Lease.

37. Furthermore, in the event that the national judge finds that Article [81](1) is applicable, he is in a position to determine the civil law effects following from the prohibition set out in Article [81](2) . . . The judge can also award compensation for loss suffered as a result of an infringement of Article [81] . . .

38. The Commission considers that there are insufficient grounds for granting the complainant's application as, in the absence of a request for exemption pursuant to Article [81](3), it would lead to a duplication of procedures and is therefore not in the Community interest for the Commission to rule upon the complainant's request that the "old" Lease has infringed Article [81](1) since the date of its introduction.'

[33] The result was that the Commission washed its hands of the old leases and never decided whether they infringed art 81(1) or not.

[34] At this point it is necessary to say something about the Bass and Whitbread cases, to which reference is made in the Commission's letter. Inntrepreneur was not the only owner of tied houses to notify its agreements to the Commission. Other large-scale proprietors were also doing so during the late 80s and throughout the 90s. Bass plc notified its tie agreements on 27 October 1987 and a new form of agreement on 12 June 1996. Whitbread plc notified its agreements on 24 May 1994. Scottish & Newcastle plc also did so, on 25 April 1996. In each of these cases the Commission adhered to the view which it had expressed informally to Inntrepreneur, namely, that the relevant market was foreclosed. By the time of the letter to Mr Crehan and the other complainants against Inntrepreneur, the Commission had published art 19(3) notices in respect of the Bass and Whitbread applications, saying that they were minded to grant exemptions under art 81(3). This implied that they regarded art 81(1) as prima facie infringed. Afterwards, the Commission gave formal decisions in all three cases, in similar terms, which were more explicit. The Whitbread decision dated 24 February 1999 (Commission Decision (EC) 1999/230 (relating to a proceeding pursuant to art [81] of the EC Treaty (Case No IV/35.079/F3—Whitbread)) (OJ 1999 L88 p 26) said in recital 127:

'3.3 Conclusion on first Delimitis test

(127) It can thus be concluded that an examination of all tying agreements, including but not limited to beer-supply agreements entered into, and the other factors relevant to the economic and legal context of the UK on-trade market shows that the brewers' tying agreements had in 1990 and still have today, on the basis of the most recent available information, the cumulative effect of considerably hindering independent access to that market, for new national and foreign competitors.'

[35] After the recitals, the actual decision of the Commission was relatively brief:

'THE COMMISSION OF THE EUROPEAN COMMUNITIES . . . HAS ADOPTED THIS DECISION:

Article 1

1. The provisions of Article [81](1) of the Treaty are, pursuant to Article [81](3), declared inapplicable to the individual lease agreements . . .

2. This Decision shall apply from 1 January 1990 until 31 December 2008.

Article 2

This Decision is addressed to: Whitbread plc . . .'

[36] The Commission having decided to make no decision on the old Inntrepreneur leases, the scene then shifted to the Strand, where the litigation with the tenants resumed. Mr Crehan's case was chosen as the lead action in group litigation and in 1998 it came before Carnwath J on the preliminary issue of whether a party to an agreement could in principle recover damages from the other party on the ground that it contravened art 81. Following an earlier decision of the Court of Appeal, Carnwath J ([1999] EuLR 409) held that there was no such cause of action and struck out the claim. There followed a reference to the European Court of Justice, which ruled that a party to the agreement could have a cause of action: see *Courage Ltd v Crehan* Case C-453/99 [2001] All ER (EC) 886, [2001] ECR I-6297. Accordingly, the action came on for trial before Park J in February and March 2003 and was heard over 29 days.

[37] The action raised a number of issues. One was whether the agreement infringed art 81, which involved deciding whether the two *Delimitis* conditions were satisfied. A second was whether the agreements fell within the block exemption in Title II of Regulation 1984/83. And then there were questions on the type of damage recoverable and the amount of such damage, if any, for which Mr Crehan was entitled to recover.

[38] Although the parties came to court armed not only with witnesses of fact about the state of the market in 1991–1993 (19 for Mr Crehan and 14 for Inntrepreneur) but also with economic and other experts (three for Mr Crehan and five for Inntrepreneur), counsel for Mr Crehan submitted that the court should decide the *Delimitis 1* issue simply on the basis of the Commission's opinion expressed in the recitals to its decision in Whitbread. The judge should not try to 'second guess' the Commission. The judge said that there were 'obvious attractions' in taking such a course but refused to do so. By that time he had heard lengthy and detailed evidence which satisfied him that, in respect of the period 1991–1993, the Commission's opinion could not be sustained. He concluded ([2003] EuLR 663 at [197]):

> '. . . I am not prepared to find that the UK market was foreclosed to that extent simply because the Commission thought that it was and said so in its decision in *Whitbread*. I have made up my own mind on the basis of the extensive evidence which has been placed before me. I do not suggest that the market was 100 per cent open to all-comers. The tied estates, even after the Beer Orders, cannot be brushed aside as insignificant, and they did to some extent seal off a part of the market. But the sealing-off was not complete even within the tied estates. Much more importantly, leaving the tied estates aside, there were, in my view, amply sufficient fully contestable other outlets to mean that *Delimitis* condition 1 was not satisfied.'

[39] The adverse decision on *Delimitis 1* meant that Mr Crehan's case failed. There was no infringement of art 81(1). Although the judge went on to consider

Delimitis 2, the block exemption and damages, he dealt with these matters only in case the Court of Appeal should find that he was wrong in saying that there had been no infringement of art 81. a

[40] This turned out to have been wise, because the Court of Appeal said that he had been wrong not to follow the Commission on this point. In making his own decision, he had not complied with what is generally called the 'duty of sincere co-operation' imposed upon the institutions of member states by art 10: b

> 'Member states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.' c

[41] The Court of Appeal ([2004] EuLR 693) said that, on the facts of the case, sincere co-operation required the judge not to entertain a submission that the view of the Commission in Whitbread had been wrong: d

> '[97] . . . In our judgment, in the present case the English court was obliged under the duty of sincere co-operation to give to the Commission much greater deference than that which the judge, with all respect to him, was prepared to give. We accept that the Commission and the ECJ left it to the English court to determine whether the application, made by this court on making the reference, that the beer tie in the Inntrepreneur lease contravened Art. 81(1), was correct. However, it is apparent from what the Commission said in the letter of 24 November 1997 to [the complainants], that it expected the English court to take into account its earlier conclusions not only in respect of Inntrepreneur but also in cases such as Whitbread, even though not final decisions. The fact that it was considered unnecessary and therefore undesirable for the Commission itself formally to give the decision as to whether Art. 81(1) applied when the English court was in a position to give the decision and to award compensation (which the Commission could not do) did not leave the judge free to reconsider the Commission's earlier conclusions afresh. Still less was the judge free so to do in 2003, by which time the Whitbread, Bass and Scottish & Newcastle decisions with its conclusions, central to those decisions, on the foreclosure of the relevant market, had been published, and the comfort letter of 24 January 2000 relating to RetailLink had been issued. We accept that it is a ready inference from that letter that in the Commission's view Art. 81(1) applied to the Inntrepreneur leases throughout the period relevant to Mr Crehan's case. e f g h
>
> [98] Inntrepreneur, in its evidence and submissions to the judge, did not attempt to distinguish the present case from Whitbread and the other decisions of the Commission going to the applicability of Art. 81(1) to the relevant market. Instead, it attacked those decisions as "fundamentally flawed". In our judgment it was inappropriate for the judge to adopt the approach that he should receive such evidence and hear such submissions, as the effect of the judge second-guessing the Commission and concluding that the Commission was wrong has been to create an irreconcilable inconsistency in the application of the Community's competition policy to the relevant market. We do not say that the Commission is infallible; far j

from it. We do say that if the Commission is to be shown to be wrong in its decisions on the applicability of Art. 81(1), that has to be decided not by the national court but by the ECJ or CFI. The judge's decision offended against the principle of legal certainty in the Community. In our opinion the judge failed to comply with the duty of sincere co-operation and thereby erred in law.'

[42] Apart from saying (at [99]) that they were not satisfied that the Commission had committed 'egregious errors' and commenting on one point (loan ties with short termination periods), on which they described the judge's view as 'at its lowest . . . tenable' (at [107]) but not entitling him to reject the contrary view of the Commission, the Court of Appeal made no comment on the judge's analysis of the facts. In their opinion it was an exercise on which he should not have embarked at all.

[43] Did the judge err in law? The potentiality for conflict between decisions of the Commission and the national courts is a matter on which the Court of Justice and the Commission itself have provided fairly detailed guidance. In *Delimitis v Henninger Bräu AG* Case C-234/89 [1991] ECR I-935 at 992 (para 47) the Court of Justice said in general terms:

> 'Account should here be taken of the risk of national courts taking decisions which conflict with those taken or envisaged by the Commission in the implementation of Articles [81](1) and [82], and also of Article [81](3). Such conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission . . .'

[44] This is a useful caution, so far as it goes, but leaves open the question of what counts as a conflicting decision. The comments of the Court of Justice have to be read in the context of the situation of potential conflict which arose in that case. In *Delimitis*'s case the German court was being asked by the tenant to say that his tied tenancy had contravened art 81(1). But the agreement belonged to a category which did not have to be notified under art 4 of Regulation 17/62 and it was therefore always open to the Commission to grant a retroactive exemption which would conflict with a judgment in the tenant's favour by the German court. The conflict envisaged was thus an inconsistency between the legal effects of the two decisions, the Commission saying that an agreement did not contravene art 81 and the German court saying that it did. It was in this context that the court spoke of the risk of conflicting decisions and advised on what to do about avoiding it:

> '50. If the conditions for the application of Article [81](1) are clearly not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue. It may do the same if the agreement's incompatibility with Article [81](1) is beyond doubt and, regard being had to the exemption regulations and the Commission's previous decisions, the agreement may on no account be the subject of an exemption decision under Article [81](3) . . .
>
> 52. If the national court . . . considers in the light of the Commission's rules and decision-making practices, that that agreement may be the subject of an exemption decision, the national court may decide to stay the

proceedings or to adopt interim measures pursuant to its national rules of procedure. A stay of proceedings or the adoption of interim measures should also be envisaged where there is a risk of conflicting decisions in the context of the application of Articles [81](1) and [82].'

[45] It will be noted that in the very last sentence, the Court of Justice adverted to the possibility of a conflict arising, not only from the Commission exercising its exclusive power to grant an exemption under art 81(3) but also from the exercise of its concurrent jurisdiction to decide whether or not an agreement infringed arts 81 or 82, presumably on applications for rulings under art 3 of Regulation 17/62. (Whether the same would be true of applications for negative clearance under art 2 is a question to which I shall return.) The Court of Justice clearly envisaged that if the Commission decided that an agreement infringed art 81(1), a national court would be obliged to follow that decision and, if such a decision was pending, should stay its own proceedings until the Commission had made its decision.

[46] After *Delimitis*'s case, the Commission issued a 'Notice on Co-operation between National Courts and the Commission in Applying arts 81 and 82 of the EC Treaty' (OJ 1993 C39 p 6) which enlarged upon the guidance which had been provided by the Court of Justice. It described the respective functions of the Commission and the national courts:

'4. The Commission is the administrative authority responsible for the implementation and for the thrust of competition policy in the Community and for this purpose has to act in the public interest. National courts, on the other hand, have the task of safeguarding the subjective rights of private individuals in their relations with one another.'

[47] The notice went on to say (at para 20) that a national court, before answering the question of whether an agreement infringed art 81—

'should ascertain whether the agreement, decision or concerted practice has already been the subject of a decision, opinion or other official statement issued by an administrative authority and in particular by the Commission. Such statements provide national courts with significant information for reaching a judgment, even if they are not formally bound by them.'

[48] The matter was taken further by the decision of the Court of Justice in *Masterfoods Ltd v HB Ice Cream Ltd, HB Ice Cream Ltd v Masterfoods Ltd (t/a Mars Ireland)* Case C-344/98 [2001] All ER (EC) 130, [2000] ECR I-11369. Masterfoods Ltd, a subsidiary of Mars Inc, brought proceedings in Ireland against HB Ice Cream Ltd, a subsidiary of Unilever, for a declaration that its agreements to provide retailers with freezer cabinets on terms that they stocked only HB ice cream contravened arts 81 and 82. On 28 May 1992 the High Court dismissed the action and, on HB's counterclaim, granted an injunction to restrain Masterfoods from inducing retailers to break their agreements by stocking Masterfoods ice cream. On 18 September 1991 Masterfoods made a complaint to the Commission under art 3 of Regulation 17/62 and on 4 September 1992 it gave notice of appeal to the Supreme Court. In the course of discussions with the Commission, HB offered to make some changes in its agreements and the Commission issued a notice saying that it proposed to grant exemption under art 81(3). However, as in this case, the Commission changed its mind and on 11 March 1998 issued a decision (Commission Decision (EC) 98/531 (relating to

a proceeding under arts [81 and 82] of the EC Treaty (Case Nos IV/34.073, IV/34.395 and IV/35.436 Van den Bergh Foods Ltd)) (OJ 1998 L246 p 1)) stating that HB's agreements infringed arts 81 and 82. HB immediately applied to the Court of First Instance to annul the decision of the Commission. That was the state of affairs when the appeal came before the Supreme Court in June 1998. The court made a reference to the Court of Justice seeking guidance as to how it b should proceed. It asked whether it should stay the Irish proceedings pending the decision of the Court of First Instance and whether the decision of the Commission on the HB agreements prevented HB from seeking to uphold the contrary decision of the national court.

[49] Advocate General Cosmas, starting from the proposition that it was necessary to avoid conflict between the decisions of Community institutions and c national courts, discussed the question of what counted as a conflict (at para 16). There could be no risk of conflict, he said 'where the legal and factual context of the case being examined by the Commission is not completely identical to that before the national courts'.

[50] Significantly for the situation in the present case, he gave (at footnote 7) as an example of such lack of identity a case in which— d

> 'the national courts are examining the legality of an exclusivity agreement in respect of the use of ice cream freezer cabinets between a particular company and retailers 1, 2 and 3 in Ireland, whilst the Commission is monitoring a similar agreement in respect of the same products in the same market between another company and retailers 4, 5 and 6.' e

[51] In such a case, said the Advocate General—

> '[t]he Commission's decision may provide important indications as to the appropriate way to interpret arts 85(1) and 86, but in this case there is no risk, from a purely legal point of view, of the adoption of conflicting decisions.' f

[52] A risk of conflict—

> 'only arises when the binding authority, which the decision of the national court has or will have conflicts with the grounds and operative part of the Commission's decision. Consequently, the limits of the binding authority of the decision of the national court and the content of the Commission's g decision must be examined every time.'

[53] In the *Masterfoods* case, the High Court had examined the agreements and the Irish ice cream market as they stood before its decision in 1992, whereas the Commission had examined the amended agreements and the market as it stood h in 1996. It followed that the decisions of the High Court and the Commission were not necessarily in conflict. Conflict would arise only if the High Court's injunction continued to apply after the Commission had ruled that the agreements were unlawful. But that was exactly what HB were asking the Supreme Court to do. The appeal therefore presented an imminent risk of conflict. j

[54] The Court of Justice accepted the Advocate General's analysis that the risk of conflict arose out of the possibility of the Supreme Court continuing an injunction to enforce agreements which the Commission had held to be unlawful:

> '59. In this case it appears from the order for reference that the maintenance in force of the permanent injunction granted by the High Court

restraining Masterfoods from inducing retailers to store its products in freezers belonging to HB depends on the validity of Decision 98/531 . . .'

[55] The ruling of the Court of Justice was that the Irish courts had to give priority to the decisions of the European institutions on the validity of the agreements which they were being asked to enforce. The Supreme Court could suspend the proceedings until the outcome of the application to the Court of First Instance for annulment was known. Or it could make a reference to the Court of Justice for a preliminary ruling on the validity of Decision 98/531. What it could not do was dismiss the appeal and enforce the injunction while the Commission's decision remained in effect.

[56] It is clear that the duty to avoid conflicting decisions, as stated by the Court of Justice in the two leading cases of *Delimitis* and *Masterfoods*, has no application to the present case. There is no possibility of conflict, in the sense discussed in those cases, between a decision of the Commission that the Whitbread agreements infringed art 81 and a decision of the national court that the Inntrepreneur agreements did not. The case rather resembles Advocate General Cosmas's example of the two ice cream manufacturers operating in the same market.

[57] Before leaving the jurisprudence of the Court of Justice, I should mention the opinion of Advocate General Van Gerven in *HJ Banks & Co Ltd v British Coal Corp* Case C-128/92 [1994] ECR I-1209, which was relied upon by Mr David Vaughan QC for Mr Crehan. The reference arose out of an action for damages brought by HJ Banks & Co Ltd (Banks) against the British Coal Corp (British Coal) for abuse of a dominant position, contrary to art 66(7) of the European Coal and Steel Community Treaty (ECSC Treaty). This resembles art 82 of the EC Treaty in being designed to prevent abuse of a dominant position but differs, as the Court of Justice eventually decided in the *Banks* case, in not being directly enforceable by individuals. However, in proceedings before this judgment had been given, arising out of a complaint to the Commission by the National Association of Licensed Opencast Operators (NALOO) and two other trade organisations, the Commission issued a decision that British Coal had been abusing its dominant position. HJ Banks was a member of NALOO and claimed that this decision was binding upon the national court. The High Court in London made a reference asking, among other things, whether art 66(7) of the ECSC Treaty created directly enforceable rights and, if so, to what extent a national court was bound, as to issues of fact or the construction of the ECSC Treaty, by a decision of the Commission. The Court of Justice decided that no directly enforceable rights were created and therefore did not answer the question about the effect of the Commission's decision. But Advocate General Van Gerven dealt with the question in the general terms in which it had been framed.

[58] He first put on one side administrative letters issued by the Commission, (such as, in this case, the 'comfort letter' issued to Inntrepreneur in 2000). These do not count as 'decisions' and were usually given without going through the procedural requirements of art 19 of Regulation 17/62. In relation to such documents, the Advocate General cited (at para 60) what the Court of Justice had said in *NV L'Oréal and SA L'Oréal v PVBA De Nieuwe AMCK* Case 31/80 [1980] ECR 3775 at 3789–3790:

'11. Such a letter . . . does not have the effect of preventing national courts, before which the agreements in question are alleged to be incompatible with

a Article 85, from reaching a different finding as regards the agreements concerned on the basis of the information available to them. Whilst it does not bind the national courts, the opinion transmitted in such a letter nevertheless constitutes a factor which the national courts may take into account in considering whether the agreements or conduct in question are in accordance with the provisions of Article 85.'

b **[59]** Interestingly, Advocate General Van Gerven classified an actual decision giving negative clearance under art 2 of Regulation 17/62 with a comfort letter. He appears to have considered that negative clearance would create a legitimate expectation against the Commission but not bind an individual who brought proceedings for infringement of arts 81(1) or 82 in a national court.

c **[60]** Advocate General Van Gerven then turned his attention to decisions that arts 81(1) or 82 had been infringed, addressed to parties not involved in the litigation in the national court. He said that it was self-evident that—

'no obstacles may be placed in the path of third parties seeking to challenge before the national court findings which the Commission has arrived at in a d decision of that kind.'

[61] Who, for this purpose, is a third party? Obviously not the person to whom the decision was addressed and upon whom, in accordance with art 249, the decision is binding. In the *Banks* case, that would have been NALOO. But the notion of a third party also excludes persons to whom the decision is of 'direct e and individual concern' and who would have locus standi under arts 225 or 230 to institute proceedings before the Court of First Instance or the Court of Justice for its annulment. In respect of others, however, the decision is not binding but the duty of sincere co-operation nevertheless requires a national court not to give a conflicting ruling. It must be remembered that in the *Banks* case, if art 66(7) had created private rights in the same way as art 82, the possibility of a conflict of f decisions in the *Delimitis* and *Masterfoods* sense would have been very real. The same issue which the court had to decide, namely whether British Coal had abused its dominant position, had been decided by the Commission. But the Advocate General (at para 61) also dealt with the situation in which the national court took a view different from that of the Commission on some question of fact g or law:

'If, on the basis of the parties' arguments, the national court comes to the conclusion that the issues of fact and/or law decided by the Commission are incorrect or insufficient, or if at any rate it has serious doubts in that regard, then in the light of the Delimitis judgment . . . it must take the following h course of action: in the case of findings which carried no weight in the final decision and do not therefore underlie the reasoning of the Commission, the national court is at liberty to adopt a different interpretation: in those circumstances the risk of conflicting decisions and the resultant impairment of the principle of legal certainty is extremely small. On the other hand, in j the case of findings which have an influence on the final decision arrived at by the Commission, the national court is well advised, in accordance with the provisions of its national procedural law, to suspend the proceedings in the case and to seek the necessary information from the Commission or make a direct reference to the Court for a preliminary ruling concerning the validity of the decision in question or the interpretation of the relevant Community competition rules.'

[62] I cannot say that I find this passage altogether easy to understand; in particular, whether the Advocate General was using the expression 'conflicting decisions' in the sense in which it was used in *Delimitis*'s case and the *Masterfoods* case or in some wider meaning, but the use of the words 'the national court is well advised' and the recommendations of asking for information or making a reference, do not suggest that the national court is under any duty to follow the decision of the Commission.

[63] The law on the relationship between the Commission and the national courts was, so to speak, codified by art 16 of Council Regulation (EC) 1/2003 (on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty), generally called the modernisation regulation, which replaced Regulation 17/62 with effect from 1 May 2004. It was of course not in force at the time of the events in this case but its significance is that it appears accurately to reflect the previous case law:

> *'Article 16 Uniform application of Community competition law*
>
> '1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.
>
> 2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.'

[64] This article makes it clear that a relevant conflict exists only when the 'agreements, decisions or practices' ruled on by the national court have been or are about to be the subject of a Commission decision. It does not apply to other agreements, decisions or practices in the same market.

[65] These authorities therefore show that the Commission stated the legal position accurately in its letter to Mr Crehan which I have already quoted (see [32], above), which said that the question of whether or not art 81(1) applied was one which 'the national court is in a position to decide'; that it could 'take into account' the views expressed by the Commission in its 'general market description' in the Whitbread art 19(3) notice; and that 'indirect guidance' on questions of law could be derived from the art 19(3) notice issued after Inntrepreneur's first application. This letter, coming soon after the Whitbread notice, would have been highly misleading if the position was that, provided only that the recipients waited for the Commission to adhere to its view in an actual decision in the Whitbread or some other case, the issue in a national court would be concluded in their favour.

[66] The Court of Appeal accepted (at [97]), that the Commission left it to the national court to determine whether art 81(1) had been infringed or not. But it said (at [77]), that it was clear that 'the Commission expected the English court to follow its view . . . that Art. 81(1) applied'. If that means no more than that the Commission thought it was right, I would not think that particularly surprising. But if it means that the Commission thought that the English court would be

obliged as a matter of Community law to follow its view, I think that is neither what the Commission said nor what the authorities require. The Court of Appeal said (at [74]) that the Whitbread and other decisions did not 'formally bind' Inntrepreneur but nevertheless held that the judge had erred in law in allowing Inntrepreneur to adduce evidence to show that the Commission was wrong. This suggests a concept of being informally bound which I find difficult to understand. If, as the Court of Appeal said, the defendant is precluded from adducing evidence to show that the Commission was wrong, the distinction is not visible to the naked eye.

[67] The Court of Appeal said (at [76]) that it was left 'profoundly uneasy' by the judge's decision to allow Inntrepreneur to challenge the Commission's opinion. But I must confess that I am left profoundly uneasy by the unfairness of the Court of Appeal's decision that Inntrepreneur could not do so. The Court of Appeal said that Inntrepreneur could have raised the matter before the Commission in its own application. It is true that if Inntrepreneur had pursued its application for negative clearance on the old agreements, it could have obtained a ruling and, if necessary, challenged that ruling in an application for annulment to the Court of First Instance. But the suggestion that it withdraw that application and litigate the matter in England came from the Commission and the Court of Appeal confirmed the judge's decision that this did not involve any abuse of process. For Inntrepreneur then to find its main defence shut out by a subsequent decision of the Commission in which it took no part seems to me a denial of a fair trial.

[68] The Court of Appeal said (at [98]) that the judge's decision had created 'an irreconcilable inconsistency in the application of the Community's competition policy to the relevant market'. But that again seems to me the opposite of what the Commission said. In its letter to Mr Crehan it said that there was no Community interest which could justify the Commission in deciding whether the old agreements infringed art 81(1) or not. If the Commission had thought that it was important to have uniformity of decision on this point, it could have given a decision on the art 3 applications and, subject to an application for annulment, that would have bound Inntrepreneur: see *Iberian UK Ltd v BPB Industries plc* [1997] ICR 164. Instead, as an exercise in subsidiarity, it left the decision to the national court. To leave a decision to someone else necessarily implies that he may decide it. In my opinion, for the judge to have made his own decision was to respect the policy of the Commission rather than to flout it.

[69] There was a good deal of discussion, both before the Court of Appeal and in argument before the House, about the degree of 'deference' which a national court should show to a decision of the Commission. Mr Vaughan QC is recorded (at [96] of the judgment of the Court of Appeal) as having constructed a scheme of three degrees of deference (absolute deference, very great deference and deference) which might have to be paid to a decision of the Commission. For my part, I do not find deference in this context a very helpful expression. It is commonly (if not altogether happily) used in administrative law when a court decides that the decision-making power on a particular question properly belongs to someone else and that the court should not substitute its own view. But the decision-making power on whether art 81(1) applies plainly belonged to the English court, exercising concurrent jurisdiction, and I find it difficult to see how the exercise of this power can be combined with 'deference' to the decision of someone else. The correct position is that, when there is no question of a conflict of decisions in the sense which I have discussed, the decision of the Commission

is simply evidence properly admissible before the English court which, given the expertise of the Commission, may well be regarded by that court as highly persuasive. As a matter of law, however, it is only part of the evidence which the court will take into account. If, upon an assessment of all the evidence, the judge comes to the conclusion that the view of the Commission was wrong, I do not see how, consistently with his judicial oath, he can say that as a matter of deference he proposes nevertheless to follow the Commission. Only a rule of law, in the nature of an issue estoppel which obliges him to do so, could produce such a result and the Court of Appeal accepted that there was no such rule.

[70] Mr Vaughan submitted that if your Lordships did not accept that the judge was obliged to follow the opinion of the Commission, it should make a reference to the Court of Justice asking whether he was so obliged or, alternatively, whether in the light of the judge's findings of fact, the decision in the Whitbread case was valid. I see little point in either question: on the first issue, it is conceded that there is no rule of Community law which required the court to follow the Commission, and on the second, the House will either be asking about the validity of a decision about agreements between other parties or else asking the Court of Justice to decide a question of fact which was within the jurisdiction of the national court.

[71] In my opinion, therefore, the judge was right in deciding that he could decide *Delimitis 1* for himself and the Court of Appeal was wrong to reverse his decision on the ground that he should have followed the Commission.

[72] Although it appears that counsel for Mr Crehan mounted a full-scale appeal against the judge's findings of fact, the Court of Appeal did not suggest that if he had been free to decide the case for himself, his conclusions could not be supported. As I mentioned earlier, on the one point on which they made any comment on his reasoning, they said that his view was ('at its lowest') tenable. Mr Brealey QC, who appeared with Mr Vaughan for Mr Crehan, wished to challenge the judge's findings before the House. But the Court of Appeal gave Inntrepreneur leave to appeal which was limited to the issues on *Delimitis 1* and *2*, the block exemption and the type of loss falling within art 81. They gave Mr Crehan leave to appeal on the measure of damages. Neither side petitioned the House for leave to argue any other points and the transcripts and other materials which would have been needed for dealing with a full appeal on fact were not made available to the House. Your Lordships therefore declined to hear argument on the facts. It follows that the judge's finding on *Delimitis 1* must stand and the appeal must be allowed. I have had the privilege of reading in draft the speech delivered by my noble and learned friend Lord Bingham of Cornhill and would associate myself with his remarks.

[73] It is unnecessary to say anything about *Delimitis 2* (on which the judge, given the artificiality of the necessary hypothesis in the light of his finding on *Delimitis 1*, stated no concluded opinion) or on the block exemption. The block exemption points raised two points of construction which are now obsolete because the relevant regulation has been revoked and replaced by another block exemption in different terms. There is therefore little point in the House expressing a view on what the true construction would have been. Your Lordships did not invite argument on any of the questions relating to damages, which in the circumstances do not arise. The cross-appeal on quantum must therefore be dismissed.

[74] Finally, I must mention the intervention of Visa UK Ltd, who are in dispute with OFT on a point related to the question at issue in this appeal. Mr Stephen Morris QC, who appeared on their behalf, made some succinct submissions which I found very helpful in relation to the questions which the House has to decide. But I say nothing about whether today's decision has any application to Visa, whose position as against the OFT may well be different from that of Mr Crehan against Inntrepreneur.

LORD RODGER OF EARLSFERRY.

[75] My Lords, I have had the privilege of considering the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann, in draft. I agree with them and for the reasons they give, I too would allow the appeal.

LORD WALKER OF GESTINGTHORPE.

[76] My Lords, I have had the privilege of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann. I am in full agreement with them, and for the reasons which they give I too would allow this appeal.

Appeal allowed.

Celia Fox Barrister.

Sutradhar v Natural Environment Research Council

[2006] UKHL 33

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD WALKER OF GESTINGTHORPE, LORD BROWN OF EATON-UNDER-HEYWOOD AND LORD MANCE

22, 23 MAY, 5 JULY 2006

Negligence – Duty to take care – Existence of duty – Defendant publishing hydrogeological report on water samples from Bangladesh – Implied statement in report as to absence of arsenic – Claimant seeking to recover damages for personal injury caused by drinking water contaminated by arsenic – Whether defendant owing duty of care to claimant.

The British Geological Survey (BGS) was a department of the defendant which undertook research in hydrogeology. The BGS undertook hydrogeological work for the purpose of testing the efficiency of artesian wells in Bangladesh. It also prepared a report assessing the hydrochemistry of the main aquifer units in the area covered by the artesian wells project. The study used water samples from the artesian wells and from shallow wells commonly used to provide drinking water. The objectives of the study included the occurrence and interaction of certain elements and their effect on biological systems in the context of fish cultivation, crop irrigation and potable water supply. The standard procedures for testing ground water at the time did not include tests for arsenic and the water samples were not tested for it. It subsequently appeared that water from many wells in Bangladesh was contaminated with arsenic. The claimant lived in a region from which some of the water samples had been taken by the BGS. He developed symptoms associated with arsenical poisoning and brought proceedings for negligence against the defendant. He contended that the BGS had caused or materially contributed to his illness by issuing a report which represented that the water in his village was safe to drink. The defendant's application for summary judgment on the basis that it owed no duty of care to the claimant was refused. The Court of Appeal reversed the trial judge and held that the claimant had no reasonable prospect of satisfying a court that the defendant owed him a duty of care. The claimant appealed.

Held – The BGS owed no duty to the population of Bangladesh not to publish a report which implied, by what it did not say, that the BGS shared the conventional wisdom about arsenic, namely, that its presence was so unlikely that it was not necessary to test for it. A duty of care was not owed in all cases in which it was foreseeable that in the absence of care someone might suffer physical injury; there had to be proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation. The BGS had had no control whatever, whether in law or in practice, over the supply of drinking water in Bangladesh, nor was there any statute, contract or other arrangement which imposed upon it responsibility for ensuring that the water was safe to drink. Accordingly, the claimant had no reasonable prospect of satisfying a court

that in all the circumstances the defendant owed him a duty of care. The appeal would therefore be dismissed (see [1], [2], [36], [38], [40]–[44], [48]–[50], below).

Perrett v Collins [1998] 2 Lloyd's Rep 255 considered.

Notes

For the test for determining notional duty of care and for negligent statements, see 33 *Halsbury's Laws* (4th edn reissue) paras 604, 614.

Cases referred to in opinions

Brooks v Metropolitan Police Comr [2005] UKHL 24, [2005] 2 All ER 489, [2005] 1 WLR 1495.

Candler v Crane Christmas & Co [1951] 1 All ER 426, [1951] 2 KB 164, CA.

Caparo Industries plc v Dickman [1990] 1 All ER 568, [1990] 2 AC 605, [1990] 2 WLR 358, HL.

Clay v AJ Crump & Sons Ltd [1963] 3 All ER 687, [1964] 1 QB 533, [1963] 3 WLR 866, CA.

Donoghue v Stevenson [1932] AC 562, [1932] All ER Rep 1, HL.

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, HL.

Le Lievre v Gould [1893] 1 QB 491, CA.

Parkinson v St James's and Seacroft University Hospital NHS Trust [2001] EWCA Civ 530, [2001] 3 All ER 97, [2002] QB 266, [2001] 3 WLR 376.

Perrett v Collins [1998] 2 Lloyd's Rep 255, CA.

Swain v Hillman [2001] 1 All ER 91, CA.

Three Rivers DC (No 3) v Bank of England [2001] UKHL 16, [2001] 2 All ER 513, [2003] 2 AC 1.

Watson v British Boxing Board of Control Ltd [2001] QB 1134, [2001] 1 WLR 1256, CA.

White v Chief Constable of South Yorkshire Police [1999] 1 All ER 1, [1999] 2 AC 455, [1998] 3 WLR 1509, HL.

Cases referred to in list of authorities

Alcock v Chief Constable of the South Yorkshire Police [1991] 4 All ER 907, [1992] 1 AC 310, [1991] 3 WLR 1057, HL.

Assicurazioni Generali SpA v Arab Insurance Group (BSC) [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] 1 WLR 577.

Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Price Waterhouse (a firm) [1998] BCC 617, CA.

D v East Berkshire Community Health NHS Trust, K v Dewsbury Healthcare NHS Trust, K v Oldham NHS Trust [2005] UKHL 23, [2005] 2 All ER 443, [2005] 2 WLR 993.

Farah v British Airways (2000) Times, 26 January, CA.

G v G [1985] 2 All ER 225, [1985] 1 WLR 647, HL.

Graham Barclay Oysters Pty Ltd v Ryan (2002) 194 ALR 337, (2002) 211 CLR 540, [2002] HCA 54.

Hawkins v Clayton (1988) 78 ALR 69, (1988) 164 CLR 539, Aus HC.

Hill v Chief Constable of West Yorkshire [1988] 2 All ER 238, [1989] AC 53, [1988] 2 WLR 1049, HL.

Home Office v Dorset Yacht Co Ltd [1970] 2 All ER 294, [1970] 2 AC 1004, [1970] 2 WLR 1140, HL.

Independents' Advantage Insurance Co Ltd v Personal Representatives of Cook (decd) [2003] EWCA Civ 1103, [2003] All ER (D) 423 (Jul).

L v Reading BC [2001] EWCA Civ 346, [2001] 1 FCR 673, [2001] 1 WLR 1575.

Murphy v Brentwood DC [1990] 2 All ER 908, [1991] 1 AC 398, [1990] 3 WLR 414, HL.

Palmer v Tees Health Authority [1999] Lloyd's Rep Med 351, CA.

Perre v Apand Pty Ltd [2000] 3 LRC 537, (1999) 164 ALR 606, [1999] HCA 36.

Phelps v London Borough of Hillingdon, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor) [2000] 4 All ER 504, [2001] 2 AC 619, [2000] 3 WLR 776, HL.

Rich (Marc) & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H [1995] 3 All ER 307, [1996] AC 211, [1995] 3 WLR 227, HL.

South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd, Mortensen v Laing [1992] 2 NZLR 282, NZ CA.

Stovin v Wise [1996] 3 All ER 801, [1996] AC 923, [1996] 3 WLR 388, HL.

Sullivan v Moody, Thompson v Connon (2001) 183 ALR 404, (2001) 207 CLR 562, [2001] HCA 59.

Sutherland Shire Council v Heyman (1985) 50 ALR 1, (1983) 50 ALR 1, Aus HC.

Tanfern Ltd v Cameron MacDonald [2000] 2 All ER 801, [2000] 1 WLR 1311, CA.

W v Essex CC [2000] 2 All ER 237, [2001] 2 AC 592, [2000] 2 WLR 601, HL.

Waters v Comr of Police of the Metropolis [2001] PIQR 6, HL.

Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 205 ALR 522, (2004) 216 CLR 515, [2004] HCA 16.

X (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

Appeal

The claimant Binod Sutradhar appealed with permission of the House of Lords Appeal Committee given on 25 January 2005 from the decision of the Court of Appeal (Kennedy and Wall LJJ, Clarke LJ dissenting) on 20 February 2004 ([2004] EWCA Civ 175, [2004] All ER (D) 357 (Feb)) allowing the appeal of the defendant Natural Environment Research Council from the decision of Simon J on 8 May 2003 ([2003] EWHC 10246 (QB), [2003] All ER (D) 87 (May)) refusing the application of the defendant (i) to strike out the claimant's claim against it for damages for personal injury or (ii) for summary judgment. The facts are set out in the opinion of Lord Hoffmann.

Lord Brennan QC, Andrew Spink and *Richard Hermer* (instructed by *Leigh Day & Co*) for the claimant.

Michael Beloff QC, Charles Pugh and *Ben Cooper* (instructed by *Manches LLP*, Oxford) for the defendant.

Their Lordships took time for consideration.

5 July 2006. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hoffmann and Lord Brown of Eaton-under-Heywood. For the reasons they give, with which I agree, I would dismiss this appeal.

LORD HOFFMANN.

[2] My Lords, the question is whether the claimant, who lives in Bangladesh, has a reasonable prospect of success in an action against the Natural Environment Research Council (NERC) for negligence in issuing a geological report which he says induced the health authorities in Bangladesh not to take steps which would have ensured that his drinking water was not contaminated by arsenic. In consequence he says that he has suffered injury from arsenical poisoning. The Court of Appeal, by a majority (Kennedy and Wall LJJ, Clarke LJ dissenting: [2004] EWCA Civ 175, [2004] All ER (D) 357 (Feb)) and reversing the judge (Simon J: [2003] EWHC 10246 (QB), [2003] All ER (D) 87 (May)) decided that the claimant had no reasonable prospect of satisfying a court that in all the circumstances the NERC owed him a duty of care. It struck out the claim. I agree. In my opinion the claim is hopeless.

SUMMARY JUDGMENT

[3] Under CPR 24.2 the court has power to give summary judgment against a claimant if it considers that (a) he 'has no real prospect of succeeding on the claim . . . and (b) there is no other compelling reason why the case or issue should be disposed of at a trial'. This is a broader power than existed under the old rules, when a claim could be struck out only on the grounds that the pleading disclosed no cause of action (the old demurrer, on which no evidence was admissible) or that the claim was frivolous, vexatious and an abuse of the process of the court. Under r 24.2 evidence is admissible and witness statements have been submitted by both sides. The new power has been described by Lord Woolf MR (in *Swain v Hillman* [2001] 1 All ER 91 at 92) as salutary:

> 'It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success . . .'

[4] Lord Woolf went on to say (at 94, 95):

> 'It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position . . .
>
> Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial.'

[5] These remarks were approved by this House in *Three Rivers DC (No 3) v Bank of England* [2001] UKHL 16, [2001] 2 All ER 513, [2003] 2 AC 1 (see Lord Hope of Craighead (at [91]–[93]); Lord Hutton (at [134])). In addition, as Lord Millett said in the same case (at [192]) the 'most important principle of all is that justice should be done. But this does not mean justice to the plaintiff alone'. It is not just to a defendant to subject him to a lengthy and expensive trial when there is no realistic prospect of success.

[6] I therefore approach this appeal on the basis that the claimant's allegations of primary fact must (unless plainly fanciful, which is not the case here) be

accepted as true and allowance must be made for the possibility that further facts may emerge on discovery or at trial. The question is whether, on these assumptions, he has a real prospect of success. For this purpose, I shall first set out the facts as alleged in the statement of claim together with some incontrovertible background material which is either contained in the evidence or common general knowledge. I shall then consider whether as a matter of law there is any prospect of the claimant being able to establish a cause of action.

THE BRITISH GEOLOGICAL SURVEY

[7] NERC is incorporated by royal charter pursuant to s 1(1)(b) and (3) of the Science and Technology Act 1965 for the objects of research, instruction, the dissemination of knowledge and the provision of advice relating to the earth sciences and ecology. Its members are appointed by the Secretary of State for Trade and Industry and it is funded by grants from that department and fees for activities undertaken for other departments, foreign governments or the private sector.

[8] The British Geological Survey (BGS) was founded in 1835 as a branch of the Ordnance Survey and is now a department of NERC. It has an annual budget of £37m; about half consists of grants from public funds and the rest from paid research. It employs about 800 permanent staff and, among other things, undertakes research in hydrogeology. It has a specialised aquifer properties laboratory at Wallingford.

THE BANGLADESH SECOND DEEP TUBEWELL PROJECT

[9] The Overseas Development Agency (ODA) was in 1992 a functional wing of the Foreign and Commonwealth Office, charged with providing aid to poor countries. It subsequently became the Overseas Development Administration and in 1997 its functions were taken over by the Department for International Development (DFID). During the period 1983–1992 it was one of the donors funding a project known as the Bangladesh Second Deep Tubewell Project (DTWII) to increase food production in Bangladesh by assisting the Bangladesh Agricultural Development Corporation (BADC) to provide 4,000 deep tubewells (artesian wells) for irrigation purposes in an area north of Dacca. These were wells of substantial capacity (50–60 litres per second) equipped with a vertical turbine or electrical submersible pump.

[10] In 1984 the ODA commissioned the BGS to undertake hydrogeological work for the purpose of testing the efficiency of tubewell designs. For this purpose Mr Jeffrey Davies, a geologist specialising in hydrogeology, was employed by the BGS to test 16 well designs. He tested these wells in a relatively small area north-west of Dacca, forming part of the area covered by DTWII, which was chosen for its relatively homogeneous geological character. This project was concluded in 1988.

[11] In 1990 Mr Davies proposed a programme to check on whether there had been deterioration in the performance of the DTWII tubewells. He proposed first to revisit the 16 test wells sunk by BGS and then, if he found deterioration, to undertake a more detailed study in the following year. Funding for both stages of this programme was approved by ODA.

THE GEOLOGICAL SURVEY

[12] Mr Davies made his initial field trip early in 1991 and found no signs of deterioration. He therefore declared a second visit to be unnecessary and proposed instead that the BGS should spend the £40,000 allocated by ODA on a

study of the hydrochemistry of the main aquifer units of the whole area covered by the DTWII project. This involved taking water and sediment samples at various places and sending them to the laboratory at Wallingford for chemical analysis. The proposal claimed that, in addition to adding to the general stock of geological knowledge, his project would be useful in two ways. First, it would provide a better understanding of the way in which the DTWII irrigation wells worked. Secondly, following a suggestion from a colleague at the Institute of Aquaculture at Stirling University, he said that the chemical analysis could reveal the presence of trace elements such as aluminium and iron which might be toxic to the fish which (in a project in which the Stirling Institute was involved) rural Bangladeshis were being encouraged to farm. Indeed, such elements might be toxic to humans also. It appears that the Wallingford laboratory has a standard procedure which can test simultaneously for all the major and minor ions and the most common trace elements. As these include aluminium and iron, the information concerning the fish was obtainable at no extra cost.

[13] Mr Davies did his field work in the first three months of 1992, obtaining groundwater samples from 150 sites in central and north-eastern Bangladesh. Most of the samples were taken from deep tube wells but more than a third came from hand pumped shallow wells which were commonly sunk to provide drinking water. After they had been analysed at Wallingford, he wrote up his report.

THE REPORT

The report was entitled: 'Short term BGS Pilot Project to Assess the Hydrochemical Character of the Main Aquifer Units of Central and North-eastern Bangladesh and Possible Toxicity of Groundwater to Fish and Humans.'

[14] It began with an executive summary. This described the project as a 'reconnaissance study' which had the primary aim of producing a reliable body of data that could be used to describe the hydrochemistry of the main aquifer units of central and north-eastern Bangladesh. Such data was required to understand the hydrochemical nature of the main aquifers, the genesis of the alluvial aquifers and the modes of occurrence of 'trace elements that may be toxic to biological systems'. The 'Study Inputs' were the obtaining of samples from 150 widespread sites and submitting them to Wallingford 'for the determination of 31 major, minor and trace elements'. The report included an atlas showing the distribution of major, minor and trace elements within the study area, which could be used 'to indicate the distribution of elements and groundwater properties that can be of benefit or harmful to aspects of life in Bangladesh'. The summary gave examples relating to the elements which had been identified: deficient iodine in the water supply in some areas, which could produce goitre, high dissolved iron, manganese and zinc in other areas, which could be harmful to fish, and high phosphate content, which could also harm fish. It recorded that aluminium was not found in quantities likely to be toxic to biological systems. Finally, the summary concluded with a proposal for additional work:

> 'This type of rapid reconnaissance survey produces information of relevance not only to hydrogeologists but also to those who are concerned with availability and quality of groundwater for domestic, agricultural, aquaculture and industrial usage. Similar studies undertaken in other parts of Bangladesh could produce comparable results given limited hydrogeological inputs.'

[15] The main body of the report, under the heading 'Background', describes the participation of the BGS in DWTII, the fish farming project and the lack of adequate facilities in Bangladesh for obtaining hydrogeological data for the purposes both of designing and siting the most efficient irrigation wells and assessing the suitability of the water for fish. It went on:

> 'The above experiences indicate the need to upgrade the groundwater analysis capabilities of institutions in Bangladesh. Improved equipment and staff training are needed urgently ... Such a situation must also be of concern to public health workers who, especially during the recently completed "World Water Decade", actively promoted the installation of thousands of hand pumped wells as being the best sources of clean, wholesome (ground) water for local domestic use especially at village level ...
>
> To overcome the above difficulties a countrywide baseline study of hydrochemical, hydrogeological and geological factors needs to be undertaken. As a first step this report presents the results of a study of the hydrochemistry of aquifer units within central and northern Bangladesh. Within this area ... reasonable geological data are available from deep tubewells installed under the [DWTII] Project.'

Mr Davies then set out the study objectives:

> 'This study aimed to acquire sufficient data to permit baseline hydrochemical characterisation of aquifer units recognised and recognition of processes controlling variations in groundwater chemistry within these aquifer systems.
>
> Such data should reflect and indicate groundwater flow patterns, location of groundwater recharge and discharge areas, and delineation of groundwater bodies. Detailed studies will be made of the occurrence and interaction of aluminium, manganese, silica, phosphorus and iron and their effects upon biological systems in the context of fish cultivation, crop irrigation and potable water supply.'

[16] There followed a detailed account of the results, including the maps forming the 'atlas' which showed the geographical distribution of traces of each element for which the samples were analysed: dissolved iron, silicon, manganese, phosphorus, aluminium, zinc, bromide, fluoride, iodide etc. It discussed the aluminium content and said that 'Aluminium is therefore not considered to be a health risk in the majority of the groundwaters surveyed in this study'. There were similar discussions of iron and manganese. In the conclusions, the report said that the hydrochemistry of the aquifers reflected a number of factors which were imperfectly understood. After setting these out, it said:

> 'The above factors appear to control the distribution of minor elements some of which can be toxic to aspects of agricultural, health and aquacultural fields of interest. Such reconnaissance hydrochemical surveys will give timely indication of the possible presence and distribution of such toxic substances in groundwater systems in Bangladesh.'

[17] Finally, App 3 set out the raw data of the hydrochemical analyses of Mr Davies's samples, showing the elements for which the samples had been tested and the results.

[18] Copies of the report were supplied to the ODA, Mott MacDonald Ltd (the main engineering consultant which had been engaged on DWTII), Dacca University, the Bangladesh Agricultural Development Corp and certain non-governmental organisations involved in water resource managements. These copies were no doubt available to anyone who wanted to read them.

ARSENIC IN THE DRINKING WATER

[19] At the same time as the modest DWTII programme for sinking 4,000 irrigation wells, there was in progress a vast scheme, initially funded by the United Nations Children's Fund (UNICEF), the World Bank and other non-governmental organisations, to install more than four million shallow hand-pumped tube wells to supply drinking water in rural areas all over the country. The object of this programme was to give the people of Bangladesh access to clean drinking water instead of the contaminated pond and other surface water which had been responsible for gastrointestinal diseases and high infant mortality in the past.

[20] Unfortunately it appears that in a good many cases the water from these shallow wells, though free of harmful bacteria and other organisms, is contaminated with arsenic. Tests of a limited number of wells have revealed the presence of arsenic at levels considerably higher than the standard measure of safety prescribed by the World Health Organisation. It seems that at least until 1993, and, according to the claimant, considerably later no one thought of testing the tubewell drinking water for arsenic. Mr Peter Ravenscroft, a hydrogeologist who worked for Mott MacDonald Ltd at the relevant time, says in a witness statement made on behalf of the claimant:

> 'The majority of investigations into water resources related to quantity, and a high proportion of the practitioners working on water resource or supply projects (whether in Government, aid agencies or as consultants) did not concern themselves about most aspects of water quality. The question of groundwater quality had been very largely (with the exception of coliform bacteria, and to a lesser extent salinity and iron) neglected by both government and aid agencies.'

[21] The BGS did not test their samples for arsenic and there is no mention of arsenic in Mr Davies's report. UNICEF says that standard procedures for testing ground water at the time did not include tests for arsenic. There is considerable controversy over whether the responsible organisations should have been aware of the danger at an earlier stage. Mr Ravenscroft says that when he read the 1992 report he paid no attention to the absence of tests for arsenic and other toxic chemicals because 'I was not looking for them'. It was only in 1995 that he heard reports of arsenic poisoning in neighbouring West Bengal and drew the conclusion that there might be similar problems in Bangladesh.

[22] The consequences of the failure to test for arsenic have been most unfortunate: a paper published by the World Health Organisation (Smith, Lingas and Rahman *Contamination of drinking-water by arsenic in Bangladesh: a public health emergency* Bulletin of the World Health Organization, vol 78 (2000) pp 1093–1103) estimated that, of the 125 million inhabitants of Bangladesh, between 35 million and 77 million are at risk of drinking contaminated water and described the situation as the greatest environmental disaster that had ever happened.

THE CLAIMANT

[23] The claimant is one of the people affected by arsenic in his drinking water. He lives in the Brahmanbaria region to the north-east of Dacca, from which Mr Davies took some of his samples. He is a villager, now nearly 50, who says that until about 1983 he drank pond water. Then a tubewell was sunk in his village and he drank its water instead. In 1991 he developed symptoms associated with arsenical poisoning (melanosis, keratosis, foot ulceration) which, over the years, have become worse.

THE ALLEGATIONS OF NEGLIGENCE

[24] The claimant says that BGS caused or materially contributed to his illness, either by failing to draw attention to the presence of arsenic or by issuing a report which represented that his water was safe to drink. He, of course, had never seen the report or, one would imagine, heard of BGS. But he says that if the report had said that the water contained arsenic or had not given the impression that the water was safe, the public health authorities in Bangladesh would have taken steps to ensure that it was. So the question is whether BGS owed the claimant and others like him a duty to take reasonable care to test whether the water contained arsenic or not to issue a report which gave the impression that testing for arsenic was unnecessary. The defendants say that there is no arguable case that they were in a relationship of proximity with the population of Bangladesh which could make them liable on either of these grounds. They do not submit that there are any other grounds upon which the claimant would be bound to fail, although they point out the very considerable difficulties he would have on other issues.

[25] I have put the claimant's case in two different ways: BGS owed him a duty to test for arsenic or BGS should not have issued a report which gave the impression that there was no arsenic. It is important to distinguish between these two formulations. The first is that BGS owed him a positive duty to test for arsenic. That way of putting the matter makes it necessary to inquire what could have created such a duty. The second is essentially a claim of misrepresentation: the report is said to have given the impression, by its omission of any tests for arsenic, that the water was free of arsenic, or at any rate safe to drink, and this, as should have been foreseen, lulled the Bangladesh public health authorities into a false sense of security and inhibited them from testing the water themselves and discovering its toxic properties.

[26] Lord Brennan QC, who appeared for the claimant, disavowed the allegation of a positive duty to test for arsenic and emphasised the misrepresentation aspect of the case. He realistically saw the considerable difficulties in the way of a claim that BGS, out of all the geological experts in the world, owed such a duty to the people of Bangladesh. Nevertheless, it is important to say why BGS were under no duty to test the water for arsenic because the reasons are relevant to whether any claim can be founded upon the terms of their report.

[27] BGS had no connection with the drinking water project and no one asked them to test the water for potability. They owed no duty to the government or people of Bangladesh to test the water for anything. If Mr Davies had not found some spare money in the budget and never done his survey, BGS could not have incurred any liability. The fact that they tested for the elements specified in the report was an accident of the availability of funds, Mr Davies's idea of adding to useful knowledge and Stirling University's concerns about fish farming.

The statement of claim places much emphasis upon the expertise, world renown and so forth of BGS, and contrasts this with the impoverished state of Bangladeshi geological facilities. This was a matter to which Mr Davies himself drew attention in the report (see [15], above). But the fact that one has expert knowledge does not in itself create a duty to the whole world to apply that knowledge in solving its problems. True, the BGS was working in Bangladesh and Mr Davies did test the water for a number of trace elements. But the fact that he or the BGS in Wallingford chose to run tests for some elements cannot create a duty upon them to test for other elements. BGS therefore owed no positive duties to the government or people of Bangladesh to do anything. They can be liable only for the things they did and the statements they made, not for what they did not do.

[28] I turn therefore to whether any claim can be based upon the terms of the report. The essence of the claimant's allegation is that BGS knew or ought reasonably to have known that the report would be relied upon as a statement that the tubewell water of Bangladesh was fit to drink. More specifically, that it did not contain arsenic or any other toxic substances.

[29] In my opinion it is quite impossible to find any such statement in the report. Ms Sara Bennett, who describes herself as an Environmental Consultant and has filed a witness statement for the claimant, says that she 'accepted the statements made by the study as meaning what they said'. If this means that the report contained statements that there was no arsenic in the water, it is simply untrue. The report states absolutely clearly that the samples had been tested at Wallingford for the presence of a number of named elements and draws attention to the fact that the presence or absence of some of these elements (presence of iron, absence of iodine) may be relevant to the toxicity of the water to animals and humans. It says nothing about arsenic. No one could suppose that the BGS had tested the water for arsenic. The report does not say why they did not include arsenic in the suite of elements for which they ran tests. But the highest that the matter can be put for the claimant is that the absence of a test for arsenic implies that BGS (like, it seems, everyone else at the time, including the government, UNICEF and those closely involved in the drinking water programme) thought that the presence of arsenic was so unlikely that it was not necessary to test for it. The report can therefore at best be regarded as an implied statement by BGS that they shared that belief.

[30] It is important to be clear about the basis of the claim because the claimant, supported by the witness statements filed on his behalf, goes on to say that if the BGS had warned about the presence of arsenic, the government or some aid agency or non-governmental organisation would have done something about it. Thus Mr Ravenscroft says that 'if arsenic had been identified in 1992 an arsenic mitigation programme would have been quickly implemented'. Ms Bennett, who worked on the Northeast Regional Water Management Plan (NERP) in 1991–1994, says that if the report had identified arsenic 'it would have been highlighted as an urgent issue in the NERP April 1993 report' and measures to mitigate exposure would have been set in train. (This allegation faces formidable difficulties in the light of the measures actually taken (or not taken) by the authorities after the problem was identified, but for the purposes of this application for summary judgment I think it must be accepted as true.) It is, however, a statement about what would have happened if the BGS had tested the water for arsenic and, as I have already said and I think Lord Brennan accepts, the BGS owed no duty to test the water for arsenic. In this respect both the

witness statements and the statement of claim display some confusion about exactly what the nature of the claim is. In fact the claim depends upon the very different proposition that the BGS owed a duty not to make an implied statement that in their opinion it was unnecessary to test for arsenic and that it was this implied statement by BGS (rather than the similar implied statements being made at the time by all other experts involved in the drinking water programme) which caused the failure of the government to take protective measures.

[31] Is it then arguable that the BGS owed a duty to the population of Bangladesh not to publish a report which, although containing useful information about many other matters, implied, by what it did not say, that the BGS shared the conventional wisdom about arsenic? My Lords, I think that this question has only to be stated in order to show how improbable it is.

[32] The grounds upon which courts will decide whether or not a claimant is owed a duty of care have been examined by the House on numerous occasions. The standard framework within which this question is usually examined is to ask whether the damage was reasonably foreseeable, whether there was sufficient 'proximity' between the claimant and the defendant and whether it is fair, just and reasonable to impose a duty (see Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 573–574, [1990] 2 AC 605 at 617–618). It has often been remarked that the boundaries between these three concepts are somewhat porous but they are probably none the worse for that. In particular, the requirement that the imposition of a duty should be fair, just and reasonable may sometimes inform the decision as to whether the parties should be considered to be in a relationship of proximity and may sometimes provide a special reason as to why no duty should exist, notwithstanding that the relationship would ordinarily qualify as proximate. In these proceedings the defendant does not allege any such special reason but the concept of fairness and justice obviously looms large in the question of whether it is fair, just and reasonable that the author of a geological survey should be treated as having a relationship of proximity to the population of Bangladesh.

[33] The possibility of a duty of care in tort not to make negligent statements was first established by the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465. Until then, the law had taken the view, exemplified by the statement of Bowen LJ in *Le Lievre v Gould* [1893] 1 QB 491 at 502 that 'the law . . . does not consider that what a man writes on paper is like a gun or other dangerous instrument', that in the absence of contract, fraud or a fiduciary relationship, there is no liability for negligent statements.

[34] The old rule applied whatever the type of loss which might follow from the negligent statement: whether physical injury or financial loss. In *Candler v Crane Christmas & Co* [1951] 2 KB 164 at 194 Asquith LJ, in support of a majority judgment which upheld the previous law, gave an illustration:

> 'Singular consequences would follow if the principle laid down in [*Donoghue v Stevenson* [1932] AC 562, [1932] All ER Rep 1] were applied to negligent misrepresentation in every case in which the representee were proximate to the representor. The case has been instanced by Professor Winfield and referred to by my brother Denning of a marine hydrographer who carelessly omits to indicate on his map the existence of a reef. The captain of the "Queen Mary", in reliance on the map and having no opportunity of checking it by reference to any other map, steers her on the

unsuspected rocks, and she becomes a total loss. Is the unfortunate cartographer to be liable to her owners in negligence for some millions of pounds damages? If so, people will, in future, think twice before making maps. Cartography would become an ultra-hazardous occupation.' (See also [1951] 1 All ER 426 at 442.)

[35] Denning LJ, in a famous dissenting judgment, favoured the possibility of liability for negligent statements. But not on the basis of the kind of 'proximity' which would satisfy the requirements of *Donoghue v Stevenson* for conduct causing direct physical injury without any intermediate element of reliance, whether by the claimant or a third party. He proposed a much narrower test for a duty of care in respect of statements: the maker must be exercising a profession in which he can be expected to take care, he must know that the statement is going to be used by the person relying upon it and he must have known the particular transaction for which the information was required:

'. . . a scientist or expert (including a marine hydrographer) is not liable to his readers for careless statements in his published works. He publishes his work simply for the purpose of giving information, and not with any particular transaction in mind at all. But when a scientist or an expert makes an investigation and report for the very purpose of a particular transaction, then, in my opinion, he is under a duty of care in respect of that transaction.' (See [1951] 2 KB 164 at 183; see also [1951] 1 All ER 426 at 435.)

[36] This dissenting judgment was upheld by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 (see Lord Hodson [1963] 2 All ER 575 at 597, [1964] AC 465 at 509, Lord Devlin [1963] 2 All ER 575 at 611, [1964] AC 465 at 530 and Lord Pearce [1963] 2 All ER 575 at 617, [1964] AC 465 at 538–539). It seems to me that the alleged implied statement about arsenic in the BGS report is no different from a statement in an authoritative textbook on geology to the effect that the aquifers of Bangladesh are very unlikely to contain arsenic. It is clear that Lord Denning would not have regarded the author of such a book as in a relationship of proximity with the population of Bangladesh.

[37] Lord Brennan said that the law had developed since the pioneering days of *Candler v Crane Christmas & Co* and *Hedley Byrne & Co Ltd v Heller & Partners Ltd* and, as an indication of current thinking, relied upon the judgment of Hobhouse LJ in *Perrett v Collins* [1998] 2 Lloyd's Rep 255. This was an action by a passenger who was injured in an aircraft accident, allegedly caused by the unairworthy state of the aircraft, against an inspector who had certified that it was fit to fly. Under the terms of the Air Navigation Order 1989, SI 1989/2004, the aircraft could not lawfully fly unless such a certificate had been issued. Hobhouse LJ said that the inspector owed a duty of care to potential passengers to use reasonable care in inspecting the aircraft and issuing the certificate. He said that in respect of claims for personal injury there was now no difference in principle between liability for negligent statements and liability for other forms of conduct. The question was the degree of control and responsibility which the defendant had over the situation which involved potential injury to the claimant:

'Where the plaintiff belongs to a class which either is or ought to be within the contemplation of the defendant and the defendant by reason of his involvement in an activity which gives him a measure of control over and responsibility for a situation which, if dangerous, will be liable to injure the

plaintiff, the defendant is liable if as a result of his unreasonable lack of care he causes a situation to exist which does in fact cause the plaintiff injury.' (See at 262.)

[38] I do not propose to comment upon this statement, formulated with characteristic care and precision. It may or may not be possible now to subsume liability for negligent statements together with other conduct causing physical injury under a single principle. But that principle is not that a duty of care is owed in all cases in which it is foreseeable that in the absence of care someone may suffer physical injury. There must be proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation. Such a principle does not help the claimant. In *Perrett v Collins* the inspector had complete control over whether the aircraft flew or not. If he refused a certificate it could not fly. The purpose of the system of certification established by the 1989 order was equally clearly the protection of persons who might be injured by unairworthy aircraft and therefore placed responsibility for affording such protection upon the inspector. For my part, therefore, I have no difficulty with the proposition that the inspector owed a duty to potential passengers to exercise due care and this may be why *Perrett v Collins* has not been reported in the official series of law reports. (Compare also *Clay v AJ Crump & Sons Ltd* [1963] 3 All ER 687, [1964] 1 QB 533 in which an architect had complete control over whether a dangerous wall was left standing and *Watson v British Boxing Board of Control Ltd* [2001] QB 1134, [2001] 1 WLR 1256 in which the Board had control over the medical services provided at boxing matches.) But the claimant does not come even remotely within the principle stated by Hobhouse LJ. The BGS had no control whatever, whether in law or in practice, over the supply of drinking water in Bangladesh, nor was there any statute, contract or other arrangement which imposed upon it responsibility for ensuring that it was safe to drink. Lord Brennan said that while it was true that the BGS had no control over or responsibility for the water supply, they had control over and responsibility for their report. But this emendation of Hobhouse LJ's principle would turn it into complete nonsense. Everyone has control over and responsibility for their own actions. The duty of care depends upon a proximate relationship with the source of danger, namely the supply of drinking water in Bangladesh.

[39] Simon J refused to strike out the claim on the ground that the law was developing and that 'part of the argument [for the defendant] proceeds on the basis that a leading judgment in the Court of Appeal is wrong' (see [2003] All ER (D) 87 (May) at [54]). That was apparently a reference to Hobhouse LJ in *Perrett v Collins* [1998] 2 Lloyd's Rep 255 and it may be that the defendant made such a submission to the judge. However, so far as the judge thought that the case could arguably come within the principle stated by Hobhouse LJ or any conceivable development of that principle, I respectfully think that he was wrong. He also appears ([2003] All ER (D) 87 (May) at [49]) to have proceeded on the basis that the BGS had arguably been under a duty to test for arsenic ('The failure to test for arsenic can, at least for the purposes of the present application, properly be viewed in the context of the overall activity of conducting a competent hydrogeological survey'). This is an argument which Lord Brennan now disavows and which, as I have said, has no prospect of success. While therefore it is true that the decision to give summary judgment involves the exercise of a discretion, the judge in my opinion exercised his discretion upon a

misapprehension about the relevant principles of law and the Court of Appeal were right to reverse him.

[40] In his dissenting judgment, Clarke LJ said ([2004] All ER (D) 357 (Feb) at [44]) that it was arguable that 'the defendant should have tested for all trace elements including arsenic or made it clear in the report that it had not tested for arsenic'. But in my opinion there could not have been any duty upon the BGS to test for arsenic and the report made it perfectly clear that they had not done so.

[41] My Lords, the claimant in my opinion fails at the first hurdle of showing an arguable case that he was owed a duty of care. It is however worth considering the other formidable difficulties which, even if his case on this point had not been as hopeless as I think it is, he would have had to overcome in order to establish liability. He would have to show that it was negligent of the BGS, in the context of a report which did not purport to be a certificate of the potability of drinking water, not to have questioned the current orthodoxy that it was not necessary to test for arsenic. He would have to establish the causative effect of the report in the sense of showing that but for the publication of the report containing its implied endorsement by the BGS of the unlikelihood of arsenic being present in the water, that orthodoxy would have been questioned by the Bangladesh government or someone else who would have alerted the government to the dangers. He would have to show that the government would have done something to provide alternative water supply for the claimant's village. All of these points are conceded to be arguable, but the claimant must succeed on all of them and, as any punter will know, if your chances on each of four issues are 20%, your chances of succeeding on all four are less than 0·2%.

[42] The overriding objectives of the Civil Procedure Rules include achieving justice for both claimants and defendants and saving time and expense. These objectives sometimes conflict and compromises are required. It is not the case that the administration of justice, alone among the services provided by the state, is exempt from any considerations of cost. It is obvious that a trial of this action, involving an examination of the water resources programme in Bangladesh over a number of years, would be an enormous and expensive undertaking. Your Lordships were told that the costs incurred in these proceedings by the claimant and other residents of Bangladesh who wish to bring similar actions, at the expense of United Kingdom public funds, already exceed £380,000. That takes no account of the costs incurred, also at the public expense, by NERC. That is a factor which, however unpalatable it may be to those who think that justice is priceless, must be taken into account. And justice to the defendant requires one to have regard to the burden which a long and complicated trial would impose upon NERC. Speaking for myself, I think that even if the resources of the state and NERC were infinite, it would still be wrong for this case to proceed to trial. But when one considers the scale and cost of a trial, the case for stopping the proceedings now appears to me to be overwhelming. I am also in complete agreement with the speech to be delivered by my noble and learned friend Lord Brown of Eaton-under-Heywood, which I have had the privilege of reading in draft. I would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE.

[43] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. For the reasons set out in his opinion, with which I agree, I would dismiss this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[44] My Lords, I too would dismiss this appeal and in doing so agree with everything said by my noble and learned friend Lord Hoffmann. I nevertheless want to add a short judgment of my own simply to highlight what seem to me the critical features of the case.

[45] I agree with Lord Hoffmann (at [41], above) that there could be no duty on BGS to test for arsenic and I agree too that their report made it perfectly clear that they had not done so. I agree therefore that the relevant question is that earlier posed by Lord Hoffmann (at [32], above): is it arguable that BGS owed a duty to the population of Bangladesh not to publish a report which implied, by what it did not say, that BGS shared the conventional wisdom about arsenic (namely—see [30], above—that its presence was so unlikely that it was not necessary to test for it)?

[46] Lord Hoffmann rightly points out (at [42], above) that, the existence of a relevant duty of care aside, one of the other formidable difficulties in the claimant's path would be to show that it was negligent of BGS, in the context of a report which did not purport to be a certificate of the potability of drinking water, not to have questioned the current orthodoxy that it was unnecessary to test for arsenic. For the purpose of deciding whether BGS were under a duty of care, however, we must assume that their report, in impliedly stating that arsenic was not a hazard, constituted a negligent misstatement. If the claimant could prove that, but for such negligent misstatement, the government of Bangladesh or other relevant Bangladeshi authorities would have discovered the hazard and eliminated it from the water supply thereby safeguarding the claimant from the injury he sustained (each of these representing further formidable difficulties in the claimant's path as Lord Hoffmann also points out at [42], above) would he be entitled to succeed in this claim? That critically seems to me the true issue.

[47] Beguilingly though the argument was put by Lord Brennan QC, there seems to me to be only one answer to that question, the answer no. *Clay v AJ Crump & Sons Ltd* [1963] 3 All ER 687, [1964] 1 QB 533, *Perrett v Collins* [1998] 2 Lloyd's Rep 255 and *Watson v British Boxing Board of Control Ltd* [2001] QB 1134, [2001] 1 WLR 1256 are the authorities principally relied upon by the appellant in this appeal. But in the present case there is nothing like the directness and immediacy between the defendant's role in events and the claimant's injuries which characterise each of those cases: an architect who was responsible for the safety of the site buildings negligently left standing a wall which then collapsed on the plaintiff workman; an inspector responsible for certifying airworthiness negligently certified an aircraft as fit to fly; and the British Boxing Board of Control, with the responsibility for determining the medical care and facilities to be immediately available for those injured in the boxing ring, negligently failed to specify a sufficient level of care. It is the contrasts rather than the similarities between those cases and this which are so striking.

[48] Here the essential touchstones of proximity are missing. BGS had no 'control over' or 'responsibility for' (see Hobhouse LJ's judgment in *Perrett v Collins* [1998] 2 Lloyd's Rep 255 at 262 quoted by Lord Hoffmann at [38], above) the provision of safe drinking water to the citizens of Bangladesh in the same way as the architect, the air safety inspector and the British Boxing Board of Control had control over and responsibility for ensuring respectively a safe wall, a safe aircraft and a safe system for treating injured boxers. There was here no 'particular transaction' (Denning LJ's phrase in his dissenting judgment, later to be vindicated, in *Candler v Crane Christmas & Co* [1951] 1 All ER 426 at 435, [1951]

2 KB 164 at 183) such as the preparation of accounts to be shown to a known potential investor—or, indeed, such as triggered the implied statements attesting to the safety respectively of the wall, the aircraft and the boxing ring in the later three cases. BGS's position is akin rather to that of the notionally negligent marine hydrographer referred to by both Denning LJ and Asquith LJ in *Candler v Crane Christmas & Co*. Moreover (and this perhaps is just a mirror image of the last point), unlike the comparatively narrow classes of potential claimants in the other cases—those likely to be injured respectively by the collapsing wall, the crashing aeroplane or the inadequate provision of immediate care for injured boxers—the class of potential claimants here (assuming BGS were indeed to owe the duty of care contended for) is the entire population of Bangladesh or at the very least that of the areas tested during the 1992 survey.

[49] I recognise, of course, that the three pre-conditions to the imposition of a duty of care classically formulated in *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605—the foreseeability of harm, a sufficient proximity between the parties, and that it is fair, just and reasonable to impose a duty of care in all the circumstances—to a substantial degree overlap. There are copious statements throughout the case law and the academic commentaries to that effect. And I recognise too that we are to assume for present purposes that the appellant can establish both the foreseeability of harm and that it would be fair, just and reasonable to impose a duty of care here, in the sense that there are no sufficient policy reasons for denying a duty which would otherwise exist, as, for example, in cases of psychiatric injury (see *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1, [1999] 2 AC 455), 'wrongful birth' (see *Parkinson v St James's and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530 at [46], [2001] 3 All ER 97 at [46], [2002] QB 266), or actions brought in respect of police investigations (see, most recently, *Brooks v Metropolitan Police Comr* [2005] UKHL 24, [2005] 2 All ER 489, [2005] 1 WLR 1495). But all that said, if ever there were a case which is bound to fall at the proximity hurdle this surely is it. Whatever is required to constitute a sufficient proximity to support a duty of care—and I acknowledge the imprecision of the concept and the many criticisms it has attracted down the years—it is not to be found on any possible view of the facts here. That is the long and the short of it. The appellant's claim must inevitably fail and so too, therefore, must his appeal.

LORD MANCE.

[50] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friends Lord Hoffmann and Lord Brown of Eaton-under-Heywood. For the reasons they give, with which I agree, I would dismiss this appeal.

Appeal dismissed.

Celia Fox Barrister.

Patel and another v Pirabakaran

[2006] EWCA Civ 685

COURT OF APPEAL, CIVIL DIVISION
WILSON LJ AND SIR PETER GIBSON
3 MARCH, 26 MAY 2006

Landlord and tenant – Forfeiture of lease – Premises let as a dwelling – Enforcement of right of re-entry or forfeiture unlawful otherwise than by proceedings in court – Lease of shop premises and residential flat – Landlord peaceably re-entering shop premises – Whether lease forfeit – Whether premises let as a dwelling – Meaning of 'let as a dwelling' – Protection from Eviction Act 1977, s 2.

The defendant tenant held premises which consisted of a ground floor shop with a flat above. He conducted a retail business on the ground floor and resided on the first floor. The lease contained a right of re-entry for the landlord into the premises 'or any part thereof in the name of the whole'. The tenant fell into arrears of rent and the claimant landlords purported to exercise their right of re-entry by causing the locks of the shop to be changed. The tenant remained resident in the flat, which had a separate entrance. The landlords issued a claim for an order for possession of the flat on the basis that the lease had become forfeit by their re-entry. Section 2[a] of the Protection from Eviction Act 1977 provided that where any premises were let as a dwelling on a lease which was subject to a right of re-entry or forfeiture it was not lawful to enforce that right otherwise than by proceedings in the court while any person was lawfully residing in the premises or part of them. The tenant argued that the premises were 'let as a dwelling' within the terms of s 2 of the 1977 Act in that the premises were 'let wholly or partly as a dwelling', so that the lease had not been lawfully forfeited. The judge considered that 'let as a dwelling' in s 2 meant 'let exclusively as a dwelling', so that the landlords had not been precluded from exercising their right of re-entry otherwise than by proceedings in court. He made an order for possession and the tenant appealed.

Held – In circumstances in which premises were let partly for residential purposes and partly for business purposes and in which the tenant was residing in the part let for residential purposes, the landlord was required by s 2 of the 1977 Act not to enforce any right of forfeiture under the lease otherwise than by proceedings in court. The phrase 'let as a dwelling' in s 2 meant 'let wholly or partly as a dwelling' and so applied to premises which were let for mixed residential and business purposes. When the precursor of s 2 of the 1977 Act had been introduced in the Rent Act 1965 that was understood to be the established meaning of the phrase, contained in a series of prior enactments and so construed in a series of judgments of the Court of Appeal. If that was what the phrase then meant in the 1965 Act, that was what it now meant in s 2 of the 1977 Act. There was no reason to suppose that in enacting s 2 Parliament had intended that tenants who held tenancies for mixed purposes should not also enjoy the protection which was afforded to purely residential tenants. Accordingly, the appeal would be allowed (see [1], [25], [34], [37], [46]–[48], [52], [56], below).

a Section 2 is set out at [3], below

Epsom Grand Stand Association Ltd v Clarke [1919] WN 170, *Maunsell v Olins* [1975] 1 All ER 16, *Cheryl Investments Ltd v Saldanha, Royal Life Saving Society v Page* [1979] 1 All ER 5, *Pulleng v Curran* (1980) 44 P&CR 58, *Webb v Barnet London BC* (1988) 21 HLR 228, *Wagle v Trustees of Henry Smith's Charity Kensington Estate* [1990] 1 QB 42 and *Wellcome Trust Ltd v Hamad, Ebied v Hopkins, Church Comrs for England v Baines* [1998] 1 All ER 657 considered.

National Trust for Places of Historic Interest or Natural Beauty v Knipe [1997] 4 All ER 627 distinguished.

Notes

For entry: residential occupiers, see 27(1) *Halsbury's Laws* (4th edn reissue) para 547.

For the Protection from Eviction Act 1977, s 2, see 23 *Halsbury's Statutes* (4th edn) (2004 reissue) 565.

Cases referred to in judgments

Billson v Residential Apartments Ltd [1992] 1 All ER 141, [1992] 1 AC 494, [1992] 2 WLR 15, HL.

British Land Co Ltd v Herbert Silver (Menswear) Ltd [1958] 1 All ER 833, [1958] 1 QB 530, [1958] 2 WLR 580, CA.

Cheryl Investments Ltd v Saldanha, Royal Life Saving Society v Page [1979] 1 All ER 5, [1978] 1 WLR 1329, CA.

Connors v UK (2004) 16 BHRC 639, ECt HR.

Epsom Grand Stand Association Ltd v Clarke [1919] WN 170, CA.

Farrell v Alexander [1976] 2 All ER 721, [1977] AC 59, [1976] 3 WLR 145, HL.

Hicks v Snook (1928) 27 LGR 175, CA.

Lambeth London BC v Kay, Leeds City Council v Price [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 WLR 570.

Maunsell v Olins [1975] 1 All ER 16, [1975] AC 373, [1974] 3 WLR 835, HL.

National Trust for Places of Historic Interest or Natural Beauty v Knipe [1997] 4 All ER 627, [1998] 1 WLR 230, CA.

Pulleng v Curran (1980) 44 P&CR 58, CA.

R v Brighton and Area Rent Tribunal, ex p Slaughter [1954] 1 All ER 423, [1954] 1 QB 446, [1954] 2 WLR 289, DC.

Wagle v Trustees of Henry Smith's Charity Kensington Estate [1990] 1 QB 42, [1989] 2 WLR 669, CA.

Webb v Barnet London BC (1988) 21 HLR 228, CA.

Wellcome Trust Ltd v Hamad, Ebied v Hopkins, Church Comrs for England v Baines [1998] 1 All ER 657, [1998] QB 638, [1998] 2 WLR 156, CA.

Appeal

The defendant, Rasiah Pirabakaran, who was the tenant of shop premises and residential accommodation under a lease dated 20 August 1999, appealed with permission of Judge Oppenheimer from his decision in the Brentford County Court on 25 August 2005 granting the claimant landlords, Navichandra Manibhai Patel and another, an order for possession of the premises. The landlords had re-entered the shop premises on 13 February 2004. The facts are set out in the judgment.

Jan Luba QC and *Erol Topal* (instructed by *Van-Arkadie & Co*, Harrow) for the tenant.

Tom Weekes (instructed by *Albin Hunt & Stein*) for the landlords.

Cur adv vult

26 May 2006. The following judgments were delivered.

WILSON LJ.

THE QUESTION

[1] In circumstances in which premises are let partly for residential purposes and partly for business purposes and in which the tenant is residing in the part let for residential purposes, is the landlord required by s 2 of the Protection from Eviction Act 1977 not to enforce any right of forfeiture under the lease otherwise than by proceedings in court?

[2] Such is the question raised by this appeal. It is surprising that it has not previously been answered.

INTRODUCTION

[3] Section 2 of the 1977 Act, which is entitled 'Restriction on re-entry without due process of law', provides:

> 'Where any premises are let as a dwelling on a lease which is subject to a right of re-entry or forfeiture it shall not be lawful to enforce that right otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them.'

[4] So, more focussed, the question becomes whether premises let partly for residential purposes and partly for business purposes are 'let as a dwelling' within the meaning of s 2 of the 1977 Act. The appeal is against an order for possession made by Judge Oppenheimer in the Brentford County Court on 25 August 2005. His answer to that question was negative. But, recognising its importance and difficulty, he gave permission to appeal against his order. Mr Luba QC, who now appears for the appellant tenant, contends that the judge's answer should have been affirmative. Mr Weekes, who, as he did before the judge, appears for the respondent landlords, maintains that the judge's negative answer was correct.

[5] In effect, therefore, Mr Luba suggests that the phrase 'let as a dwelling' in s 2 of the 1977 Act means 'let wholly or partly as a dwelling', whereas Mr Weekes suggests that it means 'let exclusively as a dwelling'.

THE FACTS

[6] The issue arises out of a lease dated 20 August 1999 of premises described therein as 'all that land together with shop premises and residential accommodation above' at 44 Syon Lane, Osterley, Middlesex, granted by the respondent landlords to third parties for a term of 16 years at a rent of £7,230 pa subject to review. In 2003, with the licence of the landlords, the third parties assigned the lease to the appellant tenant (the tenant). By then the rent had risen to £10,845 pa.

[7] By cl 3(13) of the lease the tenant covenanted—

> 'Not to use or permit the Demised Premises to be used otherwise than as to the ground floor as a shop for the business of a retail grocers greengrocers and provisions merchant the sale of newspapers periodicals magazines and

a stationery and the sale of intoxicating liquors of all descriptions for consumption off the Demised Premises AND as to the upper floor for residential accommodation for a single family.'

[8] It was agreed in the lease that the landlords should have a right of re-entry as follows:

b 'That if the said rents or any part thereof shall be unpaid for twenty one days after any of the days hereinbefore appointed for payment thereof whether or not the same shall have been lawfully demanded or if . . . or if . . . or if any covenant on the Tenant's part herein contained shall not be performed or observed then and in any of the said cases it shall be lawful for c the Landlord or any person or persons duly authorised by the Landlord in its behalf to enter into and upon the Demised Premises or any part thereof in the name of the whole to re-enter the same and to repossess and enjoy without prejudice to any right of action or remedy of the Landlord in respect of any antecedent breach of any of the covenants by the Tenant.'

d [9] The tenant conducted a retail business on the ground floor of the premises and resided on the first floor. By 13 February 2004 he was, so the judge found, in arrears of rent for at least 21 days in the sum of £1,059. On that day the landlords purported to exercise their right of re-entry by causing bailiffs to change the locks of the shop on the ground floor. Until the hearing before the judge in August 2005 the tenant remained excluded from the shop. Until September 2004, e however, he remained resident in the flat, which has a separate entrance.

[10] On 8 September 2004 the landlords issued a claim against the tenant for an order for possession of the flat. The basis of the claim was that, by their re-entry on 13 February 2004, the lease had become forfeit.

[11] On 12 September 2004 water cascaded from the flat into the shop through f the ceiling. In that regard the tenant was charged with committing criminal damage to the premises and it became a condition of his bail that he should not return to the flat. On 13 September the landlords peaceably changed the locks of the flat. On 20 September the tenant issued a claim against the landlords for an injunction that they should be restrained from excluding him from either part of the premises. The basis of the claim was that, by reason of s 2 of the 1977 Act, the g purported forfeiture of the lease on 13 February 2004 was unlawful. On 24 September, explaining that he hoped to secure an alteration of the bail condition, the tenant obtained an interim injunction against the landlords that they should not prevent him from occupying the flat. In the event, however, he failed to secure an alteration of the condition. In January 2005 he was convicted h of causing criminal damage to the premises and, apart from being sentenced to community service, he was ordered to pay £4,000 to the landlords by way of compensation. The conclusion of the criminal proceedings enabled him to return to reside in the flat; and, at the time of the hearing before the judge in August 2005, he remained resident in it.

j [12] The events of September 2004 are irrelevant to the forfeiture or otherwise of the lease. For the contractual right of re-entry is into the premises 'or any part thereof in the name of the whole'. Thus, unless the landlords were precluded by s 2 of the 1977 Act from exercising their right of re-entry otherwise than by proceedings in court, their actions on 13 February 2004 achieved forfeiture of the lease referable to the whole premises and the tenant thereupon became a trespasser in the flat.

[13] In a succinct judgment the judge held, by reference to an authority to which I will refer in [32], below, that the demised premises were not 'let as a dwelling'; that accordingly the landlords were not constrained by s 2 of the 1977 Act; and that therefore the lease had been lawfully forfeited on 13 February 2004. He went on to hold—against which there is no appeal—that, partly by reference to the criminal damage, there was no ground for granting the tenant relief from forfeiture under s 146(2) of the Law of Property Act 1925. So in the claim brought by the landlords he ordered the tenant to give them possession of the flat and to pay them damages for trespass; and he dismissed the claim brought by the tenant.

THE 1977 ACT

[14] The first task is to set s 2 of the 1977 Act in context. Along with ss 1, 3 and 4, it is in Pt I, entitled 'Unlawful Eviction and Harassment'. Section 5, on the other hand, is in Pt II, entitled 'Notice to Quit'. The remaining sections are in Pt III, entitled 'Supplemental Provisions'.

[15.1] One does best to start with s 3, which is entitled 'Prohibition of eviction without due process of law' and which, as amended, provides:

> '(1) Where any premises have been let as a dwelling under a tenancy which is neither a statutorily protected tenancy nor an excluded tenancy and—(a) the tenancy (in this section referred to as the former tenancy) has come to an end, but (b) the occupier continues to reside in the premises or part of them, it shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings in the court, his right to recover possession of the premises.'

[15.2] By s 8(1), the phrase 'statutorily protected tenancy' now means eight specified types of tenancy. The third, which has been in the list from the beginning and which is set out at (c), is 'a tenancy to which Part II of the Landlord and Tenant Act 1954 applies'. This leads to s 23 of that Act (the 1954 Act), which provides:

> '(1) Subject to the provisions of this Act, [Part II] of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.'

[15.3] So the ambit of s 3 becomes clear. If the circumstances are that (a) the premises have been 'let as a dwelling'; (b) the tenancy has come to an end; and (c) the occupier, ie anyone lawfully residing in them at the termination of the tenancy, continues to reside in them, then it is unlawful for the owner to recover possession of them from him otherwise than by proceedings in court. If, however, by another source, the former tenant already enjoys security of tenure or other statutory protection following the termination of his tenancy, he has no need for the protection of s 3 and so is excluded from it on the footing that he has 'a statutorily protected tenancy'.

[15.4] The inclusion within the phrase 'statutorily protected tenancy' of a tenancy to which Pt II of the 1954 Act applies may also be significant. Part II applies to a tenancy, such as in the present case, of premises occupied partly for residential purposes and partly for business purposes because, within the meaning of s 23, the property 'includes' premises occupied for business purposes. The possible significance is that Parliament thought it necessary specifically to

exclude such a tenancy from the ambit of s 3 by including it in s 8 as a type of 'statutorily protected tenancy'. Had Parliament considered that it was not of premises 'let as a dwelling', such a tenancy would not in any event have fallen within s 3 and there would have been no need to provide that it should be thus excluded. Accordingly the perceived need to exclude it may suggest that, at any rate for the purpose of s 3, such a tenancy is indeed of premises 'let as a dwelling'. I will return to this argument, to which it will be convenient to refer as 'the s 8 argument'.

[16.1] Next one should turn to s 2 itself, set out at [3], above. On any view it is closely related to s 3. Thus the requisite circumstances are, again, that the premises are 'let as a dwelling' and that a person is lawfully residing in them. The difference is, however, that the proscription in s 2 is against enforcement of a right of forfeiture otherwise than by court proceedings and therefore, in that termination of the tenancy is achieved only at the moment of such enforcement, the section, unlike s 3, does not cater for the situation in which, at the time of recovery of possession, the tenancy has already come to an end. No doubt the proscription could have been insinuated into s 3 but at a cost in terms of terminological complexity. So it is given a section of its own; and, since it addresses an immediately prior stage in the relationship between landlord and tenant, it is presumably given an immediately prior position in the Act.

[16.2] Statutorily protected tenancies, although excluded from s 3, are not excluded from s 2. The reason is that no tenant has statutory protection, otherwise than by virtue of s 2 itself, against peaceable re-entry pursuant to a forfeiture clause. Violent re-entry is in any event prohibited by the criminal law, namely s 6 of the Criminal Law Act 1977; but the offence can be committed only if the tenant or some other person happens to be present at the time of re-entry.

[17] Finally one should turn to s 1. Although it has a much wider sweep, the section has a direct nexus with ss 2 and 3. It creates criminal offences of unlawfully depriving a 'residential occupier' of his occupation of premises and of harassing him. Under s 1(1) the phrase 'residential occupier' is defined to mean:

> '. . . a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises.'

The persons protected under ss 2 and 3 are prime examples of persons in the third category of 'residential occupier', namely persons occupying premises as a residence by virtue of the restrictions therein upon the right of others to recover possession of them.

[18] The links between ss 1, 2 and 3 reflect their collection together within Pt I. Section 5, however, has an entirely different subject and so comprises Pt II. Its only similarity with ss 2 and 3 is that it addresses premises 'let . . . as a dwelling'. It provides that a notice to quit such premises shall not be valid unless it is in writing, contains prescribed information and is given not less than four weeks in advance.

THE ORIGINS OF THE PROVISIONS IN THE 1977 ACT

[19] The 1977 Act was an Act of consolidation. Subsequently, however, it has been amended and so now it does more than to reflect legislation passed prior to 1977. Section 5 has a pedigree different from that of ss 1–3, in that, as originally

enacted, it re-enacted a provision of the Rent Act 1957 as amended. By contrast ss 1–3, as originally enacted, re-enacted ss 30–32 respectively of the Rent Act 1965 as amended. But two of those sections of the 1965 Act, namely ss 30 and 32, derive, with modifications, from s 1 of the Protection from Eviction Act 1964, being an Act passed with only temporary effect pending the bringing forward of the new government's Bill later to become the 1965 Act. Thus, whereas ss 1 and 3 of the 1977 Act have their genesis in s 1 of the 1964 Act, s 2 of the 1977 Act has its genesis only in s 31 of the 1965 Act, of which it is indeed a replica.

[20] Sorely in need of assistance in resolving such ambiguity in s 2 of the 1977 Act as prompts respectable rival arguments that the phrase 'let as a dwelling' means 'let wholly or partly as a dwelling' or, instead, means 'let exclusively as a dwelling', the court would have been entitled to consider any relevant explanation proffered in Parliament while what was to become s 31 of the 1965 Act travelled into enactment. But resort to Hansard proves to be of no assistance. In introducing to the House of Lords the clause which was to become s 31 of the Act Lord Mitchison said only:

> '. . . this is a proposed new clause, and I think that I had better read out to the House the first sentence of what I have been told about it. This new clause deals with a small and technical lacuna in Clauses 30 and 31. I am perfectly prepared to explain the small but technical lacuna, but it is very dull, and I wonder whether your Lordships will accept that from me. I beg to move.' (See 269 HL Official Report (5th series) col 475.)

Insertion of the clause was agreed; nothing more was said.

'LET AS A DWELLING' IN OTHER CONTEXTS

[21] The phrase 'let as a dwelling', although never directly the subject of construction in the context of s 2 of the 1977 Act, has been the subject of extensive construction in other provisions. But such construction has not been entirely consistent; and the inconsistency is no doubt testament to the desire of the courts to serve the different purposes perceived to underlie different provisions.

[22] Rent control and security of tenure were introduced on an emergency basis by the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915. Section 2(2) of the 1915 Act provided that the Act applied 'to a house or a part of a house let as a separate dwelling . . . and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies . . . ' In *Epsom Grand Stand Association Ltd v Clarke* [1919] WN 170 this court considered the applicability of the Act to the letting of premises on the race-course upon terms under which the tenants were to run part of them as a public-house and to occupy the other part themselves. The court held that the premises were 'let as a separate dwelling'. Bankes LJ, with whose judgment Scrutton and Atkin LJJ concurred, said (at 171):

> 'The house was dwelt in by the defendants and let to them for that purpose. It is in the fullest sense a dwelling-house, and none the less so because it is also a public-house. [Counsel for the landlord] contended that the Acts do not apply to houses if let for business purposes. I cannot accept that view. No doubt if the word "dwelling-house" is given its ordinary meaning the Act may seem to include cases not contemplated by the Legislature; but a restricted meaning would exclude many cases which were intended to be included. The object of the Legislature was to include all houses which are occupied as dwelling-houses provided they are of the class

a ascertained by their value as prescribed by the Act, notwithstanding that they are also used by the tenant for other purposes as well as those of a dwelling-house.'

In *Maunsell v Olins* [1975] 1 All ER 16 at 24, [1975] AC 373 at 389 Lord Wilberforce observed:

b

> 'Everybody knows . . . that protection under the Rent Acts is given not merely to single, identifiable, pure dwelling-houses or dwelling units, but also to units of a mixed character—houses . . . part (even a substantial part) of which is used for business purposes.'

c In *Wellcome Trust Ltd v Hamad, Ebied v Hopkins, Church Comrs for England v Baines* [1998] 1 All ER 657 at 665, [1998] QB 638 at 650 this court observed that the line of authority to which Lord Wilberforce there referred began with the *Epsom* case.

[23] The 1915 Act was replaced by the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. By s 12(2) it was again provided that the Act applied to d premises 'let as a separate dwelling'. But Parliament expressly endorsed the construction favoured in the *Epsom* case by including in the subsection a proviso that:

> '(ii) the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office e or for business, trade or professional purposes; . . .'

This second proviso to s 12(2) of the 1920 Act, repeated in almost identical terms in s 3(3) of a supplementary enactment, namely the Rent and Mortgage Interest Restrictions Act 1939, led to a confident continuation of the line of authority which favoured the generous construction, begun in the *Epsom* case, of the phrase f 'let as a dwelling' so as to cover a tenancy for mixed residential and business purposes ('for mixed purposes'). The line continued through, for example, the decisions of this court in *Hicks v Snook* (1928) 27 LGR 175, in *R v Brighton and Area Rent Tribunal, ex p Slaughter* [1954] 1 All ER 423, [1954] 1 QB 446 and in *British Land Co Ltd v Herbert Silver (Menswear) Ltd* [1958] 1 All ER 833, [1958] 1 QB 530.

g **[24]** I have explained at [15.4], above that, when the 1954 Act was enacted in order, in Pt II, to provide security of tenure for business tenants, the definition in s 23(1) of the tenancy to which Pt II applied was wide enough to cover a tenancy for mixed purposes (provided that there was continued occupation for business use). For three years, however, premises 'let as a dwelling' were precluded by s 43(1)(c) of the 1954 Act from falling under the protection of that h Act and remained under that of the Rent and Mortgage Interest Restrictions Acts. Then, however, came the Rent Act 1957, which removed the protection of these Acts from a large number of residential lettings above a modest rateable value. From then onwards a letting of premises above the specified value for mixed purposes (provided that there was continued occupation for business use) fell j under the protection of the 1954 Act: see s 11(7) of, and para 11 of Sch 4 to, the 1957 Act. A letting of premises below that value for mixed purposes (provided that there was continued occupation for business use) was ultimately also brought under the protection of the 1954 Act by s 64(2) of the Housing Act 1980. Even when, in the interim, the 1965 Act had reversed much of the effect of the 1957 Act by establishing a regime of regulated tenancies, it had barred tenancies which fell under the protection of the 1954 Act from falling into the new regime:

see s 1(3). It had also excised both the second proviso to s 12(2) of the 1920 Act and s 3(3) of the 1939 Act: see paras 1(1) and 3 of Sch 1.

[25] Thus it has been clear since 1957 that a tenancy for mixed purposes falls under the protection of the 1954 Act, provided that there is continued occupation for business use. For the purpose of discerning whether such a tenancy was protected and if so by what regime, it thus ordinarily became irrelevant to ask whether the premises were 'let as a dwelling'. So, after 38 years, the line of authority begun in the *Epsom* case largely came to an end. Does it follow however that, when, in other contexts and of course in particular in s 31 of the 1965 Act and also in s 32 thereof, Parliament used the phrase 'let as a dwelling', it did not intend the generous construction favoured by that line of authority to apply to it?

[26] Sir Ashley Bramall, a distinguished commentator in the field, wrote the notes to the Rent Act 1965 upon its publication in *Current Law Statutes*. In relation to s 32 he noted that '[t]here would seem to be no reason why the rules which have been established under the earlier Rent Acts for construing [the phrase "let as a dwelling"] should not apply to this section'; and he cited the case of *Ex p Slaughter*. In relation to s 31 he wrote:

> 'This section deals with the special case of enforcement of the right of re-entry under a lease. The lease has not come to an end before the right is enforced, so that s.32 has no application, but once the eviction has started it cannot be said that the tenant, or anyone claiming under him, occupies under the contract of tenancy so as to bring him within the definition of "residential occupier" in s.30 (5). Special provision is therefore required . . . It is to be observed that the section applies to ["statutorily protected"] tenancies . . . cf. s. 32).'

By the last sentence, Sir Ashley thus put forward the s 8 argument.

[27] Mr Julian Farrand, also a distinguished commentator in the field, wrote the notes to the 1977 Act upon its publication in *Current Law Statutes*. In relation to the phrase 'let as a dwelling' in s 2, he referred to his notes in the same volume to s 1 of the Rent Act 1977, which was enacted on the same day as was the 1977 Act. There he cited then recently reaffirmed authority in this court to the effect that it included premises used for business purposes as well as for a dwelling.

[28] Between 1978 and 1988 followed a quartet of authorities of this court which, as Mr Luba concedes, present difficulties for his construction. Directly or indirectly they each addressed a situation, far removed from the present, in which there had been a letting for mixed purposes, following which the tenant had ceased business use and argued that the cessation enabled him to invoke either the more benign protection of the Rent Act 1977 or the right to buy under the Housing Act 1985. In the quartet the court unsurprisingly rejected such an argument; but, unfortunately for Mr Luba, it did so by suggesting that the premises had not been 'let as a dwelling'.

[29.1] The first case is *Cheryl Investments Ltd v Saldanha, Royal Life Saving Society v Page* [1979] 1 All ER 5, [1978] 1 WLR 1329. The facts did not reflect the situation to which I have just referred; but, in what he called his fourth illustration, Lord Denning MR chose to address it ([1979] 1 All ER 5 at 10, [1978] 1 WLR 1329 at 1334). He said that in that situation the tenant's argument would fail 'because [the premises were] never let to him as a separate dwelling'.

[29.2] The second case is *Pulleng v Curran* (1980) 44 P&CR 58. In the event the tenant failed to establish that his business use had ceased and so his argument fell at the first hurdle. But, in passages later construed not to be obiter but to represent a second ground for the dismissal of his appeal, all three members of the court proceeded to reject his argument that, if his business use had ceased, he was protected by the Rent Act 1977. Although in their judgments Sir George Baker and Cumming-Bruce LJ in my view steered clear of casting their conclusion on the basis that the premises had not been let as a dwelling, Stephenson LJ (at 74) adopted that basis; and (at 75) he supported it by reference to the dictum of Lord Denning MR in the case of *Cheryl Investments*.

[29.3] The third case is *Wagle v Trustees of Henry Smith's Charity Kensington Estate* [1990] 1 QB 42, [1989] 2 WLR 669. Here the business use had undeniably ceased and the court held that the tenants did not thereby become protected under the Rent Act 1977. Counsel for the tenants had submitted that there was a long line of authority which precluded the court from holding that the premises were not 'let as a dwelling'. He had also submitted that the facts that in 1920 and 1939 Parliament had endorsed the conclusion that a letting for mixed purposes enjoyed the protection of the Rent etc Acts, that in 1957 it had changed the protection of such a letting to the 1954 Act and that in 1965 it had declined to reverse the change and had excised the provisions in the Acts of 1920 and 1939 were all irrelevant to the construction of the phrase when the need for it still arose. But the submission was rejected. Dillon LJ held ([1990] 1 QB 42 at 51, [1989] 2 WLR 669 at 676) that in particular *Pulleng*'s case obliged the court to reject it. Taylor LJ ([1990] 1 QB 42 at 53, [1989] 2 WLR 669 at 678) said that he saw some force in the submission. But he cited the dictum of Lord Denning MR in the case of *Cheryl Investments*; held that the effect of the statutory excision was that the meaning of the phrase 'let as a separate dwelling' had contracted and no longer included a tenancy for mixed purposes; and stated that the court was in any event bound to accept that view. Sir John Megaw agreed with both judgments.

[29.4] The fourth case is *Webb v Barnet London BC* (1988) 21 HLR 228, decided by the court only weeks after its decision in the case of *Wagle*. The letting for mixed purposes was of premises owned by the local authority and the tenant, who had ceased business use of the premises, wished to exercise the right to buy them under the 1985 Act. For that purpose he needed to establish that he had a secure tenancy and thus, for the purpose of s 79(1) of the 1985 Act, that the premises were 'let as a . . . dwelling'. In giving the substantive judgment Taylor LJ again relied heavily on the excision by the 1965 Act of the provisions in the Acts of 1920 and 1939, which he described as excision of the 'statutory extension' in those Acts of the phrase 'let as a dwelling'. Then, by reference in particular to the cases of *Cheryl Investments*, *Pulleng* and *Wagle*, he proceeded to explain why the court was bound to hold that the premises were not 'let as a . . . dwelling'.

[30] Mr Luba reserves the right to complain elsewhere, were it helpful to his argument for him to do so, that in the above quartet of cases this court fell into error. But he accepts that we are bound by the decisions and that, had his client voluntarily ceased business use of the premises, we could not hold him to be an assured tenant under s 1 of the Housing Act 1988 (which applies to premises 'let as a . . . dwelling'). He submits, however, that construction of s 2 of the 1977 Act, which occupies an entirely different area of the law, should be unaffected by them; that its construction should indeed be informed by the line of authority

which began with the *Epsom* case [1919] WN 170; and that a more recent decision of this court, namely the *Wellcome Trust* case [1998] 1 All ER 657, [1998] QB 638, shows that, at least in a third area of the law, the line of authority remains valid.

[31] In the *Wellcome Trust* case there was a tenancy for mixed purposes and, with the landlord's permission, the tenant sublet one of the residential flats within the premises to the defendant, who enjoyed protection under the Rent Act 1977. The question was whether, when the tenant surrendered his tenancy of the premises, the defendant enjoyed protection under the Rent Act 1977 against the claimant freeholder. The answer depended upon whether, within the meaning of s 137(3) of the Rent Act 1977, the defendant's flat formed 'part of premises which have been let as a whole on a superior tenancy but do not constitute a dwelling-house let on a statutorily protected tenancy'. In *Maunsell v Olins* [1975] 1 All ER 16, [1975] AC 373 the House of Lords had held by a majority that, in that context, the word 'premises' meant dwelling-houses or premises treated as dwelling houses for the purposes of the Rent Acts pursuant to the line of authority which began with the *Epsom* case. In the *Wellcome Trust* case, by one valuable judgment, this court explained that, in accordance with that line of authority, the premises had been let to the tenant 'as a dwelling' and that accordingly the defendant enjoyed protection against the claimant under the Rent Act 1977. Although the case of *Webb* was cited to it, the court in the *Wellcome Trust* case was not persuaded of the relevance of the excision in 1965 of the provisions in the Acts of 1920 and 1939. It said:

> 'It does not follow that by omitting the [provisions] Parliament produced the opposite result. The effect of the omission is to bring premises, part of which are used for business purposes, within the scope of the 1954 Act. But such premises may still essentially remain a dwelling house.' (See [1998] 1 All ER 657 at 672, [1998] QB 638 at 657.)

[32.1] I come to the decision of this court in *National Trust for Places of Historic Interest or Natural Beauty v Knipe* [1997] 4 All ER 627, [1998] 1 WLR 230. It was by reference to this authority that in the present case the judge held that the premises were not 'let as a dwelling' for the purpose of s 2 of the 1977 Act; and it is by reference thereto that Mr Weekes submits that we are required to dismiss the appeal.

[32.2] In the *National Trust* case the tenancy was of what was described in the agreement as an agricultural holding; and it was agreed to be protected by the Agricultural Holdings Act 1986. The holding comprised 350 acres of pasture, together with two farmhouses. The tenants covenanted not to use the holding for any purpose other than agriculture, to farm it in accordance with the rules of good husbandry and personally to reside in the farmhouses. They fell into arrears of rent; and, having complied with the pre-requisites set by the 1986 Act, the landlords served a notice to quit. In the ensuing action for possession the tenants contended that the notice was invalid in that, contrary to s 5 of the 1977 Act, it had omitted material required to be included by regulations made pursuant thereto. The omitted material was apparently of no practical interest to the tenant of an agricultural holding. The landlords responded that, in that the premises had not been 'let . . . as a dwelling', s 5 did not apply. The tenants' contention prevailed in the county court but the landlords' appeal was allowed.

[32.3] In the *National Trust* case the primary submission on behalf of the tenants to this court was the s 8 argument, suitably adapted. The fourth of the eight types of tenancy specified in s 8 of the 1977 Act as comprised in the

phrase 'statutorily protected tenancy', set out at (d), is 'a tenancy of an agricultural holding within the meaning of the [1986 Act].' The argument of the tenants was therefore that: (a) Parliament thought it necessary by s 8 specifically to exclude a tenancy of an agricultural holding from the ambit of s 3; (b) if the phrase 'let as a dwelling' in s 3 had not included a tenancy of an agricultural holding upon which there was a dwelling-house intended for residential use, the exclusion would have been unnecessary; (c) thus the phrase in s 3 included such a tenancy; (d) the phrase bore an identical meaning in all sections of the Act in which it appeared, namely ss 2, 3 and 5; (e) thus in s 5 the phrase included such a tenancy; and (f) in that it was common ground that s 8 did not apply to s 5, such a tenancy was not thereby excluded from the ambit of s 5.

[32.4] Pill LJ noted ([1997] 4 All ER 627 at 633, [1998] 1 WLR 230 at 236) that leading counsel for the landlords was inclined to acknowledge not only the difficulty presented by the s 8 argument on behalf of the tenants but also its inexorable logic. Judge LJ ([1997] 4 All ER 627 at 635, [1998] 1 WLR 230 at 238), who gave the only other substantive judgment, specifically associated himself with the fourth limb of the argument by saying that 'unnecessary confusion would be caused unless each term in the 1977 Act is given the same meaning wherever it appears'; and he referred ([1997] 4 All ER 627 at 636, [1998] 1 WLR 230 at 239) to the apparent logic of the argument.

[32.5] Nevertheless the unanimous conclusion of the court was that the premises which were the subject of the tenancy were not 'let . . . as a dwelling' for the purpose of s 5. Pill LJ said:

> '. . . the "premises" are the subject matter of the letting, that is the entire acreage, but they are let as an agricultural holding and not as a dwelling. The subject matter of the letting includes a dwelling but I cannot read the section as if it used the expression "premises which include a dwelling" or "any dwelling house let as a part of premises". The difficulty, which I share, in understanding why Parliament saw the need to make specific reference to agricultural holdings in s 3 of the Act dealing with prohibition of eviction without due process of law, does not lead me to the conclusion that agricultural holdings are included in s 5.' (See [1997] 4 All ER 627 at 633–634, [1998] 1 WLR 230 at 237.)

For his part, Judge LJ: (a) pointed out ([1997] 4 All ER 627 at 636, [1998] 1 WLR 230 at 239) that, prior to the Act of 1977, the precursor to s 5 was contained in an Act (the 1957 Act) different from the Act (the 1965 Act) which contained the precursors to ss 3 and 8, with the result that the s 8 argument would not then have been available; (b) referred ([1997] 4 All ER 627 at 636–637, [1998] 1 WLR 230 at 239 – 240) to purportedly comprehensive provisions relating to notices to quit agricultural holdings contained in a statute enacted only four months prior to enactment of the 1977 Act; (c) concluded ([1997] 4 All ER 627 at 637, [1998] 1 WLR 230 at 241) that, in construing the phrase 'let as a dwelling', it was crucially important to focus on the specific statutory provision in which it was contained; (d) found ([1997] 4 All ER 627 at 639–640, [1998] 1 WLR 230 at 243) that the tenancy was, as the agreement stated, an agricultural tenancy, as defined by the 1986 Act; (e) held ([1997] 4 All ER 627 at 639, [1998] 1 WLR 230 at 243) that s 5 did not, as it might have done, clearly include agricultural tenancies and should not be treated as if it did so; and (f) held ([1997] 4 All ER 627 at 640, [1998] 1 WLR 230 at 243) that the farmhouses were part of the agricultural holding and that their presence did not mean that the premises were 'let . . . as a dwelling'.

[33.1] There are three other recent statutory provisions which deserve sideways reference.

[33.2] Section 81 of the Housing Act 1996 forbids exercise of a right of forfeiture for a tenant's failure to pay a service charge which has been neither agreed nor already adjudged to be payable. By s 81(1) the provision applies to 'premises let as a dwelling'; and s 81(4) provides that the phrase does not include premises let on a tenancy to which Pt II of the 1954 Act applies.

[33.3] Section 167 of the Commonhold and Leasehold Reform Act 2002 forbids exercise of a right of forfeiture for failure on the part of a tenant under a long lease to pay—in the shorthand words of the section's title—'[a] small amount for [a] short period', whether in respect of rent or otherwise. By s 167(1) the provision applies to a 'long lease of a dwelling'; and s 167(4) provides that the phrase does not include a tenancy to which Pt II of the 1954 Act applies.

[33.4] Section 168 of the 2002 Act forbids the landlord under a long lease to serve a forfeiture notice, set by s 146(1) of the 1925 Act as a pre-condition of exercise of a right of forfeiture, unless the breach specified therein has been either admitted or already adjudged to have occurred. By s 168(1), analogous to s 167(1), the provision applies to a 'long lease of a dwelling'; and s 169(4), analogous to s 167(4), provides that the phrase does not include a tenancy to which Pt II of the 1954 Act applies.

[33.5] Each of the three provisions has a dual relevance to the present issue. Their first relevance is that they each prompt an argument analogous to the s 8 argument. The argument is that, in its separate consideration of three recent provisions, Parliament has taken the view that, unless it were specifically to provide for the exclusion of tenancies for mixed purposes, the phrases 'let as a dwelling' and 'lease of a dwelling' would be wide enough to include them and would therefore have an effect which, in relation to those provisions, it did not intend. Their second relevance is that each represents yet a further step, beyond those taken by Parliament in providing, ever since the Conveyancing Act 1881, for relief from forfeiture and in enacting what became s 2 of the 1977 Act, towards substantial circumscription, albeit in specified circumstances, of the facility for a tenant to find himself deprived of his home by forfeiture: the policy of further reining in the exercise of contractual rights of forfeiture is evident.

CONCLUSION

[34] I conclude that the phrase 'let as a dwelling' in s 2 of the 1977 Act means 'let wholly or partly as a dwelling' and so applies to premises which are let for mixed residential and business purposes. I am convinced that, when its precursor was introduced as s 31 of the 1965 Act, such was understood to be the established meaning of the phrase, contained, as it had been, in a series of prior enactments and so construed, as it had been, in a series of judgments of this court. If such is what the phrase then meant in s 31 of the 1965 Act, such is what it must now mean in s 2 of the 1977 Act: for the words are identical and lie on the page without any later qualification, direct or indirect. Their meaning cannot in my view have fluctuated with the tides which have ebbed and flowed in this court in relation to the meaning of the phrase in other contexts.

[35] This view of the meaning of the phrase in s 2 of the 1977 Act is strongly supported by the s 8 argument, which I hold to be unanswerable. The exercise of statutory construction encourages the attribution to each word, and all the more to each provision, of a reasonable value and discourages the dismissal of any such

word or provision as idle surplusage. The inclusion of a tenancy for mixed purposes in s 8 of the 1977 Act, as in the other three provisions referred to in [33] above, is not idly surplus: its purpose is to exclude such a tenancy from s 3 of the 1977 Act because otherwise the phrase 'let as a dwelling' would have included such a tenancy in it. It is the clearest window into the meaning of the phrase at least in s 3 and, by reference, in s 2.

[36] Whereas, however, s 3 of the 1977 Act may be regarded as a full brother of s 2, s 5 is no relation to the brothers at all: it simply happens to inhabit the same statute, albeit a different part. Mr Weekes persuaded the judge first to extract from the *National Trust* case [1997] 4 All ER 627, [1998] 1 WLR 230 the conclusion of Judge LJ, set out at [32.4], above, that the phrase 'let as a dwelling' should bear the same meaning in ss 2, 3 and 5 and then to marry it with the conclusion of Pill LJ, set out at [32.5], above, that s 5 did not refer to the letting of 'premises which include a dwelling'. But s 2 did not fall for any direct consideration in that case; its different genesis was irrelevant; and, although my respect for the views of the members of that court goes without saying, it seems to me, in the light of the analysis of the genealogy of the whole Act set out above, that it would be almost absurd that dicta in the *National Trust* case should weigh significantly in the construction of s 2, and still less should determine it. Unlike the letting in the present case, which was expressly for the mixed purposes apt to 'shop premises and residential accommodation', the letting in the *National Trust* case was of what was described in the agreement as an agricultural holding. I believe that the essence of that decision is simple, namely that the premises were not let as a dwelling because they were let as an agricultural holding. But if that analysis, instead of being simple, were to be simplistic, then in my view we would need, albeit with regret, to tolerate a difference in the meaning of the phrase 'let as a dwelling' in s 5, on the one hand, and in ss 2 and 3, on the other.

[37] It is high time for me to stand back and to ask a basic question: is there any reason to suppose that, in enacting s 2 of the 1977 Act and its precursor, Parliament intended, notwithstanding what I consider to be the likely meaning of the words which it chose, that tenants who hold tenancies for mixed purposes should not also enjoy the protection which on any view it was affording to purely residential tenants? I suggest that three main considerations underlie the limited prohibition in s 2 against what, in *Billson v Residential Apartments Ltd* [1992] 1 All ER 141 at 146, [1992] 1 AC 494 at 536, Lord Templeman described as the 'dubious and dangerous' method of enforcing a right of forfeiture by re-entry without due process of law: (a) A tenant should not be at risk of returning home to discover that, unbeknown to him, he and his family have been locked out and are homeless. If they are to be evicted, the eviction should be conducted in an orderly fashion, upon at least some prior notice, by officers subject to court direction. (b) If there is to be an issue as to whether the landlord is entitled to forfeiture under the terms of the tenancy, it is preferable, particularly in relation to a home, for the court to determine it in advance of eviction rather than in proceedings brought by the tenant for an injunction and damages in the wake of it or in criminal proceedings against the landlord under s 1 of the 1977 Act. (c) If there is to be an issue as to whether the tenant is entitled to relief against forfeiture pursuant to s 146(2) of the 1925 Act, it is, again, preferable, particularly in relation to a home, for the court to determine it in advance of eviction rather than in its wake. I see no reason why these considerations should not apply to a

tenant for whom the premises represent not only his home but also his place of business.

HUMAN RIGHTS

[38] My suggested interpretation of s 2 of the 1977 Act, namely that it applies to premises let to a tenant for mixed residential and business purposes, has been reached for the reasons set out above, unrelated to his human rights. But reference to his human rights fortifies the interpretation.

[39] So far as it is possible to do so, s 2 must be read and given effect in a way which is compatible with the tenant's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998): s 3 of the 1998 Act. There can be no doubt that the present issue engages the tenant's right to respect for his private life and for his home pursuant to art 8(1) of the convention and that the exercise by the landlords of their purported right of re-entry interfered with his right. Article 8(2) of course provides that:

> 'There shall be no interference by a public authority with the exercise of this right [under art 8(1)] except such as is in accordance with the law and is necessary in a democratic society . . . for the protection of the rights and freedoms of others.'

[40] In this regard counsel have made brief oral submissions to us on the case of *Connors v UK* (2004) 16 BHRC 639; and, aware that only days after the hearing before us the House of Lords would in its judgment upon *Lambeth London BC v Kay, Leeds City Council v Price* [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 WLR 570 survey the impact of the case of *Connors* upon entitlement to possession of a person's home in accordance with domestic principles of law, we have allowed counsel to make written submissions upon any relevant effect of the judgment following publication.

[41] There is no doubt that the cases both of *Connors v UK* and of *Kay v Lambeth London BC* lie at a considerable distance from the present case. They address the question whether rights under art 8 represent a reservoir of entitlement upon which the occupier of a home can draw in order to resist an order for possession when domestic law leaves him defenceless. Nevertheless in my view they assist performance in the present case of our obligation under s 3 of the 1998 Act to strive for compatible interpretation. For in the former the European Court stressed—and in the latter the House accepted—that, in considering whether interference with rights of the occupier under art 8(1) is 'necessary in a democratic society' for the protection of the rights of the landowner, the court has to consider whether the interference is proportionate to that aim; and that the absence of procedural safeguards for the occupier may well lead to a conclusion that it is not proportionate.

[42] In the case of *Connors v UK* enforcement of the right given to local authorities under United Kingdom domestic law to evict a gipsy from a designated site upon termination of his licence by a bare notice to quit was held by the European Court to be incompatible with his rights under art 8. The court defined ((2004) 16 BHRC 639 at 663 (para 85)) the central issue as whether the domestic legal framework provided sufficient procedural protection for his rights. And (at 666 (para 94)) it concluded that:

'The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal . . .'

It was thus held to have been insufficient that there had been court proceedings of a formal character in which the local authority's right to possession had been endorsed; for the adequacy of the reasons behind its election to terminate the applicant's licence had never been established.

[43] That such is the foundation (or a major part of it) of the judgment in the case of *Connors v UK* is confirmed in the speeches in the case of *Lambeth London BC v Kay*, in particular in those of Lord Hope of Craighead (at [67]) and of Lord Scott of Foscote (at [160] and [172]).

[44] From the case of *Connors v UK* I confidently derive the following: that an interpretation of s 2 of the 1977 Act which prohibits a landlord from exercising—otherwise than by proceedings in court—an alleged right of re-entry upon premises let for use as a dwelling as well as for business purposes is an interpretation which would be compatible with the tenant's rights under art 8; and, by contrast, that the opposite interpretation of it would be incompatible with them.

[45] I should add that Mr Weekes complains that there is a serious fault in this line of argument, namely that it takes no account of the fact that art 8(2) circumscribes interferences with rights under art 8(1) on the part only of a 'public authority' rather than of private landlords such as his clients. In my view, however, his point does not affect the interpretative obligation under s 3 of the 1998 Act. Had s 2 of the 1977 Act not borne the meaning which I ascribe to it, a question might have arisen as to whether the positive obligations on public authorities to protect citizens from infringements of their rights under art 8 were such as to oblige the state to legislate against enforcement by private landlords of contractual rights of re-entry of premises let for mixed purposes otherwise than by proceedings in court. My conclusion, however, is that happily such legislation is already in place.

THE ANSWER

[46] My answer to the question in [1], above, is yes.

ORDERS

[47] I would allow the appeal and set aside the order for possession.

SIR PETER GIBSON.

[48] I agree that this appeal should be allowed. As we are differing from the judge and in deference to the careful arguments of counsel and because of the importance of the question raised on the appeal, I add a few words of my own. I adopt the definitions used by Wilson LJ.

[49] In *Pulleng v Curran* (1980) 44 P&CR 58 at 65 Sir George Baker said of tenanted premises similar to those which are the subject of this appeal: 'There must be tens of thousands of similar leases where the person running the business lives above the shop.' That must have been as true in 1977 when the Protection from Eviction Act 1977 was passed as it was in 1965 when the Rent Act 1965, containing the predecessor provisions to ss 2 and 3 of the 1977 Act, was passed and I do not doubt that it continues to be true today. Every lease contains a forfeiture clause such as that in cl 6(1) of the lease in the instant case. I share

Wilson LJ's surprise that the question which has arisen in this case has not previously been answered directly by an authoritative decision on s 2 of the 1977 Act.

[50] Section 2 directs attention, as Mr Weekes pointed out, to the terms of the tenancy and the use of the premises to be made by the tenant: are demised premises 'let as a dwelling'? If one looks at the statutory language, one can readily see indications pointing in two different directions. One notes that in s 2 itself, whereas the opening words are 'Where any premises are let as a dwelling', the concluding words are 'the premises or part of them', and that suggests that the whole of the premises must be let as a dwelling. Against that can be set the s 8 argument as described by Wilson LJ and in particular the noticeable absence from s 2, in contrast with s 3, of the exclusion of a statutorily protected tenancy, including a business tenancy subject to Pt II of the Landlord and Tenant Act 1954.

[51] It is ordinarily both unnecessary and undesirable to construe a consolidation Act by reference to statutory antecedents, but it is permissible to do so in a case where the consolidation Act is unclear (*Farrell v Alexander* [1976] 2 All ER 721, [1977] AC 59). The present is such a case.

[52] Mr Weekes submitted that, if anything, the legislative history of ss 2, 3 and 5 helped the landlords. Mr Luba QC has persuaded me that the opposite is true. I note in particular that ss 2 and 3 of the 1977 Act derive from ss 31 and 32 of the 1965 Act whereas s 5 derives from a different source, the Rent Act 1957. I am also persuaded that in 1965 the words 'let as a dwelling' had an established meaning through a long line of authority developed in the context of the statutory phrase 'let as a separate dwelling' in the Rent and Mortgage Restrictions Acts. The inclusion of the word 'separate' in those Acts must have made it more difficult for the courts to find that a letting for mixed purposes was a letting as a separate dwelling, but from *Epsom Grand Stand Association Ltd v Clarke* [1919] WN 170 onwards until the time of the enactment of the 1965 Act such a letting was held to be a letting as a separate dwelling. Parliament must be taken to have been aware of those decisions when enacting the predecessors of ss 2 and 3 of the 1977 Act.

[53] I respectfully agree with the comments of Wilson LJ on what he has called the quartet of cases between 1978 and 1988. In this context the decision of this court in *Wellcome Trust Ltd v Hamad, Ebied v Hopkins, Church Comrs for England v Baines* [1998] 1 All ER 657, [1998] QB 638 is of particular importance, because the quartet of cases were among those cited to the court. Nevertheless this court did not accept the suggestion of Dillon LJ in *Wagle v Trustees of Henry Smith's Charity Kensington Estate* [1990] 1 QB 42 at 48, [1989] 2 WLR 669 at 673 that the *Epsom* case could not really carry much authority ([1998] 1 All ER 657 at 665, [1998] QB 638 at 650). On the contrary, this court reaffirmed the line of authority commencing with the *Epsom* case.

[54] The decision of this court in *National Trust for Places of Historic Interest or Natural Beauty v Knipe* [1997] 4 All ER 627, [1998] 1 WLR 230 formed the basis of the judge's decision in the present case and was heavily relied on by Mr Weekes before us. Again I respectfully agree with Wilson LJ's comments on that case. The judge did not take sufficient note of the fact that that case concerned a letting of premises (over 350 acres including farmhouses) as an agricultural holding, whereas by virtue of the user covenant in cl 3(13) of the lease in the present case unquestionably the letting of the upper floor of the premises was as a dwelling; nor did he take sufficient note of the fact that the *National Trust* case was a

decision on s 5 in Pt II of the 1977 Act whereas the present case is concerned with s 2 in Pt I of that Act. Whilst I have some sympathy with the judge who not surprisingly followed dicta of this court, I respectfully disagree with his conclusion.

[55] Mr Luba disclaimed any defence based on human rights because no such defence was pleaded below and counsel then appearing for the tenant was not permitted to develop one in argument at trial. But Mr Luba suggested that the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) assisted on the interpretation of s 2 and supported the tenant's submission. I agree.

[56] For these as well as the reasons given by Wilson LJ I too would allow this appeal and make the order he suggests.

Appeal allowed.

Kate O'Hanlon Barrister.

Scottish & Newcastle plc v Raguz

[2006] EWHC 821 (Ch)

CHANCERY DIVISION

HART J

30, 31 JANUARY, 1–3, 6–9 FEBRUARY, 11 APRIL 2006

Landlord and tenant – Assignment of lease – Implied covenant – Indemnity for unpaid rent – Reversioner claiming rent from original tenant after current tenant defaulting – Original tenant claiming under implied covenant – Whether original tenant liable for rent – Whether notice of liability valid – Whether notice served within specified period of date when rent became due – Landlord and Tenant (Covenants) Act 1995, s 17(2).

The claimant was the original tenant of two underleases. It assigned the underleases to the defendant. By virtue of the Land Registration Act 1925 the assignments contained an implied covenant by the defendant that he and his successors would pay the rent reserved by the underleases, and comply with the covenants and conditions contained them, and would indemnify the claimant in the event of breach. By March 1992 the underleases had become vested in a company, H, and the reversion in another company, N. H defaulted on payment of rent in June 1999 and administrative receivers were appointed. The accrued liability of H in respect of rent was not then known as the levels of rent had been subject to rent review since 1995, in the case of the first underlease, and since 1996, in the case of the second. In 2001 N first served statutory demands on the claimant for the sums which it claimed then to be owing in respect of rent. The claimant paid the sums claimed and brought proceedings against the defendant on the indemnity covenant. Section 17[a] of the Landlord and Tenant (Covenants) Act 1995 applied as the underleases had been granted before 1 January 1996. Under that section, where a person (the former tenant) was as a result of an assignment no longer a tenant under a tenancy but, inter alia, remained bound by a covenant of the tenancy under which any fixed charge was payable, the former tenant was not to be liable under that covenant to pay any amount unless, within the period of six months beginning with the date when the fixed charge became due, the landlord served on the former tenant a notice informing him that the charge was then due and that the landlord intended to recover from the former tenant such amount as was specified in the notice. A 'fixed charge' included rent. Where a notice had been served under s 17(2) the amount the former tenant was liable to pay was not to exceed the amount specified unless his liability was subsequently determined to be for a greater amount, the notice informed him of that possibility, and within the period of three months beginning with the date of the determination, the landlord served a further notice informing the original tenant that the landlord intended to recover that greater amount. N had served the claimant with a number of s 17(2) notices, including, on 8 March 2001, in relation to the first underlease, a notice specifying a sum of additional rent for the period 18 April 1995 to 28 September 2000 pursuant to a rent review concluded on 23 September 2000 (the March notice), and on 20 July 2001, in relation to the second underlease, a notice specifying a sum of additional rent for the period 25 December 1996 to 28 September 2001 pursuant to a rent review agreed on

a Section 17, so far as material, is set out at [20], below

10 July 2001 (the July notice). The defendant contended, inter alia, on the basis that its indemnity extended only to rent not paid by H and for which the claimant had itself been liable, that the claimant had not been liable to N in relation, inter alia, to the sums claimed under the March notice and the July notice, as they had not been served within the period of six months of the charge becoming due. The claimant contended that the 'date when the charge becomes due' in s 17(2) of the 1995 Act referred to when the charge became 'demandable', which where rent had not yet become demandable, being subject to an unresolved process of review, meant that a landlord did not need to serve a notice under s 17(2) in order to preserve the original tenant's liability.

Held – On the true construction of s 17 of the 1995 Act subsequently determined rent was due at the date of its accrual as a liability, not at the date of its demandability. Section 17(2) was designed to relieve a former tenant of liability in respect of any fixed charge unless the landlord had taken a purely formal step of notification to preserve the former tenant's liability. No hardship to the landlord resulted. In the case of a long drawn out process of rent review he could protect himself against the possibility of the current tenant proving in due course unable to meet his liability by serving protective notices on the original tenant. The original tenant then got the requisite early warning of what the future might hold. Accordingly, in the instant case, the March notice and the July notice had been ineffective to render the claimant liable in respect of those sums of additional rent specified in them (see [24], [31], [34]–[36], below).

Notes

For implied indemnity covenants on transfers of pre-1996 leases, see 26 *Halsbury's Laws* (4th edn) (2004 reissue) para 974, and for the liability of original tenant for rent, see 27(1) *Halsbury's Laws* (4th edn reissue) para 256 and Supp to 27(1) *Halsbury's Laws* (4th edn reissue) para 256.

For the Landlord and Tenant (Covenants) Act 1995, s 17 , see 23 *Halsbury's Statutes* (4th edn) (2004 reissue) 1192.

Cases referred to in judgment

Allied London Investments Ltd v Hambro Life Assurance Ltd [1984] 1 EGLR 62.

Bank of India v Trans Continental Commodity Merchants Ltd [1983] 2 Lloyd's Rep 298, CA.

Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd [2003] EWHC 1252 (Ch), [2004] 3 All ER 184, [2003] 1 WLR 2064.

Dawson v Lawes (1854) 23 LJ Ch 434, 69 ER 119.

Ikerigi Cia Naviera SA v Palmer, Global Transeas Corp v Palmer, The Wondrous [1991] 1 Lloyd's Rep 400; *affd* [1992] 2 Lloyd's Rep 566, CA.

Jervis v Harris [1996] 1 All ER 303, [1996] Ch 195, [1996] 2 WLR 220, CA.

MacTaggart v Watson (1835) 3 Cl & Fin 525, 6 ER 1534, HL.

Scottish & Newcastle plc v Raguz [2003] EWCA Civ 1070, [2004] L & TR 11.

Socomex Ltd v Banque Bruxelles Lambert SA [1996] 1 Lloyd's Rep 156.

South Tottenham Land Securities Ltd v R & A Millett (Shops) Ltd [1984] 1 All ER 614, [1984] 1 WLR 710, CA.

United Scientific Holdings Ltd v Burnley BC [1977] 2 All ER 62, [1978] AC 904, [1977] 2 WLR 806, HL.

Webber (CA) (Transport) Ltd v Railtrack plc [2003] EWCA Civ 1167, [2004] 3 All ER 202, [2004] 1 WLR 320.

Claim

The claimant Scottish & Newcastle plc brought proceedings for the payment of the sum of £346,313·32 (later amended by the addition of £245,714·55) and for declaratory relief against the defendant Zeljko Stephen Raguz on an indemnity covenant contained in an assignment of underleases dated 17 March 1967 and 7 March 1969 of hotel premises in Leicester by the claimant to the defendant. The facts are set out in the judgment.

Christopher Stoner (instructed by *Eversheds LLP*, Newcastle upon Tyne) for the claimant.

Edward Bannister QC and *Marion Lonsdale* (instructed by *LHP Law LLP*, Redditch) for the defendant.

Cur adv vult

11 April 2006. The following judgment was delivered.

HART J.

[1] This action concerns two underleases dated respectively 17 March 1967 (the 1967 lease) and 7 March 1969 (the 1969 lease) whereby Colston Property Holdings Ltd demised to the claimant hotel premises in Leicester for a term of years expiring on 22 March 2062. By each underlease the claimant covenanted to pay rent in advance on the usual quarter days, the rent being reviewable every 14 years of the term.

[2] The claimant assigned the underleases to the defendant on 29 September 1982 for a consideration of £1. At the same time the hotel business then carried on at the premises by the claimant was assigned to a company in which the defendant was interested, Impney Hotel Properties Ltd. The assignments of the underleases contained, by virtue of s 24 of the Land Registration Act 1925, a covenant by the defendant that he and his successors would pay the rent reserved by, and comply with the covenants and conditions contained in, the underleases and would indemnify the claimant in the event of breach (the s 24 indemnity). The precise terms of that covenant are examined in more detail below.

[3] Not long afterwards, it would seem in about March 1983 but the defendant remembers it somewhat differently, the defendant assigned the underleases to a company called Villafield Ltd, which in turn gave covenants for indemnity to the defendant guaranteed by two gentlemen, apparently brothers, called Virani.

[4] By March 1992 the underleases had become vested in a company called Hotel St James Ltd (HSJ). HSJ defaulted on payment of rent in June 1999 and its mortgagees appointed administrative receivers on 6 October 1999, the administrative receivers being a Mr Kinlan and Mr Dattani, partners in the well-known firm of BDO Haywood.

[5] By that time the reversioner to the underleases was National Car Parks Ltd (NCP). Its inability to recover rent from HSJ meant that the claimant, as original underlessees, became a potential target of a claim by NCP for the rent under the lease so long as it remained unpaid. Subject to the provisions of the Landlord and Tenant (Covenants) Act 1995 the claimant had no answer to that claim.

[6] The amount of NCP's potential claim against the claimant suffered from uncertainty in two respects. First, as regards the past, the accrued liability of HSJ in respect of rent was not known: the level of the passing rent had been the subject of an unresolved process of review since 1995 in the case of the 1967 lease

and 1996 in the case of the 1969 lease. The amount of accrued liability in respect of the reviewed rent would only be known when that review process was completed. Secondly, so far as the future was concerned, there was potential liability for the claimant until 2062. The only way of mitigating that potential liability was to find someone who was prepared to take on the liability under the two underleases.

[7] The defendant was similarly on the hook. To the extent that the claimant was made liable for the rents, it could prima facie pass on the liability to him.

[8] An additional feature of this situation, horrid for both claimant and defendant, was that it was in the highest degree unlikely that NCP would resolve matters for both of them by forfeiting the lease. The claimant is a major quoted public company and, from the point of view of any landlord, a 'blue chip' covenant. There are also peculiarities about the premises which can usefully be described at this stage.

[9] The premises demised by the 1967 and 1969 leases comprise the top storey or two of a late 1960s multi-storey car park in what was once, but has ceased to be, the commercial heart of Leicester. Access to the premises under those underleases was by virtue of an easement from ground floor level by lift. There were, in addition, reserved parking spaces for the hotel in the upper storeys of the car park. From an aesthetic, planning or commercial point of view, the vision behind the development, clear and bright-eyed as it may have been in the late 1960s, is difficult to recapture through twenty-first century spectacles which see only the multi-storey car park with, at street level, some down-market commercial premises (a sauna and massage parlour giving some indication of the overall tone). The original conception had no doubt been the creation of a high class hotel (as required by the user covenants) offering easy city centre parking with commanding views over the city. It was originally badged as the Abbey Motor Hotel.

[10] At some point in the history of the premises the access arrangements had been improved by the acquisition of an alternative access at street level through a lobby. The lease of this access (the lobby lease) post-dated the involvement of either the claimant or the defendant but had, by 1999, become integral to the way in which the hotel actually operated. The lobby lease had also expired by that date, and HSJ had only the benefit of a continuing lease under the Landlord and Tenant Act 1954.

[11] What has given rise to the dispute between the parties to this action is the steps which the claimant took in order to protect its own position in the unpleasant situation with which it was faced. In very summary form the claimant's approach was as follows: (i) it decided that the solution was that the administrative receivers should be supported in their attempts to dispose of the underleases as soon as possible to a person who would then assume responsibility for the rent; (ii) it hoped that such a person (the purchaser) would pay a premium to the administrative receivers sufficient to enable HSJ to discharge its liability for any accrued liability in respect of rent; (iii) it was persuaded that those aims were more likely to be achieved if the hotel business kept running while the premises were being marketed; (iv) in the face of a threat by the administrative receivers that they would have to close the business before the purchaser could be found, it agreed to assist the administrative receivers in keeping the business running.

[12] That policy had some merit. The decision to support the administrative receivers was taken in May 2000 (although not formalised until August 2000) and by October 2000, a purchaser had been found at a premium of £200,000 who

appeared anxious to complete quickly. This was a company (Skymede Enterprises Ltd) of whom the moving force was a Mr Rizvi. As a result, however, of a chapter of unforeseen events, the sale to Mr Rizvi's company was not completed until 28 February 2003. In the meantime HSJ had paid no rent. On 13 June 2001 NCP had served statutory demands on the claimant for sums totalling £346,313·32 (£323,515·96 under the 1967 lease and £22,797·36 under the 1969 lease) which it claimed then to be owing in respect of rent. The claimant paid that sum to NCP on 5 July 2001.

[13] By 28 February 2003 further rent (and other sums) had accrued due under the leases (including the lobby lease). NCP made it a condition of the assignment that those sums (which included £245,714·55 in respect of rent arrears under the 1967 lease and the 1969 lease) should be paid off. The claimant took steps to ensure that this happened, providing the necessary sums from its own resources.

[14] Those proceedings were commenced on 17 September 2001. As originally formulated they sought payment of the sum of £346,313·32 and declaratory relief as regards future liabilities. By amendment made on 30 January 2006 they were amended by the addition of a claim to the £245,714·55.

[15] A summary judgment application made by the claimants in November 2001 and not determined at first instance until 9 December 2002 yielded the claimant only a limited success. In his judgment dated 9 December 2002, Judge Norris held that a distinction had to be drawn between rent for which the claimant had become liable prior to 3 August 2000 and that which had accrued subsequent to that date. The significance of the date was that it was the date on which the claimant (or more accurately its subsidiary S&N Pubs and Restaurants Ltd (Pubs)) formally entered into the agreement with the administrative receivers which was intended to enable the latter to continue trading the hotel business while the purchaser was being sought (the maintenance agreement). The judge held that the question whether the defendant should be liable to the claimant in respect of rental demanded after that date had to go to trial. But he held that the defendant had no answer to the claim for rent demanded before that date, a sum claimed to be £39,978·08. He rejected the defendant's argument that the s 24 indemnity was in the nature of a guarantee and therefore discharged altogether as a result of the arrangements entered into between the claimant and the administrative receivers. Judgment was therefore given for the £39,978·08 and interest, and directions given for trial of the balance of the claim. That judgment was upheld on appeal: see *Scottish & Newcastle plc v Raguz* [2003] EWCA Civ 1070, [2004] L & TR 11 (Sir Andrew Morritt V-C, May and Sedley LJJ).

ISSUES

[16] The principal points taken by the defendant are as follows: (i) that the s 24 indemnity extends only to rent not paid by HSJ and for which the claimant was itself liable. Issue is taken as to whether the claimant ever was liable to NCP in relation to any of the sums claimed as a result of the application to the facts of s 17 of the 1995 Act (the s 17 argument). (ii) The fact of entry into the maintenance agreement and the steps taken by the claimant pursuant to it or under its general aegis had the effect of altering the character of the payments made by the claimant so as to take them outside the scope of the s 24 indemnity. These are my own very general words seeking to summarise a number of discrete points made on behalf of the defendant and summarised by Mr Bannister and Miss Lonsdale in their skeleton opening submissions in the proposition that—

'the indemnity cannot be used by the original lessee as cover for a private commercial gamble, where the original lessee in effect takes over control of the current tenant and attempts a speculative venture of his own.'

(iii) As a separate but related point, it was argued that certain of the steps taken by the claimant had had the effect of increasing its liabilities in a manner which would not have occurred had the claimant's intervention not occurred. Those steps allegedly included: (a) embarking on a fruitless exercise of seeking to sell the hotel to a purchaser who wished to use it as an asylum seekers' hostel; (b) deterring the administrative receivers from accepting what would have been an advantageous offer by NCP to settle the 1967 lease rent review rather than having it determined by an independent expert; (c) causing the hotel to be marketed at too high a premium; (d) prompting NCP to serve s 17 notices which would not otherwise have been served. (iv) In relation to the payment on 28 February 2003 it was submitted that this payment fell outside the s 24 indemnity since, on a true analysis, it was not a payment by the claimant to NCP in respect of a liability of the claimant but a payment by the claimant on behalf of HSJ in respect of HSJ's liability.

[17] In addition to those points, some detailed points on the quantum of the claim are raised, turning on the way in which NCP had (or had not) credited HSJ with certain rent deposits which it held. I deal with these at the end of my judgment.

THE SECTION 17 ARGUMENT

[18] It is convenient to take this first since it is a stand-alone legal point which requires little further by way of detailed factual narrative.

[19] At common law the claimant retained a primary liability to pay the rent under the 1967 lease and the 1969 lease until 2062. The fact that it had assigned the leases as long ago as 1982 matters, as Walton J put it in *Allied London Investments Ltd v Hambro Life Assurance Ltd* [1984] 1 EGLR 62 at 63, 'not one jot or tittle' as regards its contractual liability to the reversioner for the time being.

[20] In relation to tenancies granted after 1 January 1996 that situation no longer obtains: see ss 1(1) and 5 of the 1995 Act. So far as concerns tenancies granted before that date, the matter is governed by s 17 of the 1995 Act which, so far as material, is in the following terms:

'(1) This section applies where a person ("the former tenant") is as a result of an assignment no longer a tenant under a tenancy but . . . (b) (in the case of any tenancy) he remains bound by such a covenant.

(2) The former tenant shall not be liable under . . . the covenant to pay any amount in respect of any fixed charge payable under the covenant unless, within the period of six months beginning with the date when the charge becomes due, the landlord serves on the former tenant a notice informing him—(a) that the charge is now due; and (b) that in respect of the charge the landlord intends to recover from the former tenant such amount as is specified in the notice and (where payable) interest calculated on such basis as is so specified . . .

(4) Where the landlord has duly served a notice under subsection (2) . . . the amount (exclusive of interest) which the former tenant . . . is liable to pay in respect of the fixed charge in question shall not exceed the amount specified in the notice unless—(a) his liability in respect of the charge is subsequently determined to be for a greater amount, (b) the notice informed

him of the possibility that that liability would be so determined, and (c) within the period of three months beginning with the date of the determination, the landlord serves on him a further notice informing him that the landlord intends to recover that greater amount from him (plus interest, where payable) . . .

(6) In this section—"fixed charge", in relation to tenancy, means—(a) rent, (b) any service charge as defined by section 18 of the Landlord and Tenant Act 1985 (the words "of a dwelling" being disregarded for this purpose), and (c) any amount payable under a tenant covenant of the tenancy providing for the payment of a liquidated sum in the event of a failure to comply with any such covenant . . .'

[21] Section 27 of the 1995 Act provides for the form of any notice for the purpose of, inter alia, s 17 to be prescribed by regulations (see s 27(1)). Section 27(3) and (4) provide as follows:

'(3) The regulations shall require any notice served for the purposes of section 17 to include an explanation of the significance of the notice.

(4) If any notice purporting to be served for the purposes of section . . . 17 is not in the prescribed form, or in a form substantially to the same effect, the notice shall not be effective for the purposes of . . . section 17 . . .'

[22] The Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995, SI 1995/2964 prescribe two relevant forms of notice, one (Form 1) for use under s 17(2) and the other (Form 2) for use under s 17(4).

[23] Form 1 contains the following substantive paragraphs:

'**3.** I/we as landlord[3] hereby give you notice that the fixed charge(s) of which details are set out in the attached Schedule[4] is/are now due and unpaid, and that I/we intend to recover from you the amount(s) specified in the Schedule [and interest from the date and calculated on the basis specified in the Schedule][5]. (see Notes 2 and 3)

4.[6] There is a possibility that your liability in respect of the fixed charge(s) detailed in the Schedule will subsequently be determined to be for a greater amount. (see Note 4)'

Paragraph 3 is footnoted (fn 4) as follows:

'The Schedule must be in writing, and must indicate in relation to each item the date on which it became payable, the amount payable and whether it is rent, service charge or a fixed charge of some other kind (in which case particulars of the nature of the charge should be given). Charges due before 1 January 1996 are deemed to have become due on that date, but the actual date on which they became due should also be stated.'

Paragraph 4 is footnoted (fn 6) as follows:

'Delete this paragraph if not applicable. If applicable (for example, where there is an outstanding rent review or service charge collected on account) a further notice must be served on the former tenant or guarantor within three (3) months beginning with the date on which the greater amount is determined. If only applicable to one or more charge of several, the Schedule should specify which.'

In addition Note 4, as referred to in the text of para 4, is in the following terms:

'**4.** *Change in amount due.*—Apart from interest, the landlord is not entitled to recover an amount which is more than he has specified in the notice, with one exception. This is where the amount cannot be finally determined within six months after it is due (for example, if there is dispute concerning an outstanding rent review or if the charge is a service charge collected on account and adjusted following final determination). In such a case, if the amount due is eventually determined to be more than originally notified, the landlord may claim the larger amount if and only if he completes the paragraph giving notice of the possibility that the amount may change, and gives further notice specifying the larger amount within three months of the final determination.'

[24] The problem to which those provisions give rise is, shortly stated, this. Under a typical upwards only rent review provision such as obtained in the present case, the rent capable of being demanded by the landlord will be limited to the unreviewed rent so long as the review process has not been completed. Once, however, that process has been completed the reviewed rent will become payable retrospectively with effect from the review date and can be demanded by the landlord as from the rent day next following the completion of the review process (see *South Tottenham Land Securities Ltd v R & A Millett (Shops) Ltd* [1984] 1 All ER 614 at 618, [1984] 1 WLR 710 at 715 and *United Scientific Holdings Ltd v Burnley BC* [1977] 2 All ER 62 at 76, [1978] AC 904 at 935, per Lord Diplock). The question is as to what if anything the landlord needs to do to preserve his ability to claim the reviewed rent retrospectively as against the original tenant. Can he wait until the reviewed rent becomes demandable and then serve a notice in Form 1 within six months of that date identifying the amount of the reviewed rent which has become demandable? Or must he serve a Form 1 notice within six months of the rent day on which the reviewed rent first accrues, and then serve a Form 2 notice within three months of the date on which, having been determined, the reviewed rent becomes demandable?

[25] In posing the question in that way I have used the word 'demandable' in order to avoid the slipperiness of the words 'due' or 'payable'. For this purpose the time at which it is 'demandable' is the time at which the tenant could not resist an immediate claim for its payment as a liquidated sum.

[26] The notices served by NCP in the present case for the most part proceeded on the view that the first of the answers was the correct one. Thus, taking first the notices given under the 1967 lease, the following notices were given to the claimant:

	Date of Notice	Fixed Charges	
(1)	11.11.99	Rent for ¼ 24/6/99	£7,108·75
		Rent for ¼ 29/9/99	£7,108·75
		Maintenance charges 29/9/99	£352·77
(2)	16.6.00	Balance of	

		Rent for ¼ 25/12/99	£2,979·93
		Rent for ¼ 25/3/00	£7,108·75
(3)*	3.8.00	Rent for ¼ 24/6/00	£7,108·75
(4)	8.3.01	Rent for ¼ 29/9/00	£19,975·00
		'Additional rent for the period 18th April 1995 to 28th September 2000 payable pursuant to a valuation published by Ian Jones FRICS on 23rd September 2000 of'	£279,849·00
(5)	8.3.01	Rent for ¼ 25/12/00	£19,975·00

[27] In all these cases save for (3)* the notice was in Form 1 with para 4 struck out. Notice number (3) did, however, contain para 4 and thus preserved the possibility of claiming a subsequent increase in the rent for the quarter commencing on 24 June 2000 by the mechanism of a s 17(4) notice served within three months of 29 September 2000 (that increased rent having become payable on the quarter day next following its determination). That mechanism was not in fact employed. Instead the increased rent for that quarter was simply included in the overall lump of additional rent claimed in notice number (4).

[28] A similar, although not identical, pattern appears in the notices given under the 1969 lease:

	Date of Notice	Fixed Charges	
(1)	11.11.99	Rent for ¼ 24/6/99	£1,857·97
		Rent for ¼ 29/9/99	£1,857·97
(2)	16.6.99	Balance for ¼ 25/12/99	£778·50
		Rent for ¼ 25/3/00	£1,857·97
(3)*	3.8.00	Rent for ¼ 24/6/00	£1,857·97
(4)*	8.3.01	Rent for ¼ 29/9/00	£1,857·97
		Rent for ¼ 25/12/00	£1,857·97
(5)*	20.07.01	Rent for ¼ 25/3/01	£1,857·97
		Rent for ¼ 24/6/01	£1,857·97

'Additional rent for the period 25th December 1996 to 28th September 2001 payable pursuant to the rent review agreed and documented in a Rent Review Memorandum dated 10th July 2001 of'	£53,998·61

The asterisked notices are, once again, those in which para 4 has not been struck out.

[29] The general submissions made on behalf of the defendant may be summarised as follows: (1) where a notice which has been served in respect of rent due for any quarter has, by striking out para 4 in the statutory form, not preserved the possibility of the original tenant being liable in a greater sum than that specified in the notice, the original tenant can never be made liable for a greater sum in respect of that quarter; (2) where such a notice has been served it is implicit, not only that there will be no such liability asserted in respect of that quarter, but also that no such increased sum will be sought in respect of any earlier period; (3) since in relation to the 1967 lease and the 1969 lease the respective notices of 11 November 1999 and 16 June 2000 struck out para 4, it follows that the tenant could not be liable for increased rent in respect of the quarters covered by those notices, but also that there could be no liability for increased rent in relation to any of the preceding quarters.

[30] The claimant challenges both the first and the second steps in this argument. On its behalf Mr Stoner submitted that the critical words were those in s 17(2) which refer to 'the date when the charge becomes due', to the notice informing the tenant that 'the charge is now due', and to the fact that 'the landlord intends to recover from the former tenant such amount as is specified in the notice'. All those expressions point to the charge in question having become 'demandable'. Accordingly, where rent has not become demandable because, being subject to an unresolved process of review, its amount has not been determined, a landlord does not need to serve any notice under s 17(2) in order to preserve the original tenant's liability in respect of such sum. Moreover if no notice has been served under s 17(2), no question of having to serve a notice under s 17(4) can arise.

[31] If s 17(2) stood alone there would be much to be said for the claimant's submissions. However s 17(4) assumes that there may be a case in which the amount of the fixed charge (which is 'now due' under s 17(2)) may subsequently be determined to be in a greater amount. The concept of the fixed charge being 'now due' under s 17(2) is thus distinct from the amount in respect of that fixed charge for which the original tenant is potentially liable. If a fixed charge can be 'now due' but in an amount which has not yet been determined, 'now due' cannot mean 'demandable', but must mean 'in respect of which a liability has now arisen'.

[32] Note 4 to Form 1 shows that the draftsman of the 1995 regulations adopted this interpretation of the statutory provisions, treating s 17(4) as dealing with the case where 'the amount cannot finally be determined within six months *after it is due* (for example, if there is dispute concerning an outstanding rent review . . .)' (my emphasis). The same view of s 17(2) is, for what it is worth,

taken by the editors of 23 *Halsbury's Statutes* (4th edn) (2004 reissue) 1194 in their general note on the section where they state:

> 'Under sub-s (2), the landlord would be unable to recover the difference between the sum in the notice and the higher sum to which he was entitled by the subsequent determination (because he would not have served on the former tenant notice that the sum representing that difference was due within the requisite six-month period), and this would be unfair on the landlord. Sub-s (4) therefore enables . . .'

[33] Such an approach does, however, lead to an apparent oddity. It means that in a case such as the present, where the rent review process spread over a number of years, the landlord would only be entitled to claim the subsequently determined rent from the original tenant if he had served notices throughout the period, even though there was no default whatsoever by the current tenant in paying the demandable rent and no reason to suppose that the current tenant would default in paying the subsequently determined rent. On this scenario the landlord would not within the six-month period have any intention of claiming the demandable rent from the original tenant (because it had been paid). His s 17(2) notice would therefore have to specify 'the amount' which he intends to claim either as 'nil' or as 'nothing at the moment, but wait and see'.

[34] I do not think that there is any way of resolving this difficulty. It does not appear to me that the solution can lie in construing s 17(2) and (4) differently depending on whether or not a s 17(2) notice has been served. Either the subsequently determined rent is 'due' at the date of its accrual as a liability or at the date of its demandability. I have (somewhat to my own surprise) come to the conclusion that the former is the correct construction.

[35] That conclusion does, in my judgment, fit with the policy underlying the section. Subsection (2) is designed to relieve the former tenant of liability in respect of any fixed charge unless the landlord has taken a purely formal step of notification to preserve the former tenant's liability. If the law is as I think it is no hardship to the landlord results. In the case of a long drawn out process of rent review he can protect himself against the possibility of the current tenant proving in due course unable to meet his liability by serving protective notices on the original tenant. The original tenant then gets the requisite early warning of what the future may hold. By contrast if the law is as the claimant contends, considerable hardship may result for the original tenant. Years after a particular rental period has passed the original tenant may be faced with a claim in respect of that rental period whereas the statute appears designed to allow the original tenant to be free from claims if he has not received a notice within the period of six months of a particular rent payment date. The facts of the present case dramatically illustrate how severely that can impact on the original tenant. A construction of the section which permits an original tenant to sleep easily in respect of a rental period once six months has elapsed without having received a protective notice from the landlord seems to me entirely consistent with Parliament's intention.

[36] Accordingly, in my judgment, NCP's notice dated 8 March 2001 which specified the additional rent of £279,849 under the 1967 lease and its notice dated 20 July 2001 which specified the additional rent of £53,998·61 under the 1969 lease were not effective to render the claimant liable in respect of those sums.

[37] The defendant contended that those notices were also ineffective to render the claimant liable in respect of (in the case of the 1967 lease) the £19,975

claimed for the quarter commencing 29 September 2000 and (in the case of the 1969 lease) the two sums of £1,857·97 for the quarters 25 March 2001 and 24 June 2001. This was on the basis that, although effective notices could have been given at those dates in respect of those amounts, the inclusion in each case of the additional invalid claims for the additional rent rendered the whole notice 'hybrid' and therefore non-compliant with the statute. I do not accept that contention: the inclusion of identifiable 'out of time' amounts in a notice does not render the notice ineffective in relation to properly identified amounts with respect to which it is timeous.

WIDER ARGUMENTS

[38] I turn therefore to consider the wider arguments relied on by the defendant. These arguments proceed on the assumption that the claimant was liable to NCP for all the sums in respect of which it seeks an indemnity from the defendant, and seek to provide a reason why, notwithstanding that liability and the terms of the indemnity, the claimant ought not to succeed.

[39] The effect of s 24(1) is to imply a covenant in each of the relevant transfers in the following terms:

> '(b) on the part of the transferee, a covenant with the transferor, that during the residue of the term the transferee and the persons deriving title under him will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained and on the part of the lessee to be paid, performed and observed, and will keep the transferor and the persons deriving title under him indemnified against all actions, expenses, and claims on account of the non-payment of the said rent or any part thereof, or the breach of the said covenants or conditions or any of them.'

[40] The covenant therefore has two limbs, the first consisting of the covenant that the rent will be paid, and the second consisting of the covenant to indemnify against 'actions expenses and claims on account of the non-payment of the said rent'. One question which I canvassed with counsel in argument was whether the second limb added anything to the first or was simply an expression of the legal consequences of a breach of the first? The thought behind my question was that if the latter was correct then the question of whether the defendant was liable to the claimant in the particular sums claimed could be answered by applying tests appropriate to any other claim for damages for breach of contract, namely whether the particular damage suffered fell within the scope of the duty created by the contractual promise, whether it was caused by the breach complained of, whether it was too remote in law to be recovered, and whether the claimant had fallen short in its duty to mitigate. These questions, while by no means free from difficulty in themselves, at least presented a familiar terrain. As matters stood the defendant's pleaded case in relation to its more general arguments appeared to rely rather on some suggested principle of law, or implied term, applicable to contractual indemnities which precludes recovery by the indemnified: (i) where the indemnified has 'caused or connived' at the default of the current tenant; (ii) where the indemnified has done something injurious to the indemnifier or inconsistent with his rights; (iii) in respect of losses or liabilities which have been 'prolonged or increased' as a result of acts of the indemnified; (iv) in respect of

losses or liabilities which have been incurred in consequence of reckless conduct on the part of the indemnified; (v) in respect of losses and liabilities which while of the same type as those covered by the indemnity have in fact been suffered or incurred 'as a result of a course of action voluntarily undertaken by' the indemnified.

[41] Those formulations are taken from paras 13 and 13A of the re-re-amended defence. In addition the defendant pleaded in para 14 duties owed by the claimant to the defendant not to pay to NCP sums not lawfully due from the claimant to NCP and/or to challenge the amounts due where they were arguable.

[42] In argument Mr Bannister QC did not seek to argue that my suggestion (that the question could be approached as if the second limb of the covenant could be approached on the basis that it simply set out the legal consequences of a breach of the first limb) was wrong. Nor, however, did he in terms adopt it. For his part, Mr Stoner submitted that it was wrong. He argued that the distinction between the two limbs was that breach of the first gave rise to a claim for unliquidated damages, whereas the second creates a claim in debt. A person who has a claim in debt—

> 'need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt become due. He need prove no loss; the rules as to remoteness of damage and mitigation of loss are irrelevant . . .'

(See per Millett LJ in *Jervis v Harris* [1996] 1 All ER 303 at 308, [1996] Ch 195 at 202.)

[43] I record these matters at this stage in my judgment in order to provide a context for identifying the nature of the factual issues upon which I have heard evidence and been addressed. The area of disputed fact is relatively limited, and does not require an elaborate narrative of all the events which took place between November 1999 (when the first s 17 notice was served on the claimant) and 28 February 2003 (when HSJ completed the assignment to Mr Rizvi). Apart from the existence and effect of the maintenance agreement no pleaded allegation by the defendant complains that any act of the claimant caused or contributed to the lengthy period of time which it took to complete that transaction which, from as early as October 2000 almost continually looked as if it was likely to be completed within a period of weeks from whatever date one cares to look at. The various difficulties which arose, and which conspired at every point to dash what was a reasonable expectation at the time, are catalogued in the lengthy witness statement of Mr Anderson of Eversheds who acted throughout on behalf of the claimant, and who also acted on behalf of HSJ (on the instructions of the administrative receivers) in the sale to Mr Rizvi. I found him to be a careful and conscientious witness whose evidence on these matters could be accepted.

[44] I focus therefore only on those parts of the narrative which throw up issues of potential legal relevance

[45] The story can be taken up from April 2000. Prior to that date consideration had been given by the claimant to its position in the light of the s 17 notices which had been served on it, and notification of the position had been given by the claimant to the defendant. It had appeared, however, that matters were quite likely to resolve themselves. Eversheds (acting by Miss Martin) had

understood from the administrative receivers that they were paying current rent and had every expectation of being able to achieve an early sale. The premises had in fact been on the market prior to the administrative receivers' appointment at an asking price of £995,000, and it appeared entirely possible that a premium might be obtained on sale which would both enable any arrears of rent to be discharged and produce a result satisfactory to HSJ's mortgagees (at whose instance the administrative receivers had been appointed).

[46] A letter from the administrative receivers to Miss Martin dated 4 April 2000 read as follows:

> 'The issue of rent review is at an advanced stage, having not apparently been addressed to any great degree by the parties prior to our appointment on 6 October 1999. The landlords have proposed on a without prejudice basis a rental of £53,000 p.a. on the main lease (due from about April 1995) and £16,000 p.a. on the extension, due from December 1996. An independent expert was appointed in March 1996 and he issued further revised directions in February 2000 proposing a timetable for submissions by the parties and the tenant must respond by 7th April 2000.
>
> Prior to our appointment, the company had been marketing the hotel through Christie & Co at an asking price of £995,000 but no firm offers had been received, largely we surmise because of the price and the unresolved rent reviews.
>
> Following our appointment, Christie & Co informally advised that the proposed rent increases were not unreasonable. We decided to seek further specialist advice from the hotel and licensed property valuers Messrs Fleurets and their detailed report suggests that, on balance, the proposed rent is reasonable, although there has been some difficulty in view of the length of time since the review date and the lack of information on certain matters e.g. the extent of the works carried out by the original tenant. (Your client may be able to assist in this respect).
>
> If the tenant agrees the rent as proposed, this will crystallise rent in arrears at the March 2000 quarter day of some £200,000 (exc. any interest which may be payable) against which there is a rent deposit of about £45,000. It appears that your client as original tenant is liable to the landlord for the arrears and any ongoing liability for the remaining term of the lease, up to 2062.
>
> The position of the tenant is that trading at best has been break-even but there are outstanding professional costs in the Receivership. In order for trading to continue, the Receivers need to be satisfied that all trading and professional costs can be met pending a sale and we will be asking the mortgagees whether they are prepared to put us in funds so as to enable trading to continue up to a sale of the business as a going concern.
>
> So far as concerns the prospects for a sale, it is difficult to be confident. Christie & Co suggest a marketing guide of £550,000 but that consideration be given to any offers in the region of £400,000. Fleurets informal view is that although the rack rent for the hotel could be of the order of £100/£125,000, the current poor trade may mitigate against a party paying a material premium to obtaining the business. Therefore, the mortgagees may be reluctant to invest any more money into the business.
>
> In summary, urgent discussions need to be taken on several issues:
>
> - The rent reviews

- Continuation of trade
- Selling the business

It seems to us that as original tenants, your clients are most at risk and I would invite your early considerations of the position. In particular, I am proposing to instruct Fleurets not to object to the proposed rent by the landlords by the deadline of 7 April. I would be happy to meet with your clients to discuss these matters.'

[47] Miss Martin's immediate response, so far as the rent review was concerned, was that the claimant had insufficient information on which to offer a view. In the meantime the administrative receivers, on the instructions of the mortgagees, made a counter-offer to NCP, which NCP appears almost immediately to have rejected. By virtue of the stage which the rent review had by then reached the consequence was that the matter then became one for the determination of the independent expert. He had already set a timetable for submissions by the parties' respective experts.

[48] In hindsight it is easy to see that a mistake was made by the administrative receivers in not having accepted NCP's offer since in due course the independent expert proceeded, having received submissions from NCP that the rent should be £102,000 and from HSJ that it should not be increased at all above the 1995 level of £24,000, to determine that the rent should be £68,000.

[49] The mistake was an expensive one. It meant that by 28 February 2003 the arrears were some £138,000 greater than they would have been had NCP's offer been accepted. The accuracy of that calculation was not the subject of argument before me and I have not checked it. But on any view the increase (of £15,000 pa over a period of six years) was a large one.

[50] The issue here is as to why NCP's offer was not accepted. A letter from the administrative receivers to Eversheds dated 12 April 2000 asserts that Eversheds had instructed the administrative receivers to make no concessions. The defendant relied on this as evidence of the fact stated. Mr Kinlan, in whose name the letter was written and who was called as a witness on behalf of the defendant, could not recall why this assertion had been made, but conceded that nothing in Miss Martin's written communications to the administrative receivers had justified the assertion. At the same time, when re-examined on the point, he observed that Eversheds had never taken the opportunity to deny the assertion. Miss Martin, although available to be called as a witness by the claimant in the sense that it was able to proffer a very limited witness statement from her despite the fact that she had ceased to be an employee of Eversheds since the autumn of 2002, was not called to give evidence.

[51] I think it extremely improbable that there was any relevant communication between Eversheds and the administrative receivers prior to 12 April 2000 which justified the assertion made in the letter of that date. The fact is, as the contemporary letters show, that the claimant did not feel able to say one way or the other whether NCP's offer should be accepted and that Miss Martin was concerned that her client should not be seen as having any responsibility for whatever decision was taken, at least until her client was better informed. The tenor of the written communications was that the claimant was not in a position to instruct the administrative receivers to make what might be a concession. That is not the same thing as relaying instructions from her client to the administrative receivers that they should not make concessions. I do not attach

significance to the fact that, in subsequent correspondence, she did not pick up and quarrel with the way in which the administrative receivers had chosen to interpret her response. In any event expression of the view that the administrative receivers should not make concessions, made from a position of total ignorance, could not amount to an 'instruction' to the administrative receivers not to accept NCP's offer. The claimant was not in a position to give the administrative receivers instructions.

[52] The issue is, in any case, academic in the light of the fact that the administrative receivers in fact proceeded not merely to not accept NCP's offer but to reject it by making a counter-offer at the suggestion of the mortgagees. The claimant was not consulted at all about this step and cannot be blamed for its having been taken. If the administrative receivers were acting on anyone's instructions in not accepting the offer it appears to have been instructions given by the mortgagees.

[53] What the written record gives no clue about is whether NCP's offer could at any stage have been revived. What subsequently happened was that an extension of time was obtained for Fleurets (the valuers retained by the administrative receivers) to put in their submission to the joint expert and that in the interval the claimant obtained the assistance of Messrs Humberts to advise it generally about the prospects for the premises, including the rent review process. Messrs Humberts (in the person of Mr Haigh who gave evidence before me) in due course considered and approved the submission eventually made by Fleurets to the joint expert. He could not recall the question having been raised of seeking to revive NCP's offer rather than proceeding to the expert determination. Nor could Mr Kinlan recall having given consideration to the point. So far as the claimant itself was concerned, the relevant evidence was given by Mr Hime who was at that time the claimant's Group Estate Manager and Miss Martin's principal source of instructions. He too could not recall having had an attitude that the rent should be settled by the review process rather than by negotiation with NCP and settlement by agreement. So far as he was concerned the question of review was fundamentally a matter for the administrative receivers, and he had not himself tried to evaluate what the likely outcome of the review process would be.

[54] On all the evidence I am not satisfied that the absence of any attempt by the administrative receivers to revive NCP's offer was caused by any intervention on the part of the claimant. On the contrary the conduct of all concerned seems to me consistent rather with a recognition that, having missed the opportunity to settle on NCP's terms by 7 April, the only game in town was to do the best that could be done in relation to the independent expert's determination. That might either have been because the view was taken that the independent expert's determination would probably come out closer to the Fleurets' submission than NCP's, or (which I think more likely) that the reality was that NCP's offer was no longer on the table and was most unlikely to be resurrected. Given the previous delays in the rent review process (the independent expert had been appointed as long ago as 29 March 1996) it is hardly surprising that NCP's offer should have been a final one.

[55] Accordingly I reject the submission that the claimant was in any relevant sense responsible for the fact that the NCP offer was not accepted.

[56] The second strand in the letter dated 4 April 2000 was the administrative receivers' desire to get the claimant financially involved in the project of keeping the hotel operating pending its sale. Given the claimant's unenviable position, it

is not in the least surprising that it came to the conclusion that its best option was to accept in principle the concept of supporting that project financially. This it had done by 18 May 2000. The choices available to it were limited to the following. (i) To require NCP to grant it an 'overriding lease' under s 19 of the 1995 Act. The effect of exercising that right would have been to reconstitute the claimant as a direct tenant in possession vis-à-vis NCP under new leases which would have enabled the claimant to deal with those leases free from HSJ's leases (which could then have been forfeited). (ii) To support the administrative receivers' efforts to sell the premises to an assignee who would take on the liabilities in respect of future rent, at (it was to be hoped) a premium which might extinguish or at least reduce the liability for arrears which had accrued; or (iii) do nothing and let matters take their course.

[57] The defendant does not complain that the claimant was in any sense at fault in not taking the first course. Its claim is based on the proposition that if the third course had been taken, the eventual outcome would have been more favourable. It is implicit in this proposition that 'more favourable' means for this purpose more favourable both to the claimant and to the defendant. What the defendant contends is that, had the third course been taken, the consequence would have been that HSJ would have gone into insolvent liquidation and that then one of two things would probably have happened. Either the defendant or some other person would have obtained an assignment of the leases for a negligible premium on a forced sale, or, had the liquidator disclaimed the leases, the defendant or some other person within s 118(2) of the Insolvency Act 1986 would have obtained a vesting order. In either case, the claimant's liability for the continuing rent would have been determined and any liability of the defendant to the claimant would have determined at the same time.

[58] By 17 May 2000 Mr Hime had come to the view that the claimant's interests were best served by supporting the administrative receivers' project of trying to sell the business as a going concern and for that purpose to enter into a conditional and temporary arrangement with the administrative receivers. At that stage the possibility of the claimant being able to claim against the defendant was known but not relied on in any way in choosing the course adopted, Mr Hime's memorandum to his director (Mr Izatt) merely noting that:

> 'The original individual to whom S&N made the assignment is believed to still be running/owning a number of hotels and there might be a chance (albeit small) that the indemnity that he provided following the assignment could be called upon by S&N to cover any losses for the property. Again, this aspect is being looked into.'

Miss Martin seems to have taken the view that entering into a voluntary arrangement with the administrative receivers might impair the claimant's ability to claim against the defendant and she so advised Mr Hime by letter dated 19 May 2000. The claimant's decision to proceed despite that advice shows that it was concerned to do what was perceived to be in its own commercial best interests irrespective of its ability to claim against the defendant. On the same day she wrote to the defendant's solicitors (Harefield) advising them in general terms of the position as at that date and inviting proposals from the defendant. No effective response was received to that letter.

[59] The claimant and the administrative receivers then proceeded, through their respective solicitors, to hammer out the terms of what became the maintenance agreement, dated 3 August 2000. Mr Anderson from Eversheds did the drafting on behalf of the claimant. It took the form of an agreement between (1) Pubs[a] (2) the claimant and (3) the administrative receivers. After reciting inter alia that Pubs had agreed to indemnify the claimant against the claimant's liabilities to NCP, the operative provisions of the agreement provided for Pubs to pay the administrative receivers up to £6,000 per month in respect of 'Trading Losses' as defined. That sum was calculated on the footing that the administrative receivers would be paying rent to NCP at the current level but the agreement recognised that once the rent review was finalised the sum of £6,000 would need to be revised upwards. Either party could terminate the agreement on 14 days' notice. There were provisions to ensure that sale proceeds were used to pay down expenses incurred by Pubs under the agreement and to make provision for outstanding liabilities under the leases which might fall on Pubs. There was also provision for the administrative receivers not to issue a contract for sale without Pubs' prior written approval.

[60] The maintenance agreement was never in fact operated according to its terms. In the first place there never was any indemnity between the claimant and Pubs. The insertion of Pubs as a party seems to have been the result of Mr Hime's view that, since this was hotel trade, the appropriate division within the claimant's group was that represented (in corporate terms) by Pubs. Having been so instructed Mr Anderson thought it logical for the indemnity (a draft of which he supplied) to be in place as between Pubs and the claimant. No such indemnity was however ever executed. Moreover, when the administrative receivers did in due course call for support, it was the claimant (and not Pubs) which gave it. In the second place, although the maintenance agreement contemplated that the trading losses would be calculated after payment of the rent, the administrative receivers in fact never did pay any rent. In practice this meant that they were able to continue trading the hotel without making any call on the claimant for a considerable period of time. It was not until October 2001 that they first looked to the claimant for direct financial assistance. The claimant then gave the assistance requested, not because the maintenance agreement obliged it to (which it did not), but for the purely pragmatic reason (what Mr Fenwick in his evidence called a 'simple commercial approach') that by doing so the hotel could be kept trading and the contemplated transaction with Mr Rizvi kept alive.

[61] Both these features of the practical operation of the arrangements have given rise to substantial controversy in the course of these proceedings. The possibility of the existence of an indemnity provoked a suspicion on the part of the defendant and his advisers that the claimant itself had not in fact suffered the liability in respect of which it was claiming. Further, the fact that the administrative receivers had been permitted and/or encouraged by the claimant to continue trading without paying the rent due to NCP prompted a suspicion that this course of conduct had been deliberately pursued by the claimant in the knowledge that the resulting liability for rent could be passed on to the defendant.

[62] So far as the first point is concerned it was accepted by the defendant by the end of the trial that there was no indemnity in place between Pubs and the

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a See [15], above.

claimant and, moreover, that it was the claimant, rather than Pubs, which had made all the payments in respect of which it was claiming indemnity from the defendant. a

[63] So far as concerns the second point, I am quite satisfied (and this was I think largely accepted by Mr Bannister in his closing speech) that the reason for the administrative receivers' non-payment of rent, and the claimant's acquiescence in that, had a much simpler explanation than that suspected by the b defendant. Regardless of whether or not it had an effective claim over against the defendant, the claimant's motivation at all times was to see that the leases were assigned as soon as practicable to an assignee who would then be responsible for future rent. It was assumed throughout that NCP would make it a condition of any such assignment that all arrears of rent would be discharged. Accordingly it c did not matter whether the rent was paid when it was due or not. If it was to be paid when it was due the only source of funds with which it could be paid would have been the claimant. If not paid until the completion of the assignment to the new tenant, it would again have to be funded by the claimant except to the extent that any premium paid by the assignee went to reduce it. Since at all material times it appeared both to the claimant and to the administrative receivers that the d best chance of obtaining a purchaser was to keep the hotel trading it made sense for the claimant not to require the administrative receivers to keep the rent up to date.

[64] The contemplation of both the claimant and the defendant, at the date of the maintenance agreement, was that the arrangements which it envisaged e would be in place for only a relatively short time. It was expected that the hoped for purchaser would appear on the scene in the relatively near future. This happened in October 2000 when agreement was reached in principle for the sale to Mr Rizvi. It is the defendant's case, however, that by this time the claimant's 'interventions' had already critically damaged what would otherwise have been the prospects of a speedy assignment to a new tenant. Three such interventions f are relied on.

[65] First, it is said that the claimant's actions over the rent review caused a delay in the determination of the rent, and that the resulting uncertainty over the rent impaired the marketing process. I have already concluded that responsibility for NCP's offer not having been accepted by HSJ cannot be laid at the door of g the claimant.

[66] Secondly, it was said that the hotel was being marketed at too high a premium. Christie's were marketing it at £500,000. The defendant called expert evidence that it was unrealistic to have expected to achieve offers in relation to such a figure. That evidence, given with the benefit of hindsight, was plainly h correct. There is however not a scrap of evidence to suggest that marketing the hotel in this way deterred anyone at all from making offers at a realistic level, or that any such offers were made and rejected in the hope of attracting higher ones. There is in my judgment nothing in this point.

[67] Thirdly, it was said that the claimant had unrealistically pursued the idea j of selling the hotel to a purchaser for use as an asylum-seekers' hostel, and that this had resulted in the rejection of an offer from Mr Rizvi in May 2000 to purchase for £200,000. The highest at which this point can be put is that the claimant knew by 6 July 2000 that NCP's position was that it would not countenance a change of the user covenants to permit such a use. Despite this the possibility of sale to a company controlled by a Mr Jivraj (who came with

excellent references) was explored and continued to be explored until the end of August 2000, by which time it had become clear both that the Jivraj proposal did involve such a change of use and that NCP's attitude was unbending. During August, Miss Martin did legal research on the planning implications of the proposed user and on the concept of seeking to challenge any refusal of NCP to consent to an assignment on grounds of unreasonableness.

[68] The whole of the defendant's case on this point rests on two false premises. One was that Mr Rizvi had made an offer of £200,000 in May 2000 which would have resulted in a contract with him had the Jivraj proposal not been pursued. The other was that the nature of Mr Jivraj's interest was known from the outset of his arrival on the scene. In fact Mr Rizvi had not made such an offer. The most that can be said on the evidence is that some other person had approached Christie's in May 2000 with a 'tentative bid' of £200,000 and that this potential purchaser had not been followed up at the time. The fact that Mr Jivraj wanted to use the hotel as an asylum seekers' hostel was only made clear in a letter from his solicitors dated 4 August 2000 to the administrative receivers which sought to make a case that the proposed user could continue to be described as a hotel user, and that if Mr Jivraj could present his case to NCP the latter's fears would be allayed. Notwithstanding NCP's earlier indication of its attitude it was entirely reasonable, in my judgment, for further consideration to have been given to the possibilities contemplated by that letter. In the event the further approach which was then made to NCP's agents resulted in a disappointing response from them dated 24 August 2000 and one which Miss Martin's legal research could not overcome. Nothing had been lost by the possibility of a sale to Mr Jivraj having been explored.

[69] As previously indicated Mr Rizvi made his offer to buy HSJ's interests in the hotel for £200,000 on 18 October 2000. This was subject to the maximum rental under all the leases not exceeding £100,000 pa. By that time the rent under the 1967 lease had been reviewed, but the position under the 1969 lease and the lobby lease was subject to some uncertainty. Eversheds was instructed by the administrative receivers to act in the sale, and did so by Mr Anderson. Subsequently during the course of the autumn Mr Rizvi withdrew that offer and offered instead to purchase at a nil premium, later revising his offer to £100,000. By the end of the year the administrative receivers, with the claimant's concurrence, had agreed to proceed on this basis. It was at that stage contemplated that the sale was likely to take place within a reasonably short time scale: Mr Rizvi (who by this stage was making the offer not in his own name but that of his company (Skymede)) was pressing for an early completion, and the problems which were subsequently to emerge (of which the principal one concerned the lobby lease) had not fully presented themselves.

[70] A £100,000 premium meant that there was no prospect of any of the arrears of rent being discharged out of the premium. All would be swallowed up in the administrative receivers' costs and expenses.

[71] The prospect of that sale then caused consideration to be given within Eversheds to the claimant's position in relation to the arrears of rent which NCP would expect to be paid at completion as a condition of its consent to the assignments. Both Miss Martin and Mr Anderson took the view that there would be difficulty in asserting any claim for indemnity against the defendant (who by that time had been ascertained to be worth suing) except to the extent that the claimant funded the payment of those arrears as a consequence of being liable for

them under valid s 17 notices. At that stage, however, no such notices had been served in respect of the arrears of the reviewed rents under the 1967 lease. These represented by far the largest proportion of the rent which would have to be paid at completion. Consideration was therefore given to whether or not to 'prompt' NCP into serving such notices. Consideration was also given to the question whether the claimant could take advantage of the non-service of s 17 notices by paying up under the existing s 17 notices, claiming an overriding lease, and then dealing with the overriding lease free from arrears of reviewed rent.

[72] Mr Anderson's thinking on these matters is set out in a characteristically careful memorandum to Miss Martin dated 20 March 2001. His conclusion was that it would be necessary for s 17 notices to have been served if the claimant was to be able to recover from the defendant, that the device of claiming an overriding lease would not work, and that it might therefore be necessary to remind NCP to serve s 17 notices in order 'to perfect the cause of action' against the defendant. This seems to have accorded with Miss Martin's own view: she had advised Mr Fenwick (Mr Hime's successor) in early January of the need, if necessary, to prompt service of s 17 notices before completion.

[73] In fact Mr Anderson's ruminations in his 20 March memorandum were academic since by that time the notices dated 8 March 2001 had in any event been given (a footnote to his memorandum indicates that he must have learned of this fact as he was composing it). He was clear in his evidence that neither he, nor so far as he knew anyone else, had prompted the service of the s 17 notices. Mr Bannister persisted, however, in seeking to argue that the claimant had in fact prompted the notices. He based that submission primarily on a letter dated 7 February 2001 from Mr Anderson to NCP's agents Nelson Bakewell. That letter includes the sentence 'we must accept the liability of Scottish & Newcastle plc in respect of s 17 Notices properly served upon them'. Mr Bannister sought to argue that this was a covert nudge to NCP to get on with service of s 17 notices.

[74] Apart from Mr Anderson's denial that this was his intention, there are a number of reasons why I wholly reject this thesis. Chief among them is the fact that the letter has to be read in the context of the letter to which it was a reply which implicitly sought an admission that the claimant accepted liability under the s 17 notices which had been served. Other reasons include the fact that, if a nudge was intended, giving it to Nelson Bakewell, as opposed to NCP's solicitors, was an extremely oblique method of signalling the request, and the fact that when the same issue later arose (in 2003) Mr Anderson had no hesitation in tackling the matter entirely openly.

[75] Mr Bannister alternatively argued that Miss Martin might have covertly prompted the service of the notices dated 8 March 2001. There is no evidence of this at all, and (in the light of the communications passing between her and Mr Anderson during this period) it seems to me highly unlikely that she did so.

[76] Accordingly, I accept the claimant's evidence that it did not prompt the service of these s 17 notices.

[77] For reasons which I have already indicated it is unnecessary for me to dwell on the many difficulties which subsequently arose in the course of the transaction and which were in the event to defer its completion until 28 February 2003. For present purposes the story can be picked up again in early February 2003 by which time the Rizvi transaction was, at last, ready to complete.

[78] NCP's solicitors (Hamlins) sent a completion statement to Eversheds on 10 February 2003. This showed that a total of £381,300·21 had to be paid on

completion. Part of this consisted of rent deposits payable by Skymede. Once allowance was made for that, the amount which was going to have to be funded by the claimant was £306,771·99. Of that sum only part consisted of rent arrears under the 1967 and 1969 leases, namely £245,714·55, and that sum had only been made the subject of s 17 notices to the extent of notices which had been given on 4 March 2002 (£39,950 in respect of the 1967 lease and £9,400 in respect of the 1969 lease), and 3 September 2002 (the same figures). No notices had, however, been given in respect of the rent due for the quarters 29 September 2002 and 25 December 2002 (again £39,950 and £9,400 respectively).

[79] Mr Anderson was unsure what the up-to-date position with regard to s 17 notices was, and wrote to Hamlins asking for a complete set of notices. Hamlins' response was that this was irrelevant. Mr Anderson replied saying that he was not suggesting that supply of s 17 notices was a pre-condition of completion, accepted that 'however the arrears are funded, they are being funded in the name of the [HSJ]' but nevertheless repeated his request. By letter dated 20 February 2003, Hamlins repeated their position. Mr Anderson replied on 21 February in the following terms:

> 'As to that dealing with the question of Section 17 Notices, we reiterate that we do understand the point that you make but do not understand your client's reluctance to serve Section 17 Notices in respect of any part of the currently demanded arrears which are not the subject of such a notice in any event.
>
> As, from your client's point of view, this is a purely administrative step but, from our client's point of view, is a step which if untaken will prejudice its ability to recover from its immediate assignee, why not issue the notices?'

[80] Finally by letter dated 27 February 2003 Hamlins replied as follows:

> 'We note that Scottish & Newcastle are funding the discharge of the sums due from the existing tenant. However, you will please note that there are sums shown on the Completion Statement which relate to the Ground Floor Lobby Lease for which Scottish & Newcastle have no liability. Accordingly, that element relating to the Ground Floor Lobby Lease can only be accepted by our client if they are tendered by Scottish & Newcastle as agent for and on behalf of Hotel St. James Limited (In Administrative Receivership). We will require your written confirmation to this effect.
>
> With regard to the September 2002 and December 2002 quarters, we confirm that our client is prepared to serve Section 17 Notices but as a result, our client can only accept the monies from Scottish & Newcastle once those notices have been served unless Scottish & Newcastle confirm that all the monies are in fact tendered as agents for and on behalf of Hotel St. James (In Administrative Receivership).'

[81] Mr Anderson's answer on 28 February 2003 (the day of completion) was in the following terms:

> 'We confirm that the element of the completion statement relating to the Ground Floor Lobby Lease is tendered by Scottish & Newcastle Plc as agent

for and on behalf of Hotel Saint James Limited (in administrative receivership).

As to the September 2002 quarters, we confirm that the monies due by reference to these quarter dates are tendered by Scottish & Newcastle Plc as agent for and on behalf of Hotel Saint James Limited (in administrative receivership).

Clearly, it would be of assistance to us if the Section 17 Notices could be served today (in which case those payments will be made by Scottish & Newcastle Plc in discharge of its own liability) but if, for whatever reason, this is not possible, it is more important that the matter should be completed today than that it should be deferred pending the service of those Notices.

Accordingly, if notices are served (by fax) today, the relative liabilities are discharged by Scottish & Newcastle Plc in discharge of its own liability.'

[82] To add to the complication of this part of the story, unknown to Mr Anderson, Hamlins had in fact posted two s 17 notices to the claimant's head office in Edinburgh the previous day under cover of a letter (headed By Recorded Delivery) which also demanded payment of the sums claimed within 14 days. That letter was received in Edinburgh at some time on 28 February.

[83] This episode therefore raises the issues: (i) whether the £245,714·55 was tendered to NCP by the claimant in respect of its own liability or as agent on behalf of HSJ; (ii) if the latter, whether that prevents the claimant from being able to claim it from the defendant; (iii) whether the fact that the claimant prompted the final notices (totalling £49,350) prevents the claimant from being able to recover that sum from the defendant.

[84] It is convenient to defer consideration of the second and third issues until later in my judgment. As to the first, however, I will state my conclusions at this stage. First, I infer as a fact that the notices were sent by recorded delivery. That has not been strictly proved but is more probable than not. The significance of that is that the date of postage is then the date on which the notices were deemed to have been served by s 23 of the Landlord and Tenant Act 1927 (which applies for the purposes of s 17 notices by virtue of s 27(5) of the 1995 Act: see *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2003] EWHC 1252 (Ch), [2004] 3 All ER 184, [2003] 1 WLR 2064, and *CA Webber (Transport) Ltd v Railtrack plc* [2003] EWCA Civ 1167, [2004] 3 All ER 202, [2004] 1 WLR 320).

[85] On that footing the claimant's payment of the relevant moneys was in my judgment in respect of its liabilities. This is a question of construction of the correspondence. Hamlins' letter to Mr Anderson of 27 February 2003 is not easy to construe, but Mr Anderson's letter of 28 February, while giving Hamlins the assurance they sought also made it clear that payments made by the claimant after notices had been served would be discharging its own liabilities. Since a payment by HSJ would discharge the claimant's liabilities it does not appear to me to matter whether the payment, being one which was made by the claimant, was being notionally routed through HSJ or being made direct. Another formula that might, I suppose, have been used would have been for HSJ to tender it both for itself and on behalf of the claimant. It seems to me little short of bizarre to treat the claimant's ability to recover from the defendant as turning on the magic of a particular verbal formula used at completion.

[86] The remaining issue of fact to which I now turn concerns the criticism which is made of the claimant for having embarked on the project of assisting the

administrative receivers in keeping the hotel open with a view to improving the prospects of a sale. As to this there can be no doubt that the prospects of an early sale were improved by the fact that the hotel continued to operate. The time which it in fact took to achieve the sale to Mr Rizvi was not prolonged in any way by the fact that the hotel continued to be operated. It seems, on the contrary, much more likely than not that had the hotel ceased to operate at any point in the process that sale would have gone off. There is no reason to suppose in that event that some earlier sale would have been achieved than that in fact concluded with Mr Rizvi. It is true that many of the difficulties which had to be overcome in the course of the Rizvi sale had to do with the fact that the hotel was being sold as a going concern, but the principal component of the delay which occurred was in the event the difficulty of resolving the issues which arose out of the unwillingness of NCP to grant a new lobby lease for a term co-extensive with the 1967 and 1969 leases and the purchaser's unwillingness to accept anything less (a problem ultimately resolved by the claimant giving Mr Rizvi an indemnity). That problem would have had to be resolved whether or not the hotel had been kept in operation.

[87] Accordingly the only question, as it seems to me, is whether the claimant's conduct in some way deprived the defendant of an opportunity which he would otherwise have taken himself to take an assignment. The following paragraphs address that question.

[88] The claimant (by Eversheds) made early contact with the defendant in December 1999 informing him of the s 17 notices which had by then been served and that the claimant would be relying on its indemnity against him. His initial response was to deny that any such indemnity had been given, asserting the existence of some agreement with NCP which had negated it. By January 2000, however, the defendant had put the matter in the hands of Harefield, solicitors, and the position was carefully explained to them by Eversheds. Harefield responded that they were investigating Mr Raguz's own guarantors, a reference to the Virani brothers.

[89] Following the request from the administrative receivers for, and the claimant's agreement in principle to, support to keep the hotel operating, Eversheds wrote to Harefield on 19 May 2000 in the following terms:

> 'We refer to previous correspondence.
>
> Our clients have now been contacted by the Administrative Receivers of Hotel St. James Limited the current tenants of the above-mentioned premises. The Administrative Receivers have informed our clients that they have been trading at the premises but that they are now trading at a loss, and are considering pulling out of the premises and selling the Fixtures and Fittings.
>
> The Administrative Receivers have also informed our clients that they are in the process of finalising the on-going negotiations for the standing rent review and have informed us that there are arrears of rent somewhere in the region of £150,000 and that currently no rent is being paid at the premises.
>
> The Administrative Receivers have approached our clients to ascertain whether our clients would be prepared to indemnify the Administrative Receiver for trading losses at the premises to keep the premises open and we are writing to ascertain whether your client would also be prepared to become involved and underwrite the trading losses at the premises with the

view that the Administrative Receivers could sell the premises as a going concern. The Administrative Receivers has indicated to us that they would anticipate that it would be possible to then pay off the current arrears of rent.

We are aware that your client was in the hotel business previously and may still be in the business and we are also interested as to whether or not your client might be prepared to take on these premises.

Can you please contact your client as a matter of urgency and revert to us within the next few days.'

[90] No substantive response was received to that letter until 15 June 2000 when Harefield advised that they would be discussing the matter with their client, and queried how the rent arrears had grown to £150,000. That query was answered by Eversheds, who continued by letters dated 26 July and 17 August 2000 to press for a substantive response to their letter of 19 May 2000. In a telephone call made by Miss Martin to Harefield on 22 August 2000 Miss Martin elicited the information that the defendant was still in the hotel business and was interested in the premises. Eversheds sent two further chasers and were met with the response on 20 September 2000 that Harefield had understood from the earlier telephone conversation that the claimant had been going to put some concrete proposals on the table. This resulted in a suggestion (by letter dated 3 October) that the defendant should take an assignment of the premises, a premium of £100,000 being likely to be sought.

[91] Following receipt of the independent expert's determination of the 1967 lease rent review, Eversheds wrote again on 18 October 2000 to advise that the arrears were now £240,000 and suggesting a meeting. No response was received. They wrote again on 27 October to advise that Mr Rizvi was expressing interest. By 7 November 2000 LHP Law (as Harefield had by then become) themselves wrote suggesting an early meeting. By 9 November the claimants had themselves begun to doubt the value of a meeting, particularly in light of the acceptance of Mr Rizvi's offer. By letter of that date Eversheds invited the defendant instead to make an offer for the premises. This elicited the response that the defendant was indeed interested, and a request for further information in connection with the leases which Eversheds sought to supply.

[92] The defendant was interested. He and his advisers visited the hotel on 12 December 2000. For the defendant, who takes an obvious pride in his trade as an hotelier, it was a depressing sight. The hotel appeared to have suffered from years of neglect and looked very run down. He could see that it needed a very large sum of money spending on it. At his time of life he had no appetite at all for taking it on, but recognised that it might prove to be the only way in which he could mitigate his liability to the claimant and protect himself in relation to future liabilities. But at that stage his 'prayer' was that the sale to Mr Rizvi would proceed.

[93] Eversheds continued to press LHP Law for the defendant to make an offer if he was going to. They also continued to advise as to the mounting level of arrears and to supply LHP Law with such further information as they sought. On 23 March 2001 Eversheds advised of the service on the claimant of the statutory demand (in the sum of £31,011·36) and of the claimant's intention to pay it, and asking for a response within 14 days. That had to be chased. A telephone conversation between Miss Martin and Mr James at LHP Law on 2 May 2001 appeared to indicate that liability in principle was accepted but that

the defendant was thinking of putting together some deal under which the freehold might be acquired. Eversheds found themselves once again having to write chasing letters (11 May, 4 June, 12 June, 25 June, 13 July and 30 July) to which they received no response whatsoever until 6 August 2001 when they were told that LHP Law did have authority to accept service.

[94] These proceedings were then served on the defendant on 18 September 2001. They pleaded the claimant's liability under the s 17 notices served up to and including those of 20 July 2001, and the payment by the claimant to date of £346,313·05 in respect of its liabilities to NCP. They do not plead that the payment had been made against any demand by NCP, but statutory demands dated 13 June 2001, had in fact been made in respect of that sum, and payment had been made pursuant to those demands on 5 July 2001.

[95] The litigation proceeded to an application for summary judgment fixed for hearing in February 2002. Before that happened there was, however, an important meeting on 9 January 2002 between the claimant's Mr Fenwick, the defendant and a Mr Fairweather, who was an accountant and financial adviser to the defendant. There are two written records of this meeting, one Mr Fenwick's own file note and the other a note made by Miss Martin recording Mr Fenwick's oral account to her of what had transpired at the meeting. It is clear from these that the impression received by Mr Fenwick was that, while the defendant was not seeking to deny his liability, he was anxious to impress on Mr Fenwick that he might not be worth suing and that, so far as concrete proposals were concerned, what he was looking for was, if anything, to have an overriding lease in the name of his company. Mr Fenwick was puzzled as to why this route was being proposed as opposed to simply taking an assignment, and suspected that the answer lay in some intention to expunge once and for all the defendant's liability under the indemnities.

[96] The meeting ended unhappily so far as the defendant was concerned. He is a gentleman of courtly manners, modest about his abilities as a businessman but proud (and justly so) of his long years of experience as an hotelier. At the end of the meeting he expressed his gratitude to Mr Fenwick for his time and the hope that some gentlemanly agreement could be reached satisfactory to all concerned. According to him (the matter had not been put to Mr Fenwick) Mr Fenwick had replied with some such words as 'Pull the other one Mr Raguz'. The defendant told me with some feeling (which I judged to be entirely genuine) that he had been deeply offended by this remark. Whether or not Mr Fenwick actually said it, it is reasonably clear from his conversation with Miss Martin (as recorded by her) that he did have suspicions as to the genuineness of the defendant's proposals.

[97] In fact the defendant's proposals were, in my judgment, a genuine attempt by him, with Mr Fairweather's assistance, to construct a solution which would be acceptable to the claimant and at the same time free the defendant and in due course his estate from the prospect of a contingent liability stretching to 2062. The proposals were subsequently elaborated with clarity in a letter written by Mr Fairweather to Mr Fenwick dated 15 January 2002 to which the latter replied on 12 February saying that the proposals were unacceptable, that the claimant wished to retain the right to pursue the defendant on his indemnities, that the claimant had rejected the solution of its applying for an overriding lease, but that the claimant was happy for either the defendant or one of his companies to take an assignment of the leases. That letter crossed with one from

Mr Fairweather which withdrew the proposals. The defendant at no time thereafter expressed any interest in taking an assignment.

[98] Mr Fenwick had told Mr Fairweather and the defendant at the meeting on 9 January 2002 that the claimant had an agreement with the administrative receivers concerning the running of the hotel. Indeed Mr Fairweather's letter of 15 January had expressed his understanding that in addition to the claimant having paid off the arrears of £346,313·05 and paying the current passing rent, it was paying:

> '(b) approximately £100,000 per annum to the receiver of the insolvent lessee company—presumably that the payment is being made with a view to avoiding the debtor company being placed in liquidation with the consequential risk of a disclaimer and/or forfeiture thereby crystallising very much greater liabilities.'

Mr Fenwick had also invited the defendant to communicate, if he wished, with the administrative receivers. Miss Martin was dismayed to hear from Mr Fenwick that he had divulged this information. Consistently with her belief (expressed in May 2000) that entry into the maintenance agreement would prejudice the claimant's rights under the indemnity, she now recorded that she had deliberately not given the defendant details about that agreement and she feared that it might complicate matters. She advised that a tight rein be kept on what further information was given to the defendant either by the claimant or the administrative receivers.

[99] Intelligible as this approach of Miss Martin's was, it had some unfortunate consequences for the way in which she conducted the subsequent litigation on the claimant's behalf until her (abrupt) departure from Eversheds in October 2002. In particular she made a witness statement in the course of the summary judgment application in September 2002 in which she sought to give the impression that the claimant had 'no knowledge' concerning the trading activity of HSJ, and 'no role to play' in looking at potential assignees, assertions which were simply unsustainable as matters of fact. There was also a dragging of heels in disclosure relating to the maintenance agreement in the initial disclosure process, a fact which was later to embarrass Mr Anderson who took over the matter from Miss Martin following her departure.

[100] These matters, relevant though they may be to the spirit in which this litigation has been conducted (which has been highly contentious at some of its interlocutory stages), are irrelevant in answering the question whether the claimant's conduct deprived the defendant of an opportunity which he would otherwise have taken himself to take an assignment. I think that his position all along was that he was (as he put it himself) 'praying' that the Rizvi transaction would complete as soon as possible, and hoping at the same time that his professional advisers would be able to construct arguments which would reduce or extinguish what on their face appeared to be unavoidable liabilities to the claimant.

[101] In support of what I have called its wider arguments, which I have summarised at [40], above, the defendant relied on two lines of authority. The first is a line of authority relating to guarantees which recognises that a surety may be discharged where the creditor can be said to have 'caused or connived' at the default by the principal debtor. The main modern authority is *Bank of India v*

Trans Continental Commodity Merchants Ltd [1983] 2 Lloyd's Rep 298 at 302. The origins of the principle (and in particular the use of the word 'connive') can be traced back to the speech of Lord Brougham in *MacTaggart v Watson* (1835) 3 Cl & Fin 525 at 542–543, 6 ER 1534 at 1540–1541 where he said—

> 'it cannot avail to discharge a surety who has expressly bound himself for a person's doing certain things, unless it can be shown that the party taking the security has, by his conduct, either prevented the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened.'

[102] In *Dawson v Lawes* (1854) 23 LJ Ch 434 at 438, 69 ER 119 at 128 Wood VC commented on this passage that 'All that pointed to active connivance, amounting, in fact, as it would do in such a case, almost if not entirely to a fraud on the part of the persons, and particular officers who were so conducting themselves'.

[103] I do not myself find this analogy from the law of guarantees helpful. The question in what circumstances a surety may be discharged from his obligations turns primarily on equitable considerations (see per Mance J in *Socomex Ltd v Banque Bruxelles Lambert SA* [1996] 1 Lloyd's Rep 156 at 198). No question here arises of there having been conduct on behalf of the claimant which discharges altogether the defendant's liability to indemnify the claimant. The question is, rather, whether the indemnity extends on its true construction to the loss in respect of which the claimant claims.

[104] The second line of authority relied on was that supporting the proposition that an indemnified may not sue in respect of a loss which he has himself caused. Here Mr Bannister invoked the decision of Hobhouse J in *Ikerigi Cia Naviera SA v Palmer, Global Transeas Corp v Palmer, The Wondrous* [1991] 1 Lloyd's Rep 400. In that case, where a loss of hire insurance indemnified the owners of the vessel against, inter alia, 'restraint or detainment', and, where the relevant restraint or detainment had taken place as the result of the non-payment of harbour dues by the charterer, the owners were held unable to recover. Hobhouse J said (at 415, 416):

> 'it was still necessary for the plaintiffs to show that the detention was fortuitous . . . [W]here a situation comes about as a result of the voluntary conduct of the assured, it would not normally be described as fortuitous. It did not happen by chance but by the choice of the assured. Put another way, it would be in the ordinary course that, if the owners of a vessel do not pay the port dues for which they are liable to the port authority in respect of the stay of the vessel in that port (or provide acceptable security), the vessel will not be cleared. For the purposes of the law of insurance, in the absence of an express agreement to the contrary, a policy should not be construed as covering the ordinary consequences of voluntary conduct of the assured arising out of the ordinary incidents of trading; it is not a risk.'

[105] In my judgment the principle illustrated by that case has nothing to do with the present. The indemnity implied by s 24 of the 1925 Act is not an

indemnity by way of insurance against the 'fortuity' of the defendant or some successor of his not paying the rent: it is a promise to keep the claimant harmless if for any reason the defendant or his successor does not pay the rent. a

[106] That does not mean that I reject the general proposition that, if the actual reason for the non-payment was action taken by the claimant but for which the payment would have been made, that might have fallen outside the scope of the covenant. However, the reason for that would be that the second b (indemnity) limb of the covenant should not be construed as imposing a wider and more extensive liability than that attaching to the liability for common law damages for breach of the first limb. If therefore the claimant has suffered a loss which its own action could reasonably be expected to have mitigated or avoided altogether, the indemnity covenant should not be construed as covering that loss. c In that respect I do not agree with Mr Stoner's submission that there is any analogy to be drawn here with *Jervis v Harris* [1996] 1 All ER 303, [1996] Ch 195 (see [42], above).

[107] On the facts, however, there seems to me to be no question of the claimant having failed to mitigate in this way. HSJ's failure or inability to pay the rent was at no material time caused by the claimant. The period during which d that failure continued was doomed to last until an assignee could be found who would assume the liability. On the facts as I have found them, nothing which the claimant did prolonged that period. Indeed had the claimant not taken the steps which it did that period might well have been longer unless the defendant had in the meantime stepped in and taken an assignment, a course of action which he e was anxious to avoid if possible.

[108] The issue before me thus resolves into the questions (i) whether the claimant is debarred from recovering that element of the rent demanded from it in 2001 for which (if I am right in my construction of s 17) it was not liable to NCP; and (ii) whether the claimant is debarred from recovering that element of f the rent which it funded in February 2003 attributable to its liabilities under s 17 notices the service of which it had itself positively invited (and which would not have been served when they were but for that invitation).

[109] Standing back from the way in which the claimant has actually pleaded its claim, I would have little hesitation in coming to the conclusion that the g answer to both questions is negative, for essentially the same reason in each case. In each case the payment falls within the description of a payment in respect of an 'expense' or a 'claim' which was 'on account of the non-payment of the said rent', that is to say which arose as a direct result of the fact that HSJ was not only failing to meet its current liabilities in respect of rent but was plainly going to be unable to discharge any future liabilities, that NCP was not going to give its h consent to an assignment unless HSJ paid all arrears of rent, that unless the claimant funded the payment of those arrears no one else was going to do so, and that if no assignment took place the claimant would continue to accrue liabilities in respect of future rent to NCP. The claimant thus found itself in a position where, in order to stem the onslaught of future liabilities, it had to incur the j expense of meeting the arrears irrespective of its strict liability to NCP to pay the same. If that is the correct analysis, the fact that it paid sums in respect of rent in 2001 which were not the subject of valid s 17 notices, and the fact that it procured the service in 2003 of s 17 notices which would not otherwise have been served, are irrelevant to the question of its being able to recover those sums from the defendant.

[110] Consideration of the way in which the case has actually been put does, however, raise a difficulty. The claim from the outset has been, and remains, that because the claimant was liable to NCP it follows that the defendant was liable to the claimant. If I am right on the s 17 argument (as to which plainly two views are possible) the premise fails in relation to the rent paid by the claimant in response to the 2001 demand; and if the premise is good in relation to part of the 2003 payment, it was only because, by its own act, the claimant procured the service of the relevant notices.

[111] In relation to the 2003 payment my decision is that the fact that the claimant procured the service of the notices does not deprive it of its right to be indemnified against the consequent liability. That is simply because the claimant's actions in procuring the services of the notices did not materially affect the defendant's liability. The matter may be quite simply tested by asking what would have happened had the claimant simply said that it was not going to fund the payment of the arrears. The consequence would have been to alert NCP to the fact that, unless it served s 17 notices, the Rizvi transaction would not complete. If the Rizvi transaction had not completed, the inevitable result would have been that the 'missing' s 17 notices would have been served. The defendant therefore lost nothing as a result of the claimant having invited the service of those notices.

[112] I find the question of the payment in response to the 2001 statutory demands more difficult. If I am right about the s 17 notices, those demands could have been, if not ignored, defeated. It would, however, still have been in the claimant's interest to have paid those sums if they continued to be demanded (as they would have been) by NCP from HSJ as a condition of consenting to an assignment. It was likewise in the defendant's interest that those sums should be paid. Payment of those sums by the claimant in those circumstances would have been a foreseeable 'expense' recoverable by the claimant against the defendant under the s 24 covenant for indemnity. The question which I have found of some difficulty is whether the claimant has sufficiently pleaded this way of putting its case for recovery. Nothing to this effect is to be found in the particulars of claim. There is simply the denial, in para 24 of the re-amended reply that the consequence of the invalidity of the s 17 notices is to relieve the defendant of his liability to indemnify the claimant. I have been in much doubt as to whether this is enough. I have, however, narrowly concluded that, if there is a lacuna in the claimant's pleading in this respect, it should not deprive it of its remedy. This alternative way of putting the case was fully addressed by Mr Stoner in paras 163–167 of his opening skeleton argument. Moreover the points raised by the defendant in his defence permitted, indeed necessitated, a full investigation of the facts relevant to this way of putting the case, in particular an investigation of the issue as to whether or not, and if so why, the claimant would have paid the sums in question even if no valid s 17 notices had been served. Further the pleading point to which I have referred was not in terms taken by Mr Bannister.

MINOR POINTS

[113] There are two further minor points of quantum. One, which is uncontroversial, is that so far as the rent under the 1967 and 1969 leases for the quarter commencing 25 December 2002 is concerned, liability for that was assumed by Skymede in respect of the apportioned period commencing on 1 March 2003 and ought therefore not to have been included in the claim (since

it should have come from Skymede). I understood this to be accepted on behalf of the claimant. The second is a more difficult point and relates to a sum of £10,072·21 which NCP had apparently taken from rent deposits held by it in respect of rental due for the period from 24 June 1999 to 5 October 1999. The claimant conceded that, if it could be shown that this sum of £10,072·21 had indeed been taken by NCP in satisfaction of the rent due for the relevant period, it would give credit to the defendant for that sum against the amount of any judgment given by me. The defendant, however, argued that it was entitled as a matter of right to a judgment in this sum.

[114] So far as the facts are concerned I was satisfied on a balance of probabilities that the defendant's premise was correct. Without sight of the rent deposit deed it is not possible to be sure that the sum was not taken in satisfaction of sums other than rent in the strict sense of the word. The accounting information supplied by NCP made this seem unlikely.

[115] The difficulty, however, with the defendant's case is that the sum concerned relates to a period in respect of which judgment was obtained on 9 December 2002. I was not persuaded by Mr Bannister that it was open to me to go behind that judgment. Given, however, the fact that this judgment will result in an order for payment against the defendant, and that the claimant has conceded that in that event it would give credit for the sum, the point is academic.

CONCLUSION

[116] For those reasons, subject to the claimant giving credit for the sum £10,072·21, the claimant is entitled to judgment in the sums claimed.

Neneh Munu Barrister.

Order accordingly.

R (on the application of Baiai and another) v Secretary of State for the Home Department (No 2)

[2006] EWHC 1454 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

SILBER J

16 JUNE 2006

Marriage – Right to marry – Immigration – Discrimination – Requirement for persons subject to immigration control wishing to marry other than according to rites of Church of England to obtain written permission of Secretary of State – Secretary of State refusing permission to person present in United Kingdom unlawfully – Whether breach of right to marry – Whether discriminatory – Human Rights Act 1998, Sch 1, Pt I, arts 12, 14 – Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 19.

Section 19[a] of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 applied to marriages involving a party subject to immigration control (defined as any person who was not a European Economic Area (EEA) national and who required leave to enter or remain in the United Kingdom) whose marriage was to be solemnised on the authority of certificates issued by a superintendent registrar under Pt III of the Marriage Act 1949. Section 19 did not apply to marriages under Pt II of the 1949 Act, which were marriages according to the rites of the Church of England. The first claimant was an Algerian national who had entered the United Kingdom illegally and intended to marry the second claimant who was an EEA national working in the United Kingdom. The Secretary of State refused his application for a certificate of approval and the claimants, together with others, applied for judicial review. The judge held, inter alia, that s 19 of the 2004 Act infringed the right to marry contained in art 12[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), fell within the prohibition of discrimination contained in art 14[c] of the convention, and was not justified in the interests of immigration control. Following the judgment and the subsequent claims for damages by the claimants and others, a further issue was raised in relation to the first claimant which the judge dealt with by way of written submissions. The issue for determination was whether the decision of the Secretary of State to refuse to grant a certificate of approval to the first claimant on the ground that he was unlawfully in the United Kingdom was compatible with his rights under arts 12 and 14 of the convention.

Held – Where a person was in the United Kingdom illegally that was a factor which could be taken into account in the balancing exercise involved in determining the existence and extent of qualified convention rights and when considering whether the requirements of proportionality had been satisfied. The requirements of the need for effective immigration control were then relevant.

a Section 19, so far as material, is set out at [9], below

b Article 12 is set out at [24], below

c Article 14 is set out at [55], below

A policy of precluding illegal immigrants from obtaining certificates of approval and in consequence from obtaining further rights was rationally connected to the policy of immigration control as otherwise it would be manifestly unfair to other would-be immigrants. Accordingly, the art 12 rights of a person who was not in the United Kingdom lawfully would not be infringed if he were refused permission to marry and required to travel and marry abroad before applying for entry clearance. In relation to the art 14 claim there was, in the instant case, a relevant and justifiable difference between the first claimant who wished to marry in a registry office and another illegal immigrant who wished to marry pursuant to Anglican rites. In addition, there was a justifiable difference between the first claimant and somebody who had the right to stay in the United Kingdom for such a length of time that he would receive a certificate of approval. Accordingly, the Secretary of State had been entitled to refuse the first claimant's applications for a certificate (see [18], [30], [37], [38], [47], [54], [61], [77], below).

R (on the application of Mahmood) v Secretary of State for the Home Dept [2001] 2 FCR 63 applied.

Notes

For the right to marry and found a family, and for the prohibition of discrimination, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 162, 164.

For the Human Rights Act 1998, Sch 1, Pt I, arts 12, 14, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 707, 708.

For the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 19, see 31 *Halsbury's Statutes* (4th edn) (2006 reissue) 674.

Cases referred to in judgment

App No 10914/84 v Netherlands (1986) 8 EHRR 308, E Com HR.

App No 9773/82 v UK (1982) 5 EHRR 296, E Com HR.

De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, [1998] 3 WLR 675, PC.

Klip v Netherlands App No 33257/96 (1997) 91 A-DR 66, E Com HR.

Mellacher v Austria (1989) 12 EHRR 391, [1989] ECHR 10522/83, ECt HR.

R v Johnstone [2003] UKHL 28, [2003] 3 All ER 884, [2003] 1 WLR 1736.

R v Secretary of State for the Home Dept, ex p Daly [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.

R (on the application of Carson) v Secretary of State for Work and Pensions, R (on the application of Reynolds) v Secretary of State for Work and Pensions [2005] UKHL 37, [2005] 4 All ER 545, [2006] 1 AC 173, [2005] 2 WLR 1369.

R (on the application of Mahmood) v Secretary of State for the Home Dept [2001] 2 FCR 63, [2001] 1 WLR 840, CA.

Szoma v Secretary of State for the Dept of Work and Pensions [2005] UKHL 64, [2006] 1 All ER 1, [2005] 3 WLR 955.

Wandsworth London BC v Michalak [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617.

Wilson v First County Trust Ltd (No 2) [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816, [2003] 3 WLR 568.

Written submissions

Following the judgment of Silber J on the application for judicial review of the decision of the Secretary of State to refuse the application of the first claimant Mahmoud Baiai for a certificate of approval granting him permission to marry the

second claimant Izabela Trzcinska in the United Kingdom as required by s 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 on 10 April 2006 ([2006] EWHC 823 (Admin), [2006] 3 All ER 608) and his further judgment on 10 May 2006 ([2006] EWHC 1035 (Admin), Silber J was requested to resolve a further issue. He received written submissions from the claimants, the Secretary of State and the intervener, the Joint Council for the Welfare of Immigrants, on 19, 24 and 26 May 2006 and handed down judgment without an oral hearing. The facts are set out in the judgment.

Ramby de Mello, Satvinder Singh Juss and *Adrian Berry* (instructed by *David Tang & Co*) for the claimants.

Monica Carss-Frisk QC, Angus McCullough and *Richard Mumford* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Richard Drabble QC and *Eric Fripp* (instructed by the *Joint Council for the Welfare of Immigrants*) for the Joint Council for the Welfare of Immigrants.

SUMMARY (THIS DOES NOT FORM PART OF THE JUDGMENT)[a]

1. Paragraph [1] sets out the issue on this application, which is whether the refusal by the Secretary of State to grant a certificate of approval to marry to the first claimant on the grounds that he was unlawfully in this country was incompatible with his rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Paragraphs [2] and [3] give details of the refusal letters of 15 February 2005 and 15 April 2005.

2. Paragraphs [4]–[6] explain the earlier history of this litigation in the previous judgments. The chronology is set out in [7]. Details of the s 19 scheme are described in [8]–[13].

3. The background to the refusal letters is explained in [14]–[15]. Paragraphs [16]–[22] comments on the relevance of the first judgment.

4. The background to the art 12 claim is set out across [24]–[26]. Paragraphs [27]–[29] describe the advantages that the first claimant would obtain by getting married to an EEA national. Paragraph [30] explains why the immigration status of the first claimant is relevant.

5. The issue of whether the measures in the s 19 regime are designed to meet the legislative objective in relation to an illegal immigrant are considered in [30] onwards. The approach of the Secretary of State is set out in [33] and [34]. Paragraph [36] explains what the Court of Appeal in *R (on the application of Mahmood) v Secretary of State for the Home Dept* [2001] 2 FCR 63, [2001] 1 WLR 840 stated about the need for effective immigration control and the avoidance of queue jumping.

6. Paragraphs [41]–[44] explain that the art 12 right does not mean that a person is entitled to marry in a country of his or her choice. Paragraphs [45]–[47] show why the reasoning in the first judgment which led to the conclusion that parts of the s 19 regime were incompatible with art 12 rights do not apply in the case of an illegal immigrant. Paragraph [48] explains that substantial deference has to be allowed to the Secretary of State.

7. Paragraphs [50]–[53] explain why the means used to impair the art 12 right in the s 19 regime are no more than necessary to accomplish the objectives of illegal immigrants and do not interfere with their art 12 rights.

a Editor's note: Silber J supplied the following summary of his judgment.

8. The background to the art 14 claim is set out in [55]–[58]. In [59]–[61] it is explained why the art 14 claim must be rejected.

9. Paragraphs [62]–[70] deal with the consequence of the first claimant having been granted temporary admission. This passage was included as there was argument on this issue even though it does not have any effect on the outcome as the first claimant had not been given temporary admission on either of the occasions when the Secretary of State refused his application for a certificate of approval.

10. Paragraphs [71]–[74] explain the position of the s 19 regime in the light of the present judgment and of the first judgment. Paragraphs [75] and [76] explain why a third judgment was necessary in this case and why no oral submissions were made.

11. The conclusions are then set out in [77] and [78].

16 June 2006. The following judgment was delivered.

SILBER J.

I INTRODUCTION

[1] This application raises the issue of whether the decision by the Secretary of State for the Home Department (the Secretary of State) to refuse to grant a certificate of approval (COA) to marry under the scheme introduced by s 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 to Mr Mahmoud Baiai (the first claimant) on the grounds that he was *unlawfully* in this country, was compatible with his rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The claimants and the intervener (the Joint Council for the Welfare of Immigrants) (JCWI) contend that the refusal of the Secretary of State constituted an interference with the first claimant's rights under the convention while the Secretary of State submits that his rights were not infringed by the refusal. Subject to certain exceptions, this scheme requires people subject to immigration control to obtain from the Secretary of State a COA in order to be allowed to marry in this country.

[2] The Secretary of State refused the first claimant's application for a COA by a letter dated 15 February 2005 (the first refusal letter). After the first claimant and his partner Izabela Trzcinska (the second claimant) had challenged that refusal letter by way of the present judicial review proceedings, the Secretary of State reconsidered his decision to refuse to grant a COA to the first claimant in the light of the additional reasons set out in the judicial review application.

[3] By a letter dated 15 April 2005 (the second refusal letter), the Secretary of State maintained his earlier refusal of the grant of a COA to the first claimant. In both refusal letters, the Secretary of State explained, as is not disputed, first that the first claimant did not have leave to enter or to remain in the United Kingdom and second that there were no exceptional circumstances in his case.

[4] When this claim together with two similar applications came before me earlier this year, I was asked by counsel to determine an agreed list of more than 20 issues and many more sub-issues formulated by counsel for the claimants and the Secretary of State relating to the compatibility with the convention of various features of the scheme set out in the 2004 Act, which affected the right to marry of those covered by immigration control. In a judgment handed down on 10 April 2006 ([2006] EWHC 823 (Admin), [2006] 3 All ER 608 (the first

judgment), I held that various aspects of the scheme set out in the 2004 Act were incompatible with both arts 12 and 14 of the convention. I, like all counsel, expected that my rulings on this long list of issues prepared by counsel for all the claimants and the Secretary of State would then enable all the outstanding issues between the parties to be resolved.

[5] When I was dealing with the subsequent claims for damages by the present claimants and others, it became clear that this long list of issues did not deal with the question of whether the Secretary of State was entitled to reject the application of a person *unlawfully* in this country without infringing his rights under the convention and that is the issue with which I am now concerned. When I handed down the second judgment on 10 May 2006 ([2006] EWHC 1035 (Admin), [2006] All ER (D) 142 (May)) (the second judgment), I was then asked by counsel for the claimants and the Secretary of State to resolve a further issue—

> 'as to whether the Secretary of State was entitled to refuse the application of the claimant Mahmoud BAIAI (CO/1460/2005) for a Certificate of Approval ("COA") without infringing his rights under the European Convention on Human Rights . . .'

[6] For reasons which I will explain at [76], below, I was asked not only to resolve this matter as a matter of urgency but also unfortunately without the benefit of oral submissions although I have received detailed written submissions from counsel for the claimants, for the Secretary of State and for the intervener. The Secretary of State submits that notwithstanding the first judgment, the s 19 scheme does not involve a disproportionate interference with the convention rights of those (like the first claimant) who are illegally present in this country. Counsel for the claimants and for the intervener contend that the s 19 scheme does interfere with the first claimant's rights under arts 12 and 14 of the convention. There was also argument as to the right of the first claimant to receive a COA after the Secretary of State had granted to him temporary admission on 24 May 2005, which was after the first claimant had received the first and second refusal letters. To understand the rival submissions, it is now necessary to set out the facts relating to the claimants before setting out the main features of the s 19 regime.

II THE CHRONOLOGY

[7] The relevant facts relating to the claimants are:

(a) The first claimant was born on 2 September 1971. He was and remains an Algerian national. According to his witness statement of 2 March 2005, he entered the United Kingdom as an illegal immigrant in February 2002. In about October 2004 he started living with the second claimant, whom he had met two months earlier. She is a Polish national who was born on 2 July 1979 and who is working in the United Kingdom following Poland's accession to the European Union and so she is an European Economic Area (EEA)/European Economic Community (EEC) national.

(b) Under cover of a letter of 31 January 2005, the first claimant applied to the Home Office for a COA and this was refused by the Secretary of State in the first refusal letter dated 15 February 2005 in which it was explained that he had no valid leave to enter or remain in the United Kingdom and that there were no exceptional compassionate circumstances applicable in his case.

(c) The immigration authorities first became aware of the first claimant's presence when he applied for a COA to marry after what he described as his

illegal entry to the United Kingdom. When he received the first refusal letter, the first claimant was notified that he was required to make his own arrangements to leave the United Kingdom immediately. a

(d) By a letter dated 11 April 2005, the Secretary of State requested the first claimant to attend an interview to ascertain his immigration status in accordance with the usual practice of the Secretary of State when a person present in the United Kingdom comes to the attention of the authorities. b

(e) On 12 April 2005, the first claimant's legal representatives replied stating that they did not consider such an interview to be appropriate in the light of the judicial review application which the first claimant had instituted on 8 March 2005 in order to challenge the first refusal letter and the s 19 regime.

(f) In his judicial review application, the first claimant advanced reasons not only why the s 19 regime was unlawful but also why the Secretary of State ought to exercise his discretion to grant him a COA notwithstanding the fact that he did not satisfy the relevant criteria. The Secretary of State considered these matters and he issued the second refusal letter dated 15 April 2005, giving additional reasons for maintaining his refusal to grant a COA to the first claimant. c

(g) In response to the letter of 12 April 2005, the Secretary of State sent a status questionnaire on 9 May 2005 which the first claimant was asked to complete and to return so that the Secretary of State could determine the immigration status in the United Kingdom of the first claimant. The first claimant was also informed that his failure to complete and return the form or to attend an interview which he had already declined to do would result in the Secretary of State considering him to have entered and remained in the United Kingdom illegally. d e

(h) The first claimant did not complete the questionnaire but in a letter dated 16 May 2005, the first claimant's legal representatives explained that:

> 'Our client has never claimed asylum and does not intend to do so. It is conceded that he entered the UK as an illegal entrant in or about February 2002. No doubt you are aware that our client has obtained permission to apply for judicial review. His case will be fully argued before the court and we do not believe that it is appropriate to return this questionnaire to you at this stage . . .' f

(j) As the first claimant had admitted through his legal representatives that he had entered the United Kingdom illegally, the Secretary of State did not pursue his request for the first claimant to attend for an interview or to complete the questionnaire as the purpose of interviewing the first claimant was to ascertain whether he had entered the United Kingdom lawfully. g

(k) By letter dated 24 May 2006, the Secretary of State served on the first claimant form IS 96ENF, which specifically stated that the papers which granted him temporary admission were served on the first claimant 'as an illegal immigrant' and the first claimant was informed of the reporting and residence restrictions imposed on him. He was also notified that he was liable to be detained. h

(l) On 15 May 2006, the first claimant was provided with form IS 75 and he was asked to provide the immigration authorities with any reason why he might consider himself eligible to remain in the United Kingdom and any justification as to why he should not be removed or required to leave the United Kingdom. j

(m) By a letter dated 20 June 2006, the representatives of the first claimant returned the form IS 76 stating that the first claimant had already explained why

he should be allowed to remain in the United Kingdom and confirming why he did not wish to advance any other grounds.

(n) On 23 April 2006, the first claimant was granted an extension to his temporary admission.

III THE SECTION 19 SCHEME

[8] Section 19 of the 2004 Act imposes certain requirements before a person subject to immigration control is able to marry, otherwise than in accordance with the rites of the Church of England under Pt II of the Marriage Act 1949. A person 'subject to Immigration control' is a person who is not an EEA national and who requires leave to enter or remain in the United Kingdom (see s 19(4)(a)). The first claimant, who is a national of Algeria, is such a person.

[9] Section 19(3) of the 2004 Act provides that:

> 'The superintendent registrar shall not enter in the marriage notice book notice of a marriage to which this section applies unless satisfied, by the provision of specified evidence, that the party subject to immigration control—(a) has an entry clearance granted expressly for the purpose of enabling him to marry in the United Kingdom, (b) has the written permission of the Secretary of State to marry in the United Kingdom, or (c) falls within a class specified for the purpose of this paragraph by regulations made by the Secretary of State.'

[10] The relevant statutory provision in the first claimant's case is s 19(3)(b) because he is an illegal entrant to the United Kingdom and so at the time of the first and second refusal letters, he plainly did not have entry clearance for the purpose of marriage within the meaning of s 19(3)(a), nor did he fall within a specified class for the purposes of s 19(3)(c). He therefore needed the written permission of the Secretary of State to marry in the United Kingdom pursuant to s 19(3)(b).

[11] Permission by the Secretary of State is granted by the issuing of a COA pursuant to the procedure provided for in the Immigration (Procedure for Marriage) Regulations 2005, SI 2005/15 for which a fee of £135 is payable on each application for a COA.

[12] The practical effect of the new regime is that applicants, who first do not have a valid right to enter or remain in the United Kingdom beyond a short term status (ie more than six months with more than three months remaining at the time of the application for the COA) or second have an initial application for immigration status or an appeal outstanding for 18 months or third have compelling compassionate circumstances, which make it unreasonable to expect the couple to travel and marry abroad, the expectation is that *either* the couple should travel abroad and marry, and then for the partner requiring entry clearance to obtain this from abroad on the basis of his or her marriage; *or* for the individual requiring entry clearance to travel abroad (with or without his or her fiancé(e)) to obtain entry clearance, from abroad, on the basis of his intended marriage in the United Kingdom. The compassionate circumstances may be seen to be applicable where neither expectation is reasonable.

[13] The Secretary of State contends first that as the first claimant was an illegal entrant into the United Kingdom who did not have valid leave to enter or remain, he did not qualify for a COA under the general policy set out in the guidance and second that there were no exceptional compassionate circumstances which would have merited a grant of discretion in his favour.

IV THE BACKGROUND TO THE REFUSAL LETTERS

[14] The Secretary of State's decisions in the refusal letters have to be considered against the background of three important facts. First, it is not suggested by the first claimant that there were any exceptional compassionate circumstances which made it unlawful for the Secretary of State to refuse the COA on that basis.

[15] Second, in so far as counsel for the first claimant contends that the Secretary of State should have accorded weight to the fact that the first claimant had been granted temporary admission to the United Kingdom, this submission fails to appreciate that the first and second refusal letters were dated 15 February 2005 and 15 April 2005 respectively while temporary admission was not granted to the first claimant until 24 May 2005. So at the date of both of the refusal letters, the first claimant was an illegal immigrant, who had not been given temporary admission. Third, the claimants' submissions have referred to applications being made under various European Union enactments but they are not the subject of the present applications and so I will not consider them.

V THE RELEVANCE OF THE FIRST JUDGMENT

[16] The claimants and the JCWI contended that the Secretary of State was not entitled to reject the application for the COA and they point in support to the orders made in the first judgment in which I made declarations of incompatibility in respect of the s 19 regime. I do not consider that those orders mean that the Secretary of State was obliged to accede to the first claimant's application for a COA in the light of the following factors, which I set out in no particular order of importance.

[17] First, s 4(6) of the 1998 Act provides that a declaration of incompatibility: '(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.'

[18] Second, the first judgment was concerned with those who had a right to enter and to remain in the United Kingdom. None of the issues which I was asked to resolve were concerned with the position of somebody, who is *unlawfully* in this country. Such a person's status will be relevant on the extent of his or her convention rights. An illegal immigrant will be entitled to the *absolute* rights specified in the convention, such as those set out in art 3. Where, however, a right under the convention is qualified then, as I will explain at [33]–[38], below, the fact that the person concerned is in the United Kingdom illegally is a factor which can be and frequently should be taken into account first in the balancing exercise involved in determining the existence and extent of such qualified convention rights and second when considering whether the requirements of proportionality have been satisfied. This means that when the qualified convention rights of an *illegal* immigrant (such as the first claimant) are being considered, it is necessary to attach weight to the legislative objective of effective immigration control against *illegal* immigrants, which, as I will explain, is an integral part of the policy of the Secretary of State. As I explained in the first judgment ([2006] 3 All ER 608 at [61]), art 12 is not an absolute right as it requires a balance to be struck.

[19] It follows that the fact that an applicant for a COA is an *illegal* immigrant must be a relevant factor on the issue of whether the grant of the COA would be consistent with effective immigration control. When I was given the agreed list of issues to be resolved in the first judgment, none were specifically concerned

with the position of the *illegal* immigrant applicant. Thus, the specific consequences of an applicant being an *illegal* immigrant were not considered in the first judgment and nothing in it resolves the convention rights and in particular the art 12 rights of a person in that position. In consequence, the declaration of incompatibility does not mean that the Secretary of State was obliged to grant a COA to an *illegal* immigrant such as the first claimant or that that his decision to refuse a COA to the first claimant can be quashed.

[20] Third, the agreed list of issues which were the subject of the first judgment, led to very general submissions while in the present case I am concerned with specific facts. My critical findings in respect of non-Anglican religious ceremonies are not relevant as the first and second claimants were intending to marry in a registry office and that fact would have been known to the Secretary of State at least when he issued the second refusal letter as both the claim form and the first witness statement of the first claimant refer to his attempts to marry in a registry office and they both pre-date the second refusal letter. Different considerations apply to such a wedding especially as I explained in the first judgment at [71], [72], there is detailed cogent evidence that registry offices have frequently been used for sham weddings.

[21] Fourth, one of these reasons why I considered that the s 19 regime to be incompatible with the convention in the case of people *lawfully* in the United Kingdom was that there was no consideration of their particular circumstances. The terms of the first and second refusal letters show first that the Secretary of State considered carefully the first claimant's application for a COA including his personal circumstances and second that he refused the application after having considered the first claimant's full circumstances and his representations as is particularly clear from the second refusal letter.

[22] For all these reasons, the reasoning and conclusions in the first judgment do not mean that the decision of the Secretary of State to refuse the first claimant's request for a COA must be impugned.

[23] My task is to ascertain if the art 12 and art 14 rights of the first claimant have been infringed and I will focus my attention particularly on those conclusions in the first judgment, which led to the claimants succeeding in order to decide if those conclusions are applicable to the first claimant, who was an illegal immigrant.

VI THE ARTICLE 12 CLAIM

(i) *Introduction*

[24] Article 12 of the convention provides that: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.'

[25] In the first judgment, I considered whether the s 19 regime interfered with the art 12 rights of those who were in the United Kingdom and who were subject to immigration control but who were here *lawfully*. I concluded that (i):

> 'In my view, the jurisprudence of the European Commission of Human Rights expressly permits the introduction of legislation to prevent marriages entered into for the purpose of avoiding immigration control notwithstanding that this legislation might interfere with the right to marry' (see [57]);

(ii) 'The legislative objective [of preventing sham marriages entered into so as to avoid immigration control] is sufficiently important to justify limiting the fundamental [art 12 right]' (see [73]); and (iii) 'the art 12 claim succeeds as the s 19 regime is not proportionate and it constitutes a substantial interference with art 12 rights ...' (see [108]).

[26] The reason why the s 19 regime was not proportionate in respect of those who were *lawfully* in the United Kingdom was because I concluded that the regime failed to comply with two of the three requirements of proportionality specified in the classic approach propounded by Lord Clyde in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80, [1998] 3 WLR 675 at 684 and followed by Lord Steyn in *R v Secretary of State for the Home Dept, ex p Daly* [2001] UKHL 26 at [27], [2001] 3 All ER 433 at [27], [2001] 2 AC 532, namely the requirements that:

> '(ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

[27] I must now consider if these two crucial requirements have been satisfied in the case of the first claimant as he was an *illegal* immigrant at the time of the refusal letters so that, according to Miss Carss-Frisk QC, his art 12 rights were not infringed. These two requirements have to be considered in the light of the facts first that the first claimant was at the time of each of the refusal letters liable to be detained and deported as an illegal immigrant and second that on his marriage to the second claimant, his Polish partner, the first claimant's status in this country would or might change radically as a consequence of this marriage to an EEA national. The second factor is important because the first claimant has explained in his sixth witness statement dated 26 April 2006 that on marrying his partner: 'I would obtain permission to remain in the United Kingdom under EU law and EU residence document.'

[28] As I will explain at [33] and [34], below, the concern of the Secretary of State is the need to have effective immigration control, which, as the Court of Appeal has stated, means that there must be consistency of treatment between one aspiring immigrant and another with the result that there should be no queue-jumping by those who enter the United Kingdom illegally without any form of entry clearance over those who apply in the proper manner for permission to enter the United Kingdom.

[29] In summary, the first claimant on marriage would obtain the right to residence in the United Kingdom if his wife was exercising treaty rights in the United Kingdom. Even though he entered the United Kingdom illegally, the first claimant would be entitled to a residence card if he entered into a marriage to an EEA national, who was exercising treaty rights in the United Kingdom. This right arose under reg 14 of the Immigration (European Economic Area) Regulations 2000, SI 2000/2326 which were in force at the time of both refusal letters and which remained in force until 30 April 2006, when they were replaced by the Immigration (European Economic Area) Regulations 2006, SI 2006/1003. Further, after four years, the first claimant would then become entitled to permanent residence if his wife was still exercising treaty rights. A residence permit can be refused if the marriage is shown to be marriage of convenience in the form of a 'sham' marriage or if it can be demonstrated that the EEA national is not exercising his or her treaty rights. Miss Alison Bennett, an Assistant Director of the Immigration and Nationality Directorate of the Home Office, has

stated that it is very difficult in practice to prove that a marriage is not genuine *after* it has taken place. The further advantages which the first claimant would enjoy by marrying an EEA national, the second claimant, are very great and in some respects, they were greater than those enjoyed by those who marry British nationals; these advantages are set out in the first judgment ([2006] 3 All ER 608 at [68], [69]) and so I will not repeat them. Even if the first claimant did not acquire these rights, he would still be able to rely on his marriage to an EEA national resident in the United Kingdom to challenge a removal direction issued by the Secretary of State on the basis that such removal would infringe his art 8 rights because of the difficulties, which his wife would experience if she had to move to Algeria and which he has described in his witness statements. Although such a claim would probably fail in the light of the present state of the law, the first claimant would be able to use this claim (and in particular that he was *married* to a United Kingdom resident) to delay his removal for a long period in the light of the serious delays in the immigration and the immigration appeal system.

[30] The main submission of counsel for the first claimant is that the immigration status of the first claimant is not a relevant factor when considering his right to marry. I am unable to agree because as I have explained in paras [46]–[59] of the first judgment the Secretary of State is entitled to impose restrictions or conditions on the right to marry in the interests of an effective immigration policy without infringing art 12 rights provided that each condition or restriction satisfies the three requirements of proportionality. In addition, I explained in paras [64]–[73] of the first judgment, the legislative object of preventing sham marriages entered into so as to avoid immigration control is sufficiently important to justify limiting art 12 rights. The issue to which I must now turn is whether the requirements of immigration control against *illegal* immigrants means that the decisions to refuse the first claimant a COA were proportionate. That exercise entails considering the two issues on which the Secretary of State failed at the first hearing.

(ii) *Are 'the measures [in the s 19 regime] designed to meet the legislative objectives . . . rationally connected to it' for an illegal immigrant?*

[31] While the first judgment was concerned with the position of people *lawfully* present in the United Kingdom, the position of the first claimant at the time of both the first and second refusal letters was radically different because he was an *illegal* immigrant without any right to remain in the United Kingdom. The Secretary of State contends that the fact that the first claimant was an illegal immigrant was of critical, if not crucial, importance. The case for the first claimant and the JCWI is that the immigration status of the first claimant is irrelevant to the decision as to whether to grant him a COA.

[32] In my opinion as I will explain, the fact that the first claimant was an illegal immigrant is of critical importance because to allow him to marry an EEA national and thereby to obtain the right of residence in spite of the fact that he had entered the United Kingdom illegally would undermine immigration policy with the result that the Secretary of State's decisions in the two refusal letters to refuse a COA to the first claimant was 'rationally connected' to his policy of immigration control. So this requirement of the proportionality test was satisfied.

[33] Evidence has been adduced by the Secretary of State in the form of a witness statement from Miss Bennett, who explains that the Secretary of State 'attaches great importance to maintaining effective immigration control'. He

considers that: 'there is a distinction between (i) those who have leave to enter or remain (albeit short-term or limited leave) and so have a right to be present in this country; and (b) those who have no such right, being either illegal entrants or over-stayers.'

[34] Miss Bennett states that the Secretary of State—

> 'considers that the importance of maintaining effective immigration control provides a powerful justification for his policy in relation to someone in [the claimant's] position, who is an illegal immigrant, having no leave to enter or remain in the [United Kingdom].'

[35] I would add that this point is important because an illegal immigrant would have a very great incentive to marry an EEA national as his status after such a marriage would change overnight from that of somebody liable to be removed to a person with all the rights to which I referred at [29], above. That means that there would be an incentive for an illegal immigrant to enter into a sham marriage for all those reasons. In addition the policy of the Secretary of State would mean that prospective immigrants might be deterred from entering the United Kingdom illegally as they would know that they could not by-pass the system of immigration control by marrying an EEA national.

[36] The reasoning of the Secretary of State as stated by Miss Bennett is also consistent with the views expressed by the Court of Appeal in *R (on the application of Mahmood) v Secretary of State for the Home Dept* [2001] 2 FCR 63, [2001] 1 WLR 840), which were that: (i) 'A State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations' (see [2001] 2 FCR 63 at 85–86, [2001] 1 WLR 840 at 861 (para 55) per Lord Phillips of Worth Matravers MR); (ii) 'Firm immigration control requires consistency of treatment between one aspiring immigrant and another' (see [2001] 2 FCR 63 at 75, [2001] 1 WLR 840 at 850 (para 23) per Laws LJ; and that (iii):

> 'if the established rule is to the effect—as it is—that a person seeking rights of residence here on grounds of marriage (not being someone who already enjoys leave, albeit limited, to remain in the UK) must obtain an entry clearance in his country of origin, then a waiver of that requirement in the case of someone who has found his way here without an entry clearance and then seeks to remain on marriage grounds, having no other legitimate claim to enter, would in the absence of exceptional circumstances to justify the waiver, disrupt and undermine firm immigration control because it would be manifestly unfair to other would-be entrants who are content to take their place in the entry clearance queue in their country of origin' (see [2001] 2 FCR 63 at 74–75, [2001] 1 WLR 840 at 850 (para 23) per Laws LJ).

[37] These statements establish first that the Secretary of State should attach importance to the fact that an applicant for a COA is a person who is illegally in this country, second that he should not regard an illegal immigrant as having similar rights to someone who has permission to be here and third that he should not allow illegal immigrants to take advantage of their illegal presence to obtain the same rights as are available to people who have permission to be in the United Kingdom. To do otherwise, would in the words of Laws LJ: 'disrupt and undermine firm immigration control because it would be manifestly unfair to other would-be entrants who are content to take their place in the entry clearance queue in their country of origin.'

[38] All these consequences follow from the need to have a proper and fair system of immigration control, which precludes any form of queue-jumping by illegal immigrants over those having to apply from abroad for permission to come to the United Kingdom. It follows that a policy of precluding illegal immigrants from obtaining COAs and in consequence from obtaining further rights is rationally connected to the policy of immigration control as otherwise, in the words of Laws LJ which I have just quoted, it would be 'manifestly unfair to other would-be entrants'.

[39] This conclusion is supported by the submission of Miss Carss-Frisk, which I accept and which is that it is helpful to bear in mind by way of analogy, that the present requirement for persons unlawfully present in the United Kingdom to go home and get appropriate entry clearance, is generally considered to be a proportionate interference with the right to respect for family life under art 8, where a person has a developed family life in the United Kingdom; this is so even though in many cases this may entail a period of separation from a person's partner or other family as was explained in *Mahmood*'s case especially [2001] 2 FCR 63 at 74–75, 87–88, [2001] 1 WLR 840 at 850–851, 862–863 (paras 23–26, 65–67).

[40] In other words, I agree that there is no good reason why the first claimant should be in a better position under art 12 than the claimant in *Mahmood*'s case was under art 8. In the same way as Mr Mahmood was not allowed to take advantage of his illegal presence to obtain rights which were only available to somebody who had permission to be here, the first claimant should not in my view be able to circumvent the need to obtain entry clearance by being permitted to marry the second claimant and thereby obtain the advantages of having been given permission to enter the United Kingdom, which he had neither sought nor obtained.

[41] In reaching that conclusion, I have considered, but rejected, the submission of JCWI that 'nothing in the case law shows an ability to refuse to allow an individual to enter into a genuine marriage on the basis of his or her immigration status rather than a decision that the marriage is not genuine'. It is clear that the art 12 right does not mean that person is entitled to marry in the country of his or her choice and there is no case which supports such a proposition.

[42] Indeed there are decisions to the contrary in the sense that they show that art 12 does not confer on an individual the right under art 12 to get married *wherever* he wishes to do so especially where there are countervailing immigration control considerations. So in *App No 9773/82 v UK* (1982) 5 EHRR 296, the European Commission found to be manifestly ill-founded, complaints of breaches of arts 8, 12 and 14 of the convention where entry clearance was refused for the Philippine fiancée of a disabled man of limited means on the basis that she did not have the means to maintain and support herself without access to public funds. The Commission observed that there was no evidence on the file that there would be any legal obstacles preventing the applicant from marrying his fiancée in the Philippines. The Commission explained that the art 12 right 'does not in principle, include the right to choose the geographical location of the marriage' (see 296) and that 'the Commission considers that the limitation of immigration possibilities to only those people who will definitely not create an economic burden on the host state is not of itself an unreasonable or arbitrary requirement' (see 297).

[43] Similarly, in *App No 10914/84 v Netherlands* (1986) 8 EHRR 308, both applicants were present in the Netherlands and they complained that they would be prevented from marrying there because of a decision to expel the intended husband to Morocco. The Commission responded to the contention that the parties had a right to marry in the Netherlands by stating (at 309) that: 'Article 12 of the Convention does not guarantee the right to marry in a particular country, or under a particular legal system.'

[44] These cases and the decision in *Klip v Netherlands* App No 33257/96 (1997) 91 A-DR 66 (which I explained in the first judgment ([2006] 3 All ER 608 at [53], [54])) establish the right of a state to refuse to consent to a marriage on the basis of immigration control. In the light of this conclusion and the factors set out at [33]–[40], above, I conclude that the approach of the Secretary of State to refusing a COA to an illegal immigrant was 'rationally connected' to the objective of effective immigration control. In reaching that conclusion, I have also considered the application to an illegal immigrant of the five reasons which I outlined in the first judgment (at [76]–[87]) as preventing the s 19 regime being compatible with the art 14 right of those who were lawfully in this country. Those reasons are not applicable to those (like the first claimant) who are not lawfully in the United Kingdom as their application for COAs can be refused lawfully on the discrete and cogent ground of being pursuant to the policy of immigration control against those who have no right to be in the United Kingdom and which I have explained at [33]–[40], above. It is this crucial factor, which 'trumps' or overrides the five reasons set out in the first judgment. The second reason set out in the first judgment (at [77]–[84]) (which is probably the most important reason for my decision) relates to the treatment of religious non-Anglican marriages but that reasoning does not apply where the applicant for a COA, like the first applicant, intends to marry in a registry office; as I explained in the first judgment (at [71]), there was a great deal of evidence which shows that such marriages are regularly used for sham marriages.

[45] The reasons in the first judgment for finding that the s 19 regime was not rationally connected to the legislative objects, which I considered decisive when considering the position of those subject to immigration control do not apply to those who are *illegally* in this country because, as I have already pointed out, Miss Bennett has explained that the Secretary of State considers correctly in my view that the Secretary of State is entitled to draw a distinction between '(i) those who have leave to enter or remain . . . and so have a right to be present in this country; and (ii) those who have no such right, being either illegal immigrants or over-stayers'. My first judgment was dealing with those in category (i) and all my comments in that judgment have to be considered in that context while I am now dealing with the totally different position of those in category (ii) and different considerations apply to them essentially for the reasons put forward both by Miss Bennett and in *Mahmood*'s case.

[46] I am aware that the report of the Parliamentary Joint Committee on Human Rights was critical of the s 19 regime and the JCWI relies on these criticisms. It is, however, noteworthy, as Miss Carss-Frisk points out that although the passage from the report of the Parliamentary Joint Committee on Human Rights on the s 19 regime relied upon by the JCWI, is very critical of the s 19 regime, this criticism states (with my emphasis added) that 'It [the s 19 regime] is not confined to those who are *unlawfully* in the United Kingdom (overstayers and illegal immigrants)'. This comment suggests that the Joint Committee's criticisms of the s 19 regime might well not apply to illegal

immigrants, such as the first claimant or at least that those who are unlawfully in the United Kingdom are in a different position from those who are lawfully here for the purposes of the compatibility of the s 19 regime with art 12.

[47] As I explained in the first judgment, I concluded that the s 19 regime for those *lawfully* in this country was not rationally connected to meet its legislative objectives. In my view, the position is different for those *illegal* entrants in the United Kingdom as the need for proper immigration control would mean that a policy of refusing to give COAs to those who are illegally in this country (in the absence of compassionate circumstances) would be rationally connected to the objectives of having proper immigration control and of avoiding queue-jumping, as I have described in the last two paragraphs.

[48] Until now, I have been assuming that the Secretary of State had the *ordinary* degree of deference but as I explained in the first judgment ([2006] 3 All ER 608 at [63]), 'the Secretary of State and Parliament are entitled to substantial deference in determining what restrictions, if any, are appropriate to impose on art 12 rights'. That would constitute an additional reason for concluding that the measures in the s 19 regime are 'rationally connected' to the legislative objectives of maintaining immigration control against those unlawfully in the United Kingdom or those with only a limited right to remain in the United Kingdom.

[49] It is appropriate finally to refer again to the statement in the first judgment (at [88]) in which I stated that 'It is noteworthy, as Mr Drabble submits, that none of the Strasbourg case law reveals a legal system which refuses to allow a marriage within its territory where the marriage is genuine and not a sham'. In the first judgment, I had also referred to the cases of *App No 9773/82 v UK* and of *App No 10914/84 v Netherlands* to which I have just referred. They establish, as I explained in the first judgment (at [57]) that 'the jurisprudence of the European Commission of Human Rights expressly permits the introduction of legislation to prevent marriages entered into for the purpose of avoiding immigration control notwithstanding that this legislation might interfere with the right to marry'. So regrettably, my statement at [88] is incorrect but I did not use that statement to justify my conclusion which I had *already* stated in the immediately preceding paragraph and which was that:

> '. . . As I have concluded for the reasons which I have set out, the measures in the regime designed to meet the legislative objectives are not rationally connected to it, and so it follows that the regime is not proportionate and that it constitutes an infringement of art 12 rights.'

(iii) *Are 'the means used to impair the right or freedom ... [in the s 19 regime] no more than is necessary to accomplish the objective' for an* illegal *immigrant?*

[50] Before dealing with the claimants' contentions that the means used by the Secretary of State go far further than is necessary to achieve the objectives of preventing sham marriages, it is necessary to bear in mind that I am being asked to appraise matters of which the legislature and the executive have much greater knowledge than the courts would have. Thus, I approach the claimants' submissions on the basis that I should be reluctant to interfere with a decision made by Parliament. The role of the courts on this issue was explained by Lord Nicholls of Birkenhead in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40 at [70], [2003] 4 All ER 97 at [70], [2004] 1 AC 816 in this way:

'In approaching this issue, as noted in [*R v Johnstone* [2003] UKHL 28 at [51], [2003] 3 All ER 884 at [51], [2003] 1 WLR 1736], courts should have in mind that theirs is a reviewing role. Parliament is charged with the primary responsibility for deciding whether the means chosen to deal with a social problem are both necessary and appropriate. Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified (see the Rent Act case of *Mellacher v Austria* (1989) 12 EHRR 391 at 411 (para 53)). The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's convention right. The readiness of a court to depart from the views of the legislature depends upon the circumstances, one of which is the subject matter of the legislation. The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.'

[51] The application of the s 19 regime to illegal immigrants relates to issues of immigration control and the need to prevent sham marriages taking place and these matters must properly be classified as matters of broad social policy. Thus in accordance with Lord Nicholls's statement, the courts should be 'less ready' to intervene when considering whether the Secretary of State was entitled to make the decisions contained in the first and second refusal letters.

[52] The claimants and the JCWI both rely on my decision in the first judgment that the means in the s 19 regime were not necessary to accomplish the legislative objective but that decision was based on the position of those who were *lawfully* in this country. Different considerations of immigration control apply in respect of those, like the first claimant, who are *illegal* immigrants because, as I have explained, their position is very different as immigration control means that they are not entitled to be allowed to marry when they have no rights to be in the United Kingdom especially as marriage to an EEA national would or might give them rights to which they should only have been entitled if they were lawfully in this country. Illegal immigrants would also have great incentives to enter into sham marriages because of the great advantages which marriage to an EEA national would confer on them.

[53] If this were not so and illegal immigrants were entitled to marry and obtain rights of residence, then in the words of Laws LJ in *Mahmood*'s case,which I have quoted at [36], above, this would 'disrupt and undermine firm immigration control because it would be manifestly unfair to other would-be entrants who are content to take their place in the entry clearance queue in their country of origin'. In addition, there would be every incentive for prospective immigrants to avoid the need to apply for and then wait for permission to enter the United Kingdom because once they were here as illegal immigrants, they could marry an EEA national and obtain a right of residence. In my view the approach of the Secretary of State to the application by the first claimant as an illegal immigrant for a COA to marry in a registry office was 'necessary to accomplish that objective [of firm immigration control]'.

(iv) *Conclusions on the art 12 claim*

[54] I therefore conclude that the need for effective immigration control, which includes the reasons put forward by Miss Bennett and the need to prevent queue-jumping by illegal immigrants over other potential immigrants to this country as described in *Mahmood*'s case, leads to the conclusion that the art 12

rights of a person who was not here with permission would not be infringed if he was refused permission to marry and required to travel and marry abroad before applying for entry clearance. There is an exception to this approach where there are compassionate circumstances but it is not suggested that they exist in the case of the first claimant.

VII THE ARTICLE 14 CLAIM

(i) *Introduction*

[55] It is contended by counsel for the claimants and for the JCWI that the s 19 regime infringes the rights of the first claimant under art 14 of the convention, which provides that:

> 'The enjoyment of the rights and freedom set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[56] In the first judgment [2006] 3 All ER 608 at [116]–[119] I explained that the traditional approach to considering an art 14 claim has been to apply the test formulated by Brooke LJ in *Wandsworth London BC v Michalak* [2002] EWCA Civ 271 at [20], [2002] 4 All ER 1136 at [20], [2003] 1 WLR 617, but that this test had been further refined by the House of Lords in *R (on the application of Carson) v Secretary of State for Work and Pensions, R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2005] 4 All ER 545, [2006] 1 AC 173.

[57] At the first hearing, Miss Carss-Frisk contended that the proper questions which should be asked in this case in respect of the art 14 claim are first whether the two comparators are in relevantly similar positions because if they are not, there is no question of discrimination but if they are, the second question is whether the distinction is justifiable. Mr Drabble, who appeared for the intervener, preferred the single question set out by Lord Hoffmann in *Carson*'s case (at [31]) namely, 'is there enough of a relevant difference between X and Y to justify different treatment?' I will apply each of these tests, which both give the same result.

[58] In the first judgment ([2006] 3 All ER 608 at [128]–[131]), I explained why very weighty reasons were required to justify discrimination on grounds of religion and nationality. In the first judgment, I found that in the case of immigrants *lawfully* in this country, the s 14 regime constituted discrimination on grounds of religion and of nationality and that this discrimination was not justified in the interests of immigration control. My task now is to consider if the position would be different for the first claimant, who is an *illegal* immigrant and who intends to get married in a registry office.

(ii) *Was there unjustified discrimination on grounds of religion and nationality against the first claimant in refusing his applications for a COA?*

[59] The case for the claimants is that they could get married without the need to apply for a COA in the United Kingdom pursuant to the rites of the Church of England but they need a COA as they wish to marry in a registry office and that requirement is discriminatory against them. I am unable to accept that submission even in the light of the need for very weighty reasons to justify this form of discrimination as there is a very significant difference between the

claimant and somebody who wishes to marry pursuant to the rites of the Church of England; as I explained in the first judgment, there is no evidence of sham marriages taking place pursuant to Anglican religious rites as explained in the first judgment (at [78], [79]) but in contrast there is a substantial and convincing body of evidence of sham marriages taking place in registry offices as I pointed out in the first judgment (at [71]). In my view this difference constitutes very weighty reasons, which would and do justify the difference in treatment.

[60] Second, the difference in treatment between, on the one hand, the claimants and, on the other hand, those who did not have to apply for COAs or those who received COAs is justified because of the requirements of immigration control in relation to *illegal* immigrants. I have already explained in [36]–[40], above, why these requirements mean that the Secretary of State was entitled to refuse the application of the first claimant for a COA.

(iii) *Conclusions on the art 14 claim*

[61] Whichever test is applied to the first claimant's art 14 claims, it must fail as there is enough of a relevant and justifiable difference between the first claimant, who wishes to marry in a registry office and another illegal immigrant who wishes to marry pursuant to Anglican rites to justify the difference in treatment between them. In addition, there is a justifiable difference between the first claimant as an illegal immigrant and somebody who has the right to stay in this country for such a length of time that he will receive a COA. It follows that the Secretary of State was entitled in the first and second refusal letters to refuse the first claimant's applications for a COA without infringing his rights under the convention.

VIII THE EFFECT OF THE FIRST CLAIMANT HAVING BEEN GRANTED TEMPORARY ADMISSION

(i) *Introduction*

[62] It must not be forgotten first that the issue for me to determine is 'whether the Secretary of State was entitled to refuse the application of the [first] claimant . . . for a [COA] without infringing his rights under the [convention]' and second that the first claimant was not granted temporary admission until the Secretary of State had refused his applications for a COA in both the first and second refusal letters. Therefore the effect of the grant of temporary admission to the first claimant is not relevant to the issue before me but as I have heard some argument about it, I will summarise my views and I will start by explaining the statutory background to the grant of a temporary admission.

(ii) *The statutory regime relating to temporary admission*

[63] The general provision for the regulation and control of immigration into the United Kingdom is s 3 of the Immigration Act 1971, which lays down the principle that a person, who is not a British citizen requires leave to enter the United Kingdom. Schedule 2 to the 1971 Act contains administrative provisions relating to the control of entry. Paragraph 2 of Sch 2 provides for immigration officers to examine a person arriving in the United Kingdom. Paragraph 16 of Sch 2 provides that a person who is liable to examination under para 2 may be detained pending his examination and pending a decision to give or to refuse him leave to enter.

[64] Paragraph 21(1) of Sch 2 of the 1971 Act provides that:

'A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him.'

[65] This was the power under which the first claimant was granted temporary admission on 24 May 2005. Section 11 of the 1971 Act is relevant on the effects of temporary admission and it provides, in so far as is material and with my emphasis added:

'*Construction of references to entry, and other phrases relating to travel.*—(1) A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall be further deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or *temporarily admitted* or released while liable to detention, under the powers conferred by Schedule 2 to this Act.'

(iii) *The submissions*

[66] Miss Carss-Frisk contends that the grant of temporary admission does not alter the first claimant's status as an illegal immigrant because temporary admission is not a positive immigration status. It is contended on behalf of the first claimant that once he was granted temporary admission, then he was 'at large' and in consequence entitled and able to obtain a COA because: (a) those who have been granted temporary admission are deemed not to have entered the United Kingdom illegally (see s 11(1) of the 1971 Act); (b) once a person who is granted temporary admission, he is 'at large' in the United Kingdom (see para 21(2) of Sch 2 to the 1971 Act); (c) a person, who has temporary admission and is 'at large', is lawfully present in the United Kingdom; (d) the grant of temporary admission does not disqualify the person concerned from obtaining a COA because the person concerned is here pursuant to the express authorisation of an immigration officer under para 21 of Sch 2 to the 1971 Act; and (e) reliance for that proposition is placed on the comments in *Szoma v Secretary of State for the Dept of Work and Pensions* [2005] UKHL 64 at [24]–[28], [2006] 1 All ER 1 at [24]–[28], [2005] 3 WLR 955 of Lord Brown of Eaton-under-Heywood, who when considering the effect of s 11 of the 1971 Act, stated (with my emphasis added) that:

'[25] . . . In my opinion, however, s 11's purpose is not to safeguard the person admitted from prosecution for unlawful entry but *rather to exclude him from the rights* (in particular the right to seek an extension of leave) *given to those granted leave to enter* . . . it would in my judgment be quite wrong to carry the fiction beyond its originally intended purpose so as to deem a person in fact lawfully here not to be here at all . . .

[27] . . . Unless, submits [counsel for the Secretary of State], the applicant's presence in the United Kingdom has been positively authorised by a specific grant of leave to enter, rather merely than by temporary admission, his disqualification from the benefits should not be found displaced.

[28] I would reject this argument . . .'

(iv) *Discussion*

[67] The decision in *Szoma*'s case concerned entitlement to benefits and it is common ground that the actual decision in that case is not relevant to the issues raised on this application. Lord Brown's statement set out at [66](e), above, and in particular the words emphasised makes it clear that a recipient of a grant of temporary admission does not enjoy the rights of somebody who has leave to enter. The grant of temporary admission would enable the recipient of the grant to receive some social security benefits but not the right to remain. In fact the grant of temporary admission is a useful categorisation for those like the first claimant, who enter the United Kingdom illegally and who are pursuing a judicial review application for which they have received permission to proceed. Clearly people in this category require some classification to show that they have a right to be here, which is less than leave to enter and the temporary admission designation fulfils that function. If the submissions of the claimants were correct, it would mean that those with temporary admission would be regarded as having leave to enter and that would be inconsistent with the statement of Lord Brown, which I quoted at [66](e), above.

[68] In the chronology set out at [7], above, I explained the circumstance in which the first claimant was granted temporary admission. It is significant that the papers which granted the first claimant temporary admission were served on him 'as an illegal immigrant', which was the correct classification of him and he was informed of the reporting and residence restrictions imposed on him. He was also notified that he was liable to be detained. These points fortify my conclusion that the grant of temporary admission to the first claimant did not alter his status as an illegal immigrant.

[69] Thus the first claimant by receiving temporary admission did not have the rights of someone, who had the right to enter. Indeed he remained an illegal entrant as he falls within the definition of an illegal entrant in s 33(1) of the 1971 Act which provides:

> '... "illegal entrant" means a person (a) unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, or (b) entering or seeking to enter by means which include deception by another person, and includes also a person who has entered as mentioned in paragraph (a) or (b) above ...'

[70] Thus the grant of temporary admission to the first claimant does not confer on him any rights to remain in the United Kingdom and he continued to be an illegal entrant. The granting of temporary admission to an illegal entrant does not mean that he or she then becomes a legal immigrant because as Lord Brown explained in a speech from which I have already quoted (with my emphasis added) that, 's 11's purpose is ... to exclude him from the rights (in particular the right to seek an extension of leave) *given to those granted leave to enter*'. In those circumstances, when the first claimant, as an illegal entrant, was granted temporary admission, he would have been in the same position in respect of his right to marry and his convention rights as before he was granted temporary admission.

IX GENERAL COMMENTS

[71] The position that emerges is that, as I explained in the first judgment, the s 19 regime is incompatible with the convention particularly (but not exclusively) because there is no reason or evidence put forward to explain why those wishing

to marry in various non-Anglican religious marriages (whether in a Catholic, Hindu, non-conformist or any other non-Anglican ceremony) require COAs while those marrying pursuant to Anglican rites do not. Furthermore, as it appears that the Secretary of State did not consider whether non-Anglican religious ceremonies were being used for sham marriages, an additional reason why the s 19 regime is incompatible with the convention is because the Secretary of State is not entitled to deference for his views as a claim to deference is dependent on the person to whom deference is due using his knowledge or status consciously considering an issue and then reaching a conclusion on it. In any event, those covered by the s 19 regime have to pay £135 with their application for a COA and if the period of their right to remain is not for a long enough period, their application for a COA is *automatically* refused in the absence of compassionate circumstances.

[72] It is important to stress the very far-reaching adverse consequences for a person who requires a COA but does not receive it especially those who are caught by the provision for automatic refusal. The expectation for this group of people is that *either* the couple should travel abroad and marry, and then for the partner requiring entry clearance to obtain this from abroad on the basis of his or her marriage; *or* for the individual requiring entry clearance to travel abroad (with or without his or her fiancée) to obtain entry clearance, from abroad, on the basis of his intended marriage in the United Kingdom. The compassionate circumstances may be seen to be applicable where neither expectation is reasonable. Those of us who sit in the Administrative Court for long periods are now very familiar with the delays in the immigration system which are now likely to lead to very substantial delays in handling and resolving applications to enter the United Kingdom from those who have gone abroad to marry. Of course, those who wish to marry in an Anglican religious ceremony do not need to apply for a COA to marry or to go abroad to marry while they continue to be statutorily exempt from the s 19 regime.

[73] The s 19 regime is incompatible with arts 12 and 14 of the convention for a number of reasons set out respectively in paras [76]–[87] and [135]–[148] of the first judgment.

[74] The position in respect of illegal immigrants is very different because there are different and very strong objectives concerned with immigration control which mean that it is proportionate not to grant them COAs. In other words, when an illegal immigrant's convention rights to marry are under consideration, they have to be considered in the light of special factors (such as those set out in paras [28], [29] and [33]–[38], above) which are not relevant in the case of a person subject to immigration control who is lawfully in the United Kingdom. Furthermore, the first claimant intends to marry in a registry office and there is clear evidence as I explained in the first judgment ([2006] 3 All ER 608 at [71], [72]) that they have been used repeatedly for sham marriages. This means that many of the objections to the s 19 regime do not apply to those who intend to marry in registry offices.

[75] I am grateful for the helpful and thoughtful submissions that I have received from all counsel and their solicitors. I must now mention two important lessons which should be learnt from the present litigation and which are not meant to be a specific criticism of any of any of the legal teams. First it was unfortunate that all matters in dispute were not set out in the list of issues which I was asked to determine in the first judgment. The long list of more than 20 issues and many sub-issues, which I was asked to resolve for the purpose of the

first judgment, surprisingly did not deal with the position of *illegal* immigrants even though it has always been the case for the Secretary of State that the first claimant was an illegal immigrant and the position of illegal immigrants was mentioned during submissions. In future, it is imperative that if and when a list of issues for determination by a judge is being compiled, counsel should ensure that all the necessary issues are covered without the need for further submissions and a further judgment.

[76] Second, issues as important as the ones covered in the present judgment should be the subject of oral submissions. After distributing the second judgment, I agreed to resolve the issues covered by this judgment but I was then told that it would not then be possible for there to be an oral hearing because of counsels' other commitments before the time when my decision was required. So it came about that I was required to give the present judgment without an oral hearing. Although I received helpful written submissions, I was deprived of the great benefits of an oral hearing and this made my task substantially harder than it would have been if there had been an oral hearing. I hope in future that this case will not be regarded as a precedent for obtaining judgments without oral hearings.

X CONCLUSIONS

[77] For the reasons, which I have sought to set out, I conclude that the Secretary of State was entitled to refuse the application of the first claimant for a COA without infringing his rights under the convention. This conclusion also provides an additional reason for my decision in the second judgment to refuse to award damages to the present claimants.

Order accordingly.

Christian Metcalfe Barrister.

Secretary of State for Trade and Industry v Rutherford and another

[2006] UKHL 19

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD SCOTT OF FOSCOTE, LORD RODGER OF EARLSFERRY, LORD WALKER OF GESTINGTHORPE AND BARONESS HALE OF RICHMOND

6, 7 MARCH, 3 MAY 2006

Employment – Discrimination against a man – Indirect discrimination – Imposition of upper age limit of 65 on persons bringing claims for unfair dismissal and redundancy payments – Employees alleging higher proportion of men continuing in employment after 65 than women – Whether statutory provisions indirectly discriminatory – Employment Rights Act 1996, ss 109(1)(b), 156(1)(b) – EC Treaty, art 141 EC.

Sections 109[a] and 156[b] of the Employment Rights Act 1996 imposed a cut-off age of 65 for 'the right not to be unfairly dismissed' and for the right, on dismissal for redundancy, for a redundancy payment. Both appellants were men who had worked on after reaching 65 in businesses where there was no higher normal retiring age. The first appellant, who was dismissed when he was aged 67, wanted to claim a redundancy payment and compensation for unfair dismissal. The second appellant, who was dismissed when he was aged 73, wanted to claim a redundancy payment. They claimed that the cut-off age indirectly discriminated against men because the statutory provisions, although apparently neutral in their terms, had a disparate impact on men since a higher proportion of men continued in employment after 65 than women and infringed the equal pay obligations imposed by art 141 EC[c]. The employment tribunal held that they had jurisdiction to hear the appellants' claims. The Employment Appeal Tribunal allowed the Secretary of State's appeal and that decision was affirmed by the Court of Appeal. The appellants appealed.

Held – The provisions of the Employment Rights Act 1996 removing the rights to compensation and redundancy pay after the age of 65 were not indirectly discriminatory against men since they did not impose a detriment or disadvantage which had a very different impact on men as compared to women. Article 141 EC did not guarantee equal pay over working lives which ended at different ages but had the aim of ensuring that men and women who were in the same position, doing equal work, received equal pay. The only persons who would be affected by the age-related disadvantage would be those who decided to continue in employment after the specified age. The statistical evidence that relatively more women than men decided to retire from employment before attaining the age of 65, with the consequence that relatively more men than women were affected by the statutory bar did not constitute evidence of any

a Section 109, so far as material, provides: '(1) Section 94 does not apply to the dismissal of an employee if on or before the effective date of termination he has attained . . . the age of sixty-five . . .'

b Section 156, so far as material, provides '(1) An employee does not have any right to a redundancy payment if before the relevant date he has attained . . . the age of sixty-five'

c Article 141, so far as material, is set out at [29], below

cogency that the statutory bar discriminated against men; all it showed was that the statutory bar applied to relatively more men than women. There was therefore no breach of art 141 and no discrimination. Accordingly, the appeals would be dismissed (see [4], [5], [16], [23], [33]–[35], [69], [76], [83], below.)

R v Secretary of State for Employment, ex p Seymour-Smith [2000] 1 All ER 857 applied.

Decision of the Court of Appeal [2004] EWCA Civ 1186 affirmed.

Notes

For disparate impact, see 13 *Halsbury's Laws* (4th edn reissue) para 317.

Sections 109 and 156 of the Employment Rights Act 1996 were repealed, with exceptions, by the Employment Equality (Age) Regulations 2006, SI 2006/1031, reg 49(1), Sch 8, Pt 1, paras 21, 25 and 30 with effect from 1 October 2006.

For the Employment Rights Act 1996, ss 109, 156 see 16 *Halsbury's Statutes* (4th edn) (2005 reissue) 877, 931.

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Andrews v Law Society of British Columbia [1989] 1 SCR 143, Can SC.

Barry v Midland Bank plc [1998] 1 All ER 805, [1999] ICR 319, CA; *affd* [1999] 3 All ER 974, [1999] ICR 859, [1999] 1 WLR 1465, HL.

Bilka-Kaufhaus GmbH v Weber von Hartz Case C-170/84 [1986] IRLR 317, [1987] ICR 110, [1986] ECR 1607, ECJ.

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Griggs v Duke Power Co (1971) 401 US 424, US SC.

Jenkins v Kingsgate (Clothing Productions) Ltd Case 96/80 [1981] IRLR 228, [1981] ICR 592, [1981] 1 WLR 972, [1981] ECR 911, ECJ.

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Kutz-Bauer v Freie und Hansestadt Hamburg Case C-187/00 [2003] IRLR 368, [2003] ECR I-2741, ECJ.
Lewen v Denda Case C-333/97 [2000] All ER (EC) 261, [1999] ECR I-7243, ECJ.
Lommers v Minister van Landbouw, Natuurbeheer en Visserij Case C-476/99 [2002] IRLR 430, [2002] ECR I-2891, ECJ.
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Mangold v Helm Case C-144/04 [2006] All ER (EC) 383, ECJ.
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McShane v UK (2002) 35 EHRR 593, [2002] ECHR 43290/98, ECt HR.
Megner v Innungskrankenkasse Vorderpfalz Case C-444/93 [1996] All ER (EC) 212, [1995] ECR I-4741, ECJ.

Nash v Mash/Roe Group Ltd [1998] IRLR 168, Ind Trib.

Nelson v Carillion Services Ltd [2003] EWCA Civ 544, [2003] IRLR 428, [2003] ICR 1256.

Nolte v Landesversicherungsanstalt Hannover Case C-317/93 [1996] All ER (EC) 212, [1995] ECR I-4625, ECJ.

O'Flynn v Adjudication Officer Case C-237/94 [1996] All ER (EC) 541, [1998] ICR 608, [1996] ECR I-2617, ECJ.

Officier van Justitie v Kolpinghuis Nijmegen BV Case 80/86 [1987] ECR 3969, ECJ.

Paraschi v Landesversicherungsanstalt Württemberg Case C-349/87 [1991] ECR I-4501, ECJ.

Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV Joined cases C-397/01 to C-430/01 [2005] IRLR 137, [2005] ICR 1307, ECJ.

Pinna v Caisse d'Allocations Familiales de la Savoie Case 41/84 [1986] ECR 1, ECJ.

Price v Civil Service Commission [1978] 1 All ER 1228, [1978] ICR 27, [1977] 1 WLR 1417, EAT.

Price v Civil Service Commission (No 2) [1978] IRLR 3, Ind Trib.

R v Secretary of State for Social Security, ex p Equal Opportunities Commission Case C-9/91 [1992] 3 All ER 577, [1992] ICR 782, [1992] ECR I-4297, ECJ.

Rinke v Ärztekammer Hamburg Case C-25/02 [2003] ECR I-8349, ECJ.

Schnorbus v Land Hessen Case C-79/99 [2000] ECR I-10997, ECJ.

Schönheit v Stadt Frankfurt am Main Joined cases C-4/02 and C-5/02 [2004] IRLR 983, [2003] ECR I-12575, ECJ.

Spotti v Freistaat Bayern Case C-272/92 [1993] ECR I-5185, ECJ.

Stadt Lengerich v Helmig Joined cases C-399/92, C-409/92, C425/92, C-34/93, C-50/93 and C-78/93 [1995] IRLR 216, [1996] ICR 35, [1994] ECR I-5727, ECJ.

Steinicke v Bundesanstalt für Arbeit Case C-77/02 [2003] IRLR 892, [2003] ECR I-9027, ECJ.

Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales de la Savoie (URSSAF) v *Hostellerie Le Manoir SARL* Case C-27/91 [1991] ECR I-5531, ECJ.

Wippel v Peek & Cloppenburg GmbH & Co KG Case C-313/02 [2005] IRLR 211, [2004] ECR I-9483, ECJ.

Appeal

The appellants, John Dennis Rutherford and Samuel Bentley, appealed with permission of the House of Lords Appeal Committee given on 10 February 2005 from the decision of the Court of Appeal (Potter, Mummery and Scott Baker LJJ) on 3 September 2004 ([2004] EWCA Civ 1186, [2004] IRLR 892) dismissing their appeal from the decision of the Employment Appeal Tribunal (Wall J, I Ezekiel and S Springer) handed down on 2 October 2003 allowing the appeal by the Secretary of State for Trade and Industry from the decision of the employment tribunal on 15 January 2003 that it had jurisdiction to hear the appellants' claims. The facts are set out in the opinion of Lord Walker of Gestingthorpe.

Robin Allen QC, Rachel Crasnow and Paul Troop (instructed by *Linklaters* and *Islington Law Centre*) for the appellants.

David Pannick QC, Melanie Hall QC and *Kassie Smith* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Their Lordships took time for consideration.

3 May 2006. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, most people in this country who work as employees stop working by the time they are 65 years of age. The percentage of the workforce carrying on after that age is very small. One disadvantage suffered by those who do continue working is that they no longer have the benefit of redundancy pay or compensation for unfair dismissal. A higher proportion of men continue in employment after 65 than women. So, it is said, the cut-off age fixed by the employment legislation indirectly discriminates against men. An apparently neutral statutory provision has in fact a disparate impact on men. That is the claim in these proceedings. The legislative cut-off age, it is said, infringes the equal pay obligations imposed by art 141 EC.

[2] This summary over-simplifies the facts. The detailed facts are set out by my noble and learned friend Lord Walker of Gestingthorpe. But the summary suffices to identify the essential issue.

[3] My Lords, these facts seem to me to give rise *in principle* to an issue of indirect sex discrimination. Workers who retire under 65 have the statutory protection of redundancy pay and compensation for unfair dismissal throughout their working lives. Those who continue to work beyond that age do not. They lose that protection when they are 65. Of course most employees do not want, or are not able, to work beyond the age of 64. For present purposes that is nothing to the point. All employees wish to have the statutory protection so long as they are working. Those who retire under 65 have that protection, those who retire later do not. For present purposes, that is the appropriate characterisation of the impact of the statutory cut-off age.

[4] In my view, however, the claim in the present case founders at an early stage. The percentage of employees who are *not* adversely affected by the cut-off age is about 98·8%. In the make-up of this group there is virtually nothing to choose between men and women. The percentage of male employees not adversely affected is 98·6%. The corresponding figure for women is 99·0%. The percentage of employees who *are* adversely affected comprises the residual figures. This group comprises 1·2% of the workforce, and the split between men and women is 1·4% men and 1·0% women. This group comprises about 320,000 employees altogether.

[5] I do not think these figures show that the impugned legislation has an adverse impact on a substantially higher proportion of men than women. Substantial numbers of employees are involved. But the ratio of women and men who are adversely affected is 1:1·4. In the context of a national scheme applicable alike to men and women in an employed workforce of over 26m workers, of whom only 1·2% are affected by the cut-off age, I consider this ratio does not suffice to establish the necessary degree of disparate impact as between men and women. For this reason, explored more fully in the speech of Lord Walker, I would dismiss this appeal.

LORD SCOTT OF FOSCOTE.

[6] My Lords, these appeals raise a short point. Sections 109 and 156 of the Employment Rights Act 1996 impose, in their application to the two appellants,

a cut-off age of 65 for 'the right not to be unfairly dismissed . . .' (see s 94(1) and s 109(1) of the 1996 Act) and for the right, on dismissal for redundancy, to a redundancy payment (s 156(1) of the 1996 Act). Mr Rutherford was dismissed when he was aged 67. He wants to claim a redundancy payment and compensation for unfair dismissal. Mr Bentley was dismissed when was aged 73. He wants to claim a redundancy payment. At first blush the statutory provisions appear to stand in their way. But both appellants contend that under art 141 EC the statutory bar constitutes indirect discrimination against them on the ground of their sex and is therefore unlawful. They accept, of course, that the statutory bar does not constitute direct discrimination against men. The statutory provisions are neutral in their terms, expressed to apply to all men and all women in employment after the age of 65. The appellants point, however, to statistics that show that relatively more women than men leave employment under the age of 65 and, consequently, that relatively more men than women over the age of 65 are still in employment. This shows, they say, that relatively more men than women are prevented by the statutory bar from making unfair dismissal or redundancy claims and that this disparate effect constitutes indirect discrimination. The short point is whether they are right.

[7] This short point produced a judgment of some 14 pages by the employment tribunal ([2002] IRLR 768) (which held that the appellants' contention was right), a judgment of over 100 pages by the Employment Appeal Tribunal ([2003] IRLR 858) (which held it was not) and a judgment by Mummery LJ in the Court of Appeal ([2004] EWCA Civ 1186, [2004] IRLR 892), agreed to by the other members of the court, that, in a mere 14 pages, upheld the EAT. Mummery LJ commented on the lamentable state of complexity and obfuscation which appeared to attend this area of employment law. At para [3] of his judgment, set out by my noble and learned friend Lord Walker of Gestingthorpe in his opinion (at [37]) which I have had the opportunity of reading in advance, one finds references to the 'increasingly voluminous and incredibly intractable' legal materials on indirect discrimination, to the arguments becoming 'more convoluted, while continuing to multiply' and to the 'cascades of case law' from this House and from the Court of Justice of the European Communities (ECJ). Any judge who reads references of that character is likely instinctively to feel that something has gone awry with the jurisprudence about indirect discrimination.

[8] It is not that the concept of indirect discrimination on the ground of sex is difficult to express or to understand. The concept is succinctly defined in art 2(2) of Council Directive (EEC) 97/80 (OJ 1998 L14 p 6) (the burden of proof directive):

> '. . . indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.'

The text of the directive that I have cited contains, first, a statement of the situation that must be found to exist—it must be shown that a substantially higher proportion of the members of one sex than the members of the other sex are disadvantaged by the provision in question—and, second, if that situation is shown to exist, a requirement that the need for the provision be justified. So,

where a complaint of indirect discrimination is made two issues potentially arise. Both have been argued before your Lordships on these appeals but I want to concentrate for the moment on the first. Unless the requisite situation of relative disadvantage can be shown, the second issue, the issue of justification, does not arise.

[9] The directive speaks of a 'substantially higher proportion of the members of one sex' being disadvantaged. This is the language of comparison. It poses the question whether the proportion of men disadvantaged by the statutory bar is substantially higher than the proportion of women disadvantaged by it. The two proportions must be compared. Each proportion, expressed as a vulgar fraction, needs a numerator and a denominator. So the appropriate numerator and denominator must be identified.

[10] In relation to each of the fractions required by the directive to be compared the numerator will be the number of the men (in the one case) and the number of the women (in the other case) who are disadvantaged by the statutory bar. There are two possible views as to who should be included in this disadvantaged group. One view is that the disadvantaged will be those employees over the age of 65 who are dismissed. If their employment is terminated for any reason other than dismissal, ie voluntary retirement or death (it is difficult to think of any other terminating event), it is not obvious that they are disadvantaged by a bar on claims for compensation for unfair dismissal or for redundancy payments. An alternative view is that everyone who is in employment over the age of 65 is disadvantaged by the statutory bar. He or she will be working under conditions that allow no remedy for unfair dismissal or for dismissal on redundancy grounds. These seem to me to be the only two possible alternatives for the numerator.

[11] The identification of the denominator depends on the choice of numerator. If the appropriate numerator is the number of over-65-year-olds who have been dismissed, then the obvious denominator would be the total number of over-65-year-olds in employment. The comparison would ask whether the proportion of over-65-year-old men in employment who had been dismissed was substantially higher than the proportion of over-65-year-old women in employment who had been dismissed. I will refer to this comparison as 'comparison A'.

[12] But if the correct numerator in each fraction is the total number of men, in the one case, and of women in the other case, over the age of 65 and still in employment, the identification of the correct denominator becomes more difficult. One view might be that the denominator should, as in comparison A, still be the total number of men, or of women (as the case may be), over 65 years of age and still in employment. If that is right, the denominator for each of the fractions that are to be compared will be equal to the numerator for that fraction. This choice of the denominator would, in effect, constitute a mathematical expression of the conclusion that this particular type of statutory provision *cannot*, if the disadvantaged group is to be taken to include all the over-65's still in employment, create a situation of indirect discrimination. This is a startling conclusion, but it should not on that account be discounted and I want to spend a moment or two in considering it.

[13] Let me start by emphasising, perhaps unnecessarily, that indirect discrimination is a type of discrimination. The adjective 'indirect' has sometimes been criticised as insufficiently descriptive of the type. It has been suggested that

'secret' or 'concealed' might be more descriptive. But the adjective is less important than the noun. What is being looked for is discrimination. Has one sex been subjected to a disadvantage that the other sex is not subjected to? The directive, entirely consistently, asks whether the provision in question 'disadvantages' one sex proportionately more than the other.

[14] The leading case on the subject, *R v Secretary of State for Employment, ex p Seymour-Smith* which led to an ECJ ruling (Case C-167/97 [1999] All ER (EC) 97, [1999] 2 AC 554) followed by a ruling from this House ([2000] 1 All ER 857, [2000] ICR 244), was not a case of a provision imposing a disadvantage on some of those in employment but was the much more common case of a provision imposing a condition which those in employment had to satisfy in order to obtain a benefit. The case itself involved a condition requiring an employee to have had two years of continuous employment before becoming eligible to make a claim for unfair dismissal. This condition was neutrally expressed and all employees, regardless of age, had to satisfy it in order to qualify to bring unfair dismissal claims. Statistics, however, showed that proportionately fewer women employees than male employees were able to satisfy it and, accordingly, that a higher proportion of women than of men were disadvantaged by it. The issue turned in the end on whether the disadvantaged proportion of women was 'substantially' higher than the disadvantaged proportion of men.

[15] I find it easy to see that a condition of the *Ex p Seymour-Smith* type is capable of being discriminatory in its effect. Similarly, contractual or statutory benefits available only to full-time employees are capable of being, and have been held to be, discriminatory in their effect. If a proportionately higher number of women than of men work part-time the ingredients for a discriminatory effect are present. But where the provision in question does not constitute a condition for obtaining a benefit that some employees are able to satisfy and some are not but imposes a disadvantage on those who remain in employment after a specified age, the situation produced presents a rather different picture.

[16] First, it is not possible to speak coherently of those who are 'able to satisfy' the condition and those who are not able to do so. The only persons who will be affected by the age-related disadvantage will be those who decide to continue in employment after the specified age. Everyone who survives and for whom employment is available can decide, by not entering or continuing in employment, to be a person unaffected by the disadvantage. Indeed, the statistics wielded in the present case seem to show that proportionately more women than men decide to retire from employment before attaining the age of 65. The tendency appears to start from about the age of 50. The statistical evidence that relatively more women than men decide to retire from employment before they attain the age of 65, with the consequence that relatively more men than women are affected by the statutory bar, does not, in my opinion, constitute evidence of any cogency that the statutory bar *discriminates* against men. All that evidence shows is that the statutory bar applies to relatively more men than women. But since it applies to everyone over 65 years of age and can apply to nobody under that age, it is difficult to see how the directive requirement that it disadvantages a higher proportion of the members of one sex than of the other can be satisfied. There are no proportions to compare. The conclusion I would draw is that a difference in treatment of individuals that is based purely on age cannot be transformed by statistics from age discrimination, which it certainly is, to sex discrimination.

[17] Some hypothetical examples might serve to illustrate the point I am trying to make. Suppose a taxing statute were to say that the salaries of those in employment over the age of 65 were to be taxed at a rate 5% lower than the rate applicable to the salaries of those under that age. The respective tax rates would apply across the board to everyone in employment but those aged over 65 would have an advantage compared with those under that age. The former would pay less tax. Could the differential be said to be discriminatory against women on the ground that relatively fewer women than men continued in employment after the age of 65? The proposition would, in my opinion, be absurd.

[18] Now suppose a case in which the taxing statute said that the salaries of those in employment after the age of 65 were to be taxed at a rate 5 % higher than the rate applicable to the salaries of those under that age. This higher rate would, no doubt, discourage some, perhaps many, from continuing in employment after that age. It might discourage relatively more members of one sex than the other. But, so far as those who were not discouraged were concerned, the tax could not, in my opinion, be described as discriminatory against men on the ground that relatively more men than women were not discouraged.

[19] In both hypothetical examples there would be a disadvantaged group which would consist of everyone to whom the higher tax rate applied; in the former example, the group would consist of everyone under the age of 65; in the latter example the group would consist of everyone over that age. The composition of the respective groups would not depend upon an individual's ability or inability to satisfy some particular condition. It would depend, of course, on the individual's decision whether or not to continue in employment after the age of 65 and, also, on whether or not he or she survived to that age. The latter condition is essentially non-discriminatory, otherwise than on the ground of age. Age discrimination cannot be turned by statistics into sex discrimination.

[20] In each of the courts below the appropriate denominator was taken to be the number of men or women (as the case might be) in the population between the ages of 16 and 64. Each group included those assumed to be employed or to be available for employment. They were described, in contrast to the 'disadvantaged' group, whose number would constitute the numerator, as the 'advantaged' group. The description of the group as 'advantaged' is misleading. The members of the 'advantaged' group derive no advantage from the statutory bar applicable to the over-65-year-olds. The statutory bar simply does not apply to them. A fraction of which the numerator is the number of male employees over 65 years of age and the denominator of which is the total number of males in the population cannot, in my opinion, be taken to represent the proportion of men disadvantaged by the statutory bar for the purposes of the directive. The reason it cannot do so is that the two factors which take an individual from the so-called 'advantaged' group into the over 65 years of age 'disadvantaged' group, namely a decision to enter or continue in employment, and survival beyond that age, do not, whether taken singly or in conjunction with one another, have any sex discriminatory possibilities. In *R v Secretary of State for Employment, ex p Seymour-Smith* [2000] 1 All ER 857, [2000] ICR 244, the relatively higher proportion of women than men who were able to satisfy the two years continuous employment condition showed that the condition indirectly discriminated against women. It was more difficult for women than for men to satisfy the condition. But the fact that relatively more men than women are

affected by the statutory bar that applies to all employees who have attained the age of 65 does not evidence any form of discrimination against men. It is simply a consequence of the fact that more men than women go on working after that age.

[21] Accordingly, the only respect, in my opinion, in which the statutory bar might be said to have an indirectly discriminatory effect would be if comparison A were the correct comparison (see [11], above) and if the respective fractions showed that a substantially higher proportion of men than of women had their post-65 employment terminated by dismissal. But the appellants have not attempted to establish indirect discrimination by that route. The route they have chosen, rejected by the EAT and the Court of Appeal, involved, in my opinion, a misuse of statistics. Statistics are never more than a tool and the statistics deployed in the lower courts were not, in my opinion, an apt tool for identifying indirect discrimination on the facts of this case.

[22] The disadvantage of which complaint is made in this case is certainly a result of discrimination on the ground of age. Age discrimination is not yet unlawful. It will become so, I understand, under legislation to be introduced later this year. But the age discrimination cannot, in my opinion, be passed off as sex discrimination on the ground that statistics show that relatively more men than women continue in employment after the age of 65.

[23] For these reasons, which I believe follow essentially the same line of reasoning as that of my noble and learned friends Lord Rodger of Earlsferry and Baroness Hale of Richmond, with both of whose opinions I agree, I would dismiss these appeals.

LORD RODGER OF EARLSFERRY.

[24] My Lords, people who work after the age of 65 have no right to compensation for unfair dismissal (compensation) unless there is a higher normal retiring age for such employees in the undertaking where they work (see s 109(1)(b) of the Employment Rights Act 1996). Also, even if the normal retiring age in the business is higher than 65, after reaching that age they have no right to a redundancy payment (redundancy pay) (see s 156(1)(b) of the 1996 Act). Only a relatively small percentage of men and women work after the age of 65, but, as the Secretary of State accepts, the proportion of men over 65 who work is higher than the proportion of women over 65 who work. It follows that a higher proportion of men over 65 than of women over 65 are working but have no right to compensation or redundancy pay.

[25] The appellants are men who worked on after reaching 65 in businesses where there was no higher normal retiring age. Mr Rutherford was dismissed when he was 67. He says that he was unfairly dismissed but, by virtue of the legislation, could not make a claim for compensation and that he was made redundant but, for the same reason, could not claim redundancy pay. Mr Bentley was dismissed at the age of 73 and says that he was made redundant but could not claim redundancy pay because of the 1996 Act. Both appellants allege that the provisions of the 1996 Act removing the rights to compensation and redundancy pay are indirectly discriminatory against men, since they impose a detriment or disadvantage which has a very different impact on men as compared to women, whether looked at in numerical or proportionate terms. Since the discrimination cannot be objectively justified, it should be eliminated by disapplying ss 109(1)(b) and 156(1)(b) of the 1996 Act.

[26] The Secretary of State does not dispute that a considerably higher proportion of men over 65 than of women over 65 work and have no right to compensation or to redundancy pay. But he says that this does not mean that the legislation discriminates against men. To see whether it does, the employment tribunal should not look at the statistics for those over 65 who are adversely affected by the provisions, but at the statistics for those under 65 who are able to fulfil the preconditions for having the rights to compensation and to redundancy pay. The Secretary of State's preferred statistics show that in 1998 98·79% of men and 98·69% of women could fulfil those requirements, while in 2001 98·88% of men and 99·01% of women could do so. The statistics preferred by the appellants would bring out comparable figures. There is therefore no considerable difference between the position of men and women in this respect and ss 109(1)(b) and 156(1)(b) have no indirectly discriminatory effect. Even if there were discrimination, it would be objectively justified.

[27] The House was thus presented with a battle of statistics. More particularly, Mr Allen QC for the appellants submitted that the correct approach was to have regard to all the statistics, both those for employees under 65 and those for employees over 65, but that in the circumstances of this case particular weight should be given to the statistics for those over 65. For the Secretary of State Mr Pannick QC argued that an employment tribunal should have regard to all the statistics, but in a case such as the present, where the percentages of men and women who could fulfil the preconditions for enjoying the relevant rights were so close, there was no need to look at the figures for those over 65 who could not. Counsel sought to support these rival submissions by reference to the decisions of the Court of Justice of the European Communities (ECJ) (Case C-167/97 [1999] All ER (EC) 97, [1999] 2 AC 554) and of your Lordships' House ([2000] 1 All ER 857, [2000] ICR 244) in *R v Secretary of State for Employment, ex p Seymour-Smith*.

[28] My Lords, if one were to proceed along those lines and have regard to what the ECJ said in *Ex p Seymour-Smith*, then it would point in favour of placing the emphasis on the statistics for those who could comply with the preconditions for having rights to compensation and redundancy pay. Which is essentially what Mummery LJ did in giving the judgment of the Court of Appeal (see [2004] EWCA Civ 1186 at [29], [2004] IRLR 892 at [29]). My noble and learned friend, Lord Walker of Gestingthorpe, has produced a more detailed analysis which leads to essentially the same result. Therefore, if I considered the statistics in the case to be relevant to the issue of indirect discrimination raised by the appellants, I would approach the matter in that way and dismiss the appeal. But, in my view, these statistics are actually irrelevant to that issue.

[29] The appellants' entire case is based on art 141(1) EC (formerly art 119(1)) of the EC Treaty) which provides: 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.' In terms of art 141(2) 'pay' includes wages or salary 'and any other consideration . . . which the worker receives directly or indirectly, in respect of his employment, from his employer'. It is accepted that the right to compensation for unfair dismissal and the right to redundancy pay are indeed part of the consideration which a worker receives in respect of his employment. Hence they are part of the worker's 'pay' in terms of art 141(1).

[30] For the purposes of art 141, therefore, any employee who has worked for an employer for a year and who is under 65 receives as part of his or her 'pay' a

right to compensation and a right to redundancy pay. It is undisputed that in this respect men and women are to be treated equally. In other words, in return for 'equal work or work of equal value' (equal work), these men and women under 65 are entitled to an equal package comprising wages or salary, a right to compensation and a right to redundancy pay. Such a man under 65 seeing such a woman under 65 alongside him doing equal work is therefore entitled to demand that he should have a pay package equal to hers, including the rights to compensation and redundancy pay.

[31] Under the 1996 Act, however, those who work when over 65 have no right to compensation or redundancy pay. So their 'pay' for the purposes of art 141(1) does not include those elements. This applies to both men and women. Therefore, under art 141, a man over 65 seeing a woman over 65 alongside him doing equal work is entitled to demand that he should have a pay package equal to hers, but that package will not contain the rights to compensation or to redundancy pay. Provided that he gets the same (smaller) pay package as the female worker over 65, he is receiving equal pay for equal work and there is no breach of art 141.

[32] What art 141 does not do is guarantee that a man over 65 will have the same (higher) level of pay as a woman under 65 doing equal work. Parliament has decided that a younger woman, who has worked for her employer for more than a year, should have rights which a man or woman over 65 does not have. The man over 65 can claim no more than to receive pay equal to the pay of a woman over 65 for equal work. In the usual jargon, the woman over 65 is the appropriate comparator.

[33] The statistics in the case simply demonstrate that a higher proportion of men over 65 than of women over 65 work and receive this reduced package of 'pay'. They are not refined enough to show why this is so but, for present purposes, that does not actually matter since art 141 is designed to ensure that the men and women who are in the workforce receive equal pay for equal work—not to ensure that equal proportions, or indeed any particular proportion, of the men and of the women in any age group will be members of that workforce. Crucially, however, the statistics do not point to indirect discrimination. To be relevant to that issue, they would have to deal with the position among men and women over 65 who work and who therefore wish to receive equal pay for equal work. More precisely, in order to raise an issue of indirect discrimination, they would have to show that a substantially higher proportion of the men over 65 *who work* than of the women over 65 *who work* receive merely the reduced pay package. In fact, however, the statistics show no such thing since, subject to s 156(1)(a) of the 1996 Act, 100% of both groups receive it.

[34] The only conceivable way of putting the argument for the appellants would be to build on a suggestion which Lord Walker advanced for discussion during the hearing. Since a higher proportion of women stop work before 65, it might be said that there was indirect discrimination against men because a substantially higher proportion of women than of men received pay which included rights to compensation and redundancy pay throughout their entire working lives. But there is no hint of such an approach in art 141. It does not guarantee equal pay over working lives which end at different ages. It has the more straightforward aim of ensuring that men and women who are in the same position, doing equal work, receive equal pay.

[35] The appellants have not even tried to show any respect in which, while they worked on after 65, they were receiving less by way of pay than any woman over 65 received or would have received for equal work. In particular, as my noble and learned friend, Baroness Hale of Richmond, pointed out during the hearing, the appellants neither have, nor could have, shown that any woman over 65 had or would have had those rights which the 1996 Act denied to them. There is therefore no breach of art 141 and no discrimination. For these reasons, which are essentially the same as those of Baroness Hale, I would dismiss the appeals.

LORD WALKER OF GESTINGTHORPE.

[36] My Lords, this appeal is concerned with complaints of indirect discrimination in employment law. The appellants claim that ss 109(1)(b) and 156(1)(b) of the Employment Rights Act 1996 (which, as they apply in this case, exclude claims for unfair dismissal and redundancy payments by an employee who has attained the age of 65 years) are contrary to EU law as having a disproportionately adverse impact on male employees.

[37] At an early stage in his judgment in the Court of Appeal ([2004] EWCA Civ 1186 at [3], [2004] IRLR 892 at [3]), Mummery LJ (who has great experience in this field) observed:

> 'Although there is quite a simple answer to the indirect discrimination point, it has become virtually impossible and almost unacceptable to decide points of this kind in short form. The legal materials on indirect discrimination and equal pay are increasingly voluminous and incredibly intractable. The available arguments have become more convoluted, while continuing to multiply. Separating the wheat from the chaff takes more and more time. The short snappy decisions of the early days of the industrial tribunals have long since disappeared. They have been replaced by what truly are "extended reasons" which have to grapple with factual situations of escalating complexity and with thicker seams of domestic and EC law, as interpreted in cascades of case law from the House of Lords and the European Court of Justice.'

It is impossible not to feel some sympathy with these observations. As Mummery LJ went on to point out, the litigation was still stuck at the most preliminary stage. Mr Rutherford, the first appellant, started his proceedings in the employment tribunal in December 1998; Mr Bentley, the second appellant, started his proceedings in May 2001; both are still waiting to learn whether the employment tribunal had jurisdiction to hear their claims for redundancy pay (and in Mr Rutherford's case compensation for unlawful dismissal as well).

[38] The appellants' claims do however have two unusual features. The first is simply stated: although throughout the development of EU law as to equal pay and equal treatment the aim has been to put an end to long-standing and deplorable discrimination against women, these are claims for indirect discrimination on the ground of gender brought by *men*. The other unusual feature (which to my mind negatives the notion that the appeal has quite an easy answer) is less simply stated, and a full explanation of it is better deferred. In general terms, however, it is that in the consideration of these claims the comparison of proportions (inherent in any assessment of indirect discrimination) produces startlingly different results depending on whether the

comparison focuses on (i) proportions of advantaged men and women respectively (advantage-led) or (ii) proportions of disadvantaged men and women respectively (disadvantage-led). Your Lordships were not referred to any decision of the Court of Justice of the European Communities (ECJ) in which either of these two unusual features was present. All the tribunals and courts which have considered this matter have therefore had to do so without any clear guidance from the ECJ (nevertheless, in common, as I understand it, with all your Lordships, I do not consider that a reference to the ECJ is necessary or appropriate in this case; it is a matter to be decided by the national court).

THE FACTS AND THE PROCEEDINGS BELOW

[39] Mr Rutherford was dismissed by his employer, Harvest Town Circle Ltd (Harvest), on 25 October 1998 when he was aged 67. On 7 December 1998 he applied to the employment tribunal claiming against Harvest redundancy pay and compensation for unfair dismissal. In 2001 Harvest went into liquidation with Mr Rutherford's claims still unresolved.

[40] Mr Bentley was dismissed by his employer, Bodner Elem Ltd (Bodner), on 9 February 2001 when he was aged 73. At the same time Bodner went into administrative receivership, and it is insolvent. Mr Bentley commenced proceedings in the employment tribunal on 30 May 2001, claiming a redundancy payment.

[41] Neither of the appellants had a normal retiring age fixed by contract, and so the statutory default age of 65 (in ss 109 (1)(b) and 156 (1)(b) of the 1996 Act) was applicable. The Secretary of State for Trade and Industry is responsible for both unsatisfied claims in consequence of Pt XII of the 1996 Act. In relation to Mr Bentley the Secretary of State has had that responsibility since his dismissal; in the case of Mr Rutherford it arose when Harvest went into liquidation.

[42] Mr Rutherford's claim was initially heard in the Stratford Employment Tribunal in January 1999. It was submitted on his behalf that the exclusion at age 65 was contrary to art 141 EC (formerly art 119 of the EC Treaty). The case was stayed pending the reference to the ECJ made by this House in *R v Secretary of State for Employment, ex p Seymour-Smith* (the reference was made by the House on 13 March 1997 ([1997] 2 All ER 273, [1997] ICR 371), following decisions of the Divisional Court ([1994] IRLR 448) and the Court of Appeal ([1996] All ER (EC) 1, [1995] ICR 889); the ECJ gave judgment on 9 February 1999 (Case C-167/97 [1999] All ER (EC) 97, [1999] 2 AC 554); when the matter returned to this House judgment was given on 17 February 2000 ([2000] 1 All ER 857, [2000] ICR 244).

[43] Following the judgment of the ECJ in *Ex p Seymour-Smith*, on 16 July 1999 the employment tribunal ruled that it did have jurisdiction to hear the claim, as the statutory exclusions were contrary to art 141. Harvest appealed successfully to the Employment Appeal Tribunal ([2001] IRLR 599), which on 10 July 2001 allowed the appeal and remitted the case to the employment tribunal. In the judgment of the Employment Appeal Tribunal (sometimes referred to as *'Rutherford 1'*) Lindsay J gave some guidance (at 603) as to how the employment tribunal should approach the matter. By this time Harvest had gone into liquidation and the Secretary of State had taken over the defence of Mr Rutherford's claim. Soon afterwards the employment tribunal directed that Mr Bentley's claim should be heard together with Mr Rutherford's claim.

[44] The two cases were heard by the employment tribunal over eight days in June and July 2002, with expert evidence from statisticians called by both sides

(and also oral evidence by two officials of the Department of Trade and Industry). By a written decision dated 22 August 2002 ([2002] IRLR 768) the employment tribunal again decided that it did have jurisdiction to hear the claims, and that the statutory exclusions must be disapplied. At later hearings it was determined that (unless the Secretary of State's appeal was successful) Mr Rutherford was entitled to a basic award of £990 and a compensatory award of £4,500 for unfair dismissal, and that Mr Bentley was entitled to a redundancy payment of just under £1,500.

[45] Meanwhile the Secretary of State had appealed and on 2 October 2003 the Employment Appeal Tribunal (presided over by Wall J) allowed her appeal ([2003] IRLR 858). An appeal by Mr Rutherford and Mr Bentley was dismissed by the Court of Appeal on 3 September 2004 ([2004] IRLR 892).

INDIRECT DISCRIMINATION

[46] Indirect discrimination (on the ground of gender, and in the context of equal pay and equal treatment under EU law) is defined in art 2(2) of Council Directive (EEC) 97/80 (OJ 1998 L14 p 6) (the burden of proof directive) as—

> 'where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.'

This definition is largely declaratory of the case law of the ECJ (see Recital (18) of the directive and also the Opinion of the Economic and Social Committee, (1997 OJ C133 p 34 (paras 3.1.1 to 3.1.3)); also the judgment of the ECJ in *Nikoloudi v Organismos Tilepikinonion Ellados AE* Case C-196/02 [2005] ECR I-1789 at para 69).

[47] The definition has a broad scope. The 'apparently neutral' measure may be formal and general or informal and particular, ranging from national legislation applicable to all employment in a member state to an administrative change in a single employer's shift system. The disadvantage may consist in less favourable terms of employment accorded to part-term workers as compared with full-term workers (a recurring theme in the Luxembourg jurisprudence, with numerous variations), or in benefits or opportunities not being available to employees above or below a specified age (or outside a specified age bracket) where such age limits bear harder on one gender than on the other. Similarly a requirement for a minimum qualifying period of service before an employee acquires statutory rights may indirectly discriminate against women because their family responsibilities make it more difficult for them to achieve stable long-term employment.

[48] The phrase 'a substantially higher proportion of the members of one sex' is a rather compressed one which prompts several questions. The first question is: higher than what? The answer is reasonably obvious: higher than the corresponding proportion of the members of the opposite sex. The test looks at proportions rather than crude numbers for the reason stated by the ECJ in *R v Secretary of State for Employment, ex p Seymour-Smith* [1999] All ER (EC) 97 at 133, [1999] 2 AC 554 at 597:

> 'It is not sufficient to consider the number of persons affected, since that depends on the number of working people in the member state as a whole as well as the percentages of men and women employed in that state.'

This leads on to the second and more difficult question: how are these proportions to be determined? The cases show that there must be a larger group (generally referred to, in authorities on our domestic anti-discrimination legislation, as a pool) for the purposes of comparison. Because *Ex p Seymour-Smith* was concerned with secondary legislation of very general application (the two-year qualifying period introduced by the Unfair Dismissal (Variation of Qualifying Period) Order 1985, SI 1985/782) it was in that case appropriate to look at the entire national workforce as the pool. The identification of the proper pool has been one of the contentious issues in this case, although as the argument has progressed through different courts it has, I think, become apparent that what I have called the advantage-led/disadvantage-led issue is the crucial point.

[49] The principles of EU law in regard to indirect discrimination have developed over the last twenty-five years, and may still have some way to go. One of the seminal cases was *Jenkins v Kingsgate (Clothing Productions) Ltd* Case 96/80 [1981] IRLR 228, [1981] ECR 911, a reference to the ECJ from the Employment Appeal Tribunal. The opinion of Advocate-General Warner is particularly instructive, especially as it differs from the views which had been expressed by the European Commission. It makes a full examination of indirect discrimination, referring to the well-known American case of *Griggs v Duke Power Co* (1971) 401 US 424. Indirect discrimination was referred to in some of the early cases as 'disguised' discrimination, but it was soon recognised that this term was inapposite (see Evelyn Ellis *EC Sex Equality Law* (2nd edn, 1998) pp 111–113). In cases during the 1980s the ECJ did not have to focus very closely on the details of the process of comparison inherent in the notion of disproportionate impact (the concept first spelled out, I think, in Advocate-General Warner's opinion in *Jenkins*'s case ([1981] IRLR 228, [1981] ECR 911 at 936)). That is because in the early cases the disproportionate impact was perfectly obvious.

[50] For instance in *Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG* Case 171/88 [1989] IRLR 493, [1989] ECR 2743 the ECJ was concerned with a statute of the Federal Republic of Germany under which an employer was not required to pay wages during sickness to a part-time worker. Unchallenged statistical evidence showed that in at least seven member states part-time workers were predominantly women (the percentages ranging from 89% in the Federal Republic to 62% in Italy; only in Denmark, at 54%, was there anything close to parity). So in the Federal Republic there was such a striking disparity between men and women that the question referred to the ECJ assumed that the proportion of women adversely affected was considerably greater than that of men, and the ECJ was concerned only with the issue of objective justification. Nine times as many women as men were disadvantaged, and no one was going to waste time in suggesting that the entire national workforce contained nine times as many women as men.

THE *SEYMOUR-SMITH* CASE

[51] The particular importance of *R v Secretary of State for Employment, ex p Seymour-Smith* Case C-167/97 [1999] All ER (EC) 97, [1999] 2 AC 554 is that it was the first case in which the ECJ had to consider a situation in which the disparity was not obvious, but marginal and debatable. The case does therefore call for detailed examination. Ms Seymour-Smith had worked as a secretary for a firm of estate agents for fifteen months when she was dismissed in May 1991. She made

a complaint to the industrial tribunal but was met by the two-year time limit. She applied for judicial review contending that the 1985 order was invalid because incompatible with EU legislation (art 119 of the EC Treaty, as it then was, and Council Directive (EEC) 76/207 (the equal treatment directive). In 1995 the Court of Appeal, reversing the Divisional Court, granted the applicant limited declaratory relief, declined to make a reference to the ECJ, but granted leave to b appeal to this House ([1996] All ER (EC) 1, [1995] ICR 889).

[52] This House ([1997] 2 All ER 273, [1997] ICR 371) did make a reference to the ECJ of five questions, of which the third is most relevant:

> 'What is the legal test for establishing whether a measure adopted by a member state has such a degree of disparate effect as between men and c women as to amount to indirect discrimination for the purposes of art 119 of the EC Treaty unless shown to be based on objectively justified factors other than sex?'

[53] The ECJ's answer to the third question ([1999] All ER (EC) 97 at 135, [1999] 2 AC 554 at 597–598), is contained in the following paragraphs which have d been much discussed in later cases:

> '58. As regards the establishment of indirect discrimination, the first question is whether a measure such as the rule at issue has a more unfavourable impact on women than on men.
>
> 59. Next, as the UK government was right to point out, the best approach e to the comparison of statistics is to consider, on the one hand, the respective proportions of men in the workforce able to satisfy the requirement of two years' employment under the disputed rule and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce. It is not sufficient to consider the number of persons affected, since that depends on the number of working people in the member state as f a whole as well as the percentages of men and women employed in that state.
>
> 60. As the court has stated on several occasions, it must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years' g employment required by the disputed rule. That situation would be evidence of apparent sex discrimination unless the disputed rule were justified by objective factors unrelated to any discrimination based on sex.
>
> 61. That could also be the case if the statistical evidence revealed a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement of two years' employment. It h would, however, be for the national court to determine the conclusions to be drawn from such statistics.
>
> 62. It is also for the national court to assess whether the statistics concerning the situation of the workforce are valid and can be taken into account, that is to say, whether they cover enough individuals, whether they j illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant (see the judgment in [*Enderby v Frenchay Health Authority* Case C-127/92 [1994] 1 All ER 495 at 512–513, [1993] ECR I-5535 (para 17))]. It is, in particular, for the national court to establish whether, given the answer to the fourth question [relating to timing], the 1985 statistics concerning the respective percentages of men and women

fulfilling the requirement of two years' employment under the disputed rule are relevant and sufficient for the purposes of resolving the case before it.' a

[54] When the case returned to this House ([2000] 1 All ER 857, [2000] ICR 244), it had to apply the guidance given by the ECJ. The House had before it statistics for nine consecutive years, 1985–1993, which showed a modest but persistent and relatively constant differential against women in the effect of the b requirement for a two-year qualifying period. The full table is set out at [2000] 1 All ER 857 at 865, [2000] ICR 244 at 252 (and again, in a different and shorter form, at [2000] 1 All ER 857 at 870, [2000] ICR 244 at 258). In terms of the percentage of the total workforce who had completed the two-year qualifying period (the test indicated at para 60 of the judgment of the ECJ) the largest differential was in 1986: 77·2% of men to 68·4% of women, that is roughly seven c men to six women. The smallest differential was in 1993: 78·4% men and 74·1% women, or roughly sixteen men for fifteen women. These figures were, as my noble and learned friend Lord Nicholls of Birkenhead said ([2000] 1 All ER 857 at 871, [2000] ICR 244 at 258) 'in borderline country'. They were also in borderline country if one were to look at the corresponding reciprocal figures for men and women who had *not* completed the qualifying period: 22·9% against d 31·6% (about 7 to 10) for 1986, 21·6% against 25·9% (about 11 to 13) for 1993.

[55] Lord Nicholls referred to these two possible approaches in an important passage of his speech ([2000] 1 All ER 857 at 872, [2000] ICR 244 at 259). After setting out most of para 59 of the judgment of the ECJ he observed: e

'This statement appears to envisage that two comparisons should be made: a comparison of the proportions of men and women able to satisfy the requirement (the qualifiers), and a comparison of the proportions of men and women unable to satisfy the requirement (the non-qualifiers). Thereafter in its judgment the court considered only the proportions of men and women who were qualifiers. f

Some of the ramifications involved in looking at the composition of the disadvantaged group, as well as the composition of the advantaged group, were explored by the Divisional Court ([1995] ICR 889) and the Court of Appeal in the present case. Suffice to say, I do not understand the Court of Justice to have rejected use of the figures relating to the non-qualifiers in a g suitable case. Indeed the Court of Justice has looked at the composition of the disadvantaged group in several cases, although in none of them was there an issue on this point: see for instance, *Bilka-Kaufhaus GmbH v Weber von Hartz* Case C-170/84 [1986] 5 ECR 1607 at 1627 (para 31), *Nimz v Freie und Hansestadt Hamburg* Case C-184/89 [1991] ECR I-297 at 319 (para 12), and *Kowalska v Freie* h *und Hansestadt Hamburg* Case C-33/89 [1990] ECR-2591 at 2611 (paras 13–16). Having regard to the conclusion I have expressed above on the issue of disparate impact, it is unnecessary to reach a firm conclusion on this point. I prefer to leave this question open for another occasion.'

Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreed with j Lord Nicholls. The other members of the House (Lord Slynn of Hadley and Lord Steyn) disagreed as to the result of the application of the ECJ's test to the statistics, but Lord Slynn (with whom Lord Steyn agreed) concentrated on the advantaged groups while noting, ([2000] 1 All ER 857 at 863, [2000] ICR 244 at 250) that the Court of Appeal had considered both groups).

THE IDENTIFICATION OF THE POOL

[56] In order to determine this appeal your Lordships do have to look at the question which was left open in *R v Secretary of State for Employment, ex p Seymour-Smith* [2000] 1 All ER 857, [2000] ICR 244. There are as I see it two issues. One is the identification of the correct pool. The other is the choice (or balance) between what I have called the advantage-led approach and the disadvantage-led approach. The identification of the pool seems to have dominated the arguments below, but in my opinion it can now be seen as relatively uncontroversial and relatively straightforward. I shall therefore try to dispose of it at once.

[57] The relevant legislation applies generally to all employed persons on whom rights are conferred by the 1996 Act. As a matter of general principle, therefore, the pool should be all those persons. There was argument below as to whether the pool should include (i) persons who had not yet completed their qualifying period of service and/or (ii) persons who were not employed but were seeking employment. But any such fine-tuning would have only the most marginal effect on the figures. That is apparent from two tables attached to the further witness statement of Dr Hotopp, the Secretary of State's expert statistician. The differences between the two sets of figures are insignificant (in the general, non-technical sense: as to the dangers of lawyers misunderstanding statistical significance see Douglas W Vick 'Statistical Significance and the Significance of Statistics' (2000) 116 LQR 575).

[58] The controversy over the identification of the pool seems to have originated partly from Lindsay J's understandable wish (in *'Rutherford 1'* [2002] IRLR 599) to give guidance to the employment tribunal to which the case was to be remitted. In his summary (at [18]) he encouraged the use of more than one type of comparison, if only as a check. I see nothing obviously wrong with that general guidance, so long as it does not lead to over-elaboration. But in this case it unfortunately produced (see the employment tribunal's decision [2002] IRLR 768 at [16]) a long and (if I may say so) rather breathless and incoherent discussion about the appropriate methodology. Mr Allen QC (for the appellants) helpfully suggested that it should be read as four different paragraphs discussing different approaches to the problem. Read in that way, it becomes clear that the notion of 'those for whom retirement by 65 has some real meaning' (language criticised by Mr Pannick QC for the Secretary of State as introducing 'a sociological concept of considerable subjectivity and uncertainty') was only one of several possible approaches, and I respectfully think that the Court of Appeal (see [2004] IRLR 892) was wrong to suppose (see the judgment of Mummery LJ at [19]) that the employment tribunal had identified the pool as employed persons aged between 55 and 74. But in any event this is something of an irrelevance, since starting the pool with 55-year-olds makes the figures (slightly) less helpful for the appellants. The reason for that is apparent from the first three lines of each of the subsidiary tables in table A1 annexed to the employment tribunal's decision: by age 55 large numbers of women have already left the labour market, and men outnumber them by about 9 to 8.

ADVANTAGE-LED OR DISADVANTAGE-LED?

[59] Later in the discussion at para [16] of the employment tribunal's decision there are two tables (for 1998 and 2001, the years in which Mr Rutherford and Mr Bentley respectively were dismissed). These tables seem to have carried a good deal of weight in the employment tribunal's final conclusion. They do treat the whole labour force (between the ages of 16 and 79) as the relevant pool. I

reproduce that for 1998 (with a small addition clarifying the 'gender ratio' column); that for 2001 is very similar. The decision drew particular attention to the final gender ratio (1·44:1 for Mr Rutherford; the corresponding figure for Mr Bentley was 1·53:1).

	Males	Females	Gender Ratio (M/F)
Advantaged (16–64)	13,588,800	12,546,400	1·08:1
Disadvantaged (65–79)	195,200	124,900	1·56:1
Disadvantaged as % of advantaged	1·44%	1·00%	1·44:1

[60] I have two comments on this table. One is that it is usual to regard the pool as consisting of the aggregate of the advantaged and the disadvantaged, and to express the proportions of the advantaged and the disadvantaged as percentages of the whole pool: then (as in the tables in the speeches of Lord Slynn and Lord Nicholls in *R v Secretary of State for Employment, ex p Seymour-Smith* [2000] 1 All ER 857, [2000] ICR 244) the percentages will always total 100, which is easier to understand. In the above table that modification makes almost no difference to the figures for the disadvantaged, because almost all the pool, men and women, are advantaged: the figures become men 1·42%, women 0·99% (with the ratio unchanged). The other (and more important) comment is that the table omits the corresponding figures for the advantaged, which (as proportions of the whole pool) are men 98·58%, women 99·01%, with a ratio (M/F) of 1:1·004. So when related to the pool as a whole, the advantage to women is barely perceptible. The revised table below shows the effect of making these changes.

	Males	Females	Gender Ratio (M/F)
Advantaged	13,588,800	12,546,400	1·08:1
Disadvantaged	195,200	124,900	1·56:1
Total pool	13,784,000	12,671,300	1·08:1
Disadvantaged as % of pool	1·42%	0·99%	1.44:1
Advantaged as % of pool	98·58%	99·01%	1:1·004

[61] This point was (as Lord Slynn noted when *Ex p Seymour-Smith* was before this House) discussed by the Divisional Court and the Court of Appeal in *Ex p Seymour-Smith*, but only as a curiosity, since the difficulties in that case were of a different character. The clearest comment was that of McCullough J in the Divisional Court (see [1994] IRLR 448 at 457 (para 108)) (though he was giving his view without the benefit of the guidance later obtained from the ECJ):

> 'My conclusion is that, in considering whether there is considerable disparity, the court should look both at the relative percentages of those who meet the requirement and at the relative percentages of those who do not. Of these the more important group will be those who qualify. The following example makes the point. If 98% of men qualify and 2% do not, and if 96% of women qualify and 4% do not, it would not be right to conclude that the disparity was considerable. But if only 4% of men and only 2% of women qualified the opposite conclusion might well be correct.'

[62] It may be helpful to some if I summarise this in algebraic form. If A and D denote the numbers of advantaged and disadvantaged persons, and M and W the numbers of men and women, the men's pool (PM) consists of AM + DM and the women's pool of AW + DW. The proportions to be considered can then be expressed as the percentages AM/PM % (advantage-led) or DM/PM % disadvantage-led); similarly with the women's pool. Mummery LJ has given a clear and detailed description of this advantage-led approach (see [2004] IRLR 892 at [25]). In many cases (including *Ex p Seymour-Smith*) either approach will produce much the same result. But when the vast majority of each pool is classified as advantaged, the choice (or balance) between the two methods becomes critical. 1·44:1 is arguably a considerable difference, but 1:1·004 is not.

[63] My Lords, the jurisprudence of the ECJ does not provide a clear answer to this question. The formulation at para 60 of its judgment in *R v Secretary of State for Employment, ex p Seymour-Smith*[1999] All ER (EC) 97, [1999] 2 AC 554 has been repeated in numerous later cases, including cases decided since the coming into full force of the burden of proof directive. It is sufficient to mention the decision of the Grand Chamber in *Allonby v Accrington and Rossendale College* Case C-256/01 [2005] All ER (EC) 289 at 321, [2004] ECR I-873 (para 79) (that case was decided on facts ante-dating the directive, but it seems most unlikely that the Grand Chamber would not have referred to it if it had been thought to have made a significant change in the law). But (as already noted) none of these cases involved pools with a very large percentage of advantaged persons and a very small percentage of disadvantaged persons (or vice versa).

[64] Mr Allen placed great reliance on the burden of proof directive, and submitted that in the face of the plain language of art 2 it would be contra legem to focus on a comparison of the advantaged percentages in the two groups. But the burden of proof directive was intended to codify, not to alter, the jurisprudence of the ECJ. Article 2 defines indirect discrimination in terms of disadvantage, which is unsurprising, but (as Mummery LJ observed in his judgment in the Court of Appeal ([2004] IRLR 892 at [35])):

> 'The definition describes when a certain state of affairs (ie indirect discrimination) exists: it does not, however, prescribe the methodology for assessing the statistical evidence in order to determine whether or not that state of affairs exists. No methodology has been laid down in the Treaty or in any Directive or in national legislation. It has been left to the national

courts and tribunals, which hear and assess the evidence and find the facts, to work out from case to case a satisfactory method for assessing whether or not there is disparate adverse impact in the particular case.'

[65] Your Lordships must therefore resolve this matter largely as a matter of principle. I must confess that my first reaction was that in this case an advantage-led approach could have the effect of masking a significant degree of disparate disadvantage, and that a demonstrable element of indirect discrimination should not be ignored merely because it affected relatively few people. Plainly that is the case with direct discrimination, whether on the ground of gender or on any other ground. To say that only a few individuals are disadvantaged is no excuse. But indirect discrimination is in my view different, especially where it is the type which may be produced by national legislation of general application, and which may be assessed on a purely statistical basis (see *Allonby v Accrington and Rossendale College* Case C-256/01 [2005] All ER (EC) 289 at 321, [2004] ECR I-873 (para 80)). In such cases the pool should be taken as it is, and the relevant statistics analysed, without regard to any underlying sociological or economic factors. Such factors may be highly relevant at the second stage of objective justification, but they are not relevant at the first stage. For that reason the employment tribunal was in my view wrong to ask itself (at the first stage) who had a real interest in retirement by 65 (though that point by itself made little practical difference to the outcome). The purpose of the analysis is to look for disproportionate impact on men as such and on women as such, as anonymous, characterless material for statisticians.

[66] Our domestic jurisprudence (concerned as it is with anti-discrimination legislation framed in much more detailed terms than EU law) has gone rather further than the ECJ in exploring the intricacies of indirect discrimination. It has recognised that the appropriate pool should not be narrowed by reference to qualifications or conditions which are not logically relevant to the statistical exercise in hand: see *Perera v Civil Service Commission* [1982] IRLR 147 at 151–152, [1982] ICR 350 at 358–359 (proportion of late immigrants irrelevant; upheld by the Court of Appeal [1983] IRLR 166, [1983] ICR 428 without mention of this point); *Jones v University of Manchester* [1993] IRLR 218 at 226 and 230, [1993] ICR 474 at 495 and 505 (proportion of 'mature' graduates irrelevant); *London Underground Ltd v Edwards (No 2)* [1998] IRLR 364 at 370, [1999] ICR 494 at 508–509 (proportion of single parents irrelevant); and *Barry v Midland Bank plc* in the Court of Appeal [1998] 1 All ER 805 at 819, [1999] ICR 319 at 334 and in this House [1999] 3 All ER 974 at 983–984, [1999] ICR 859 at 869–870 (pool incorrectly limited to one specialised department). This is certainly consistent with, and to my mind provides a little support for, an advantage-led approach which takes the unvarnished statistics as it finds them.

[67] I do not express the view that some element of disadvantage-led analysis may not be appropriate in some cases. But it must be recognised that there is a difficulty here: the more extreme the majority of the advantaged in both pools, the more difficult it is, with any intellectual consistency, to pay much attention to the result of a disadvantage-led approach. However I can imagine some (perhaps improbable) cases in which a disadvantage-led approach would serve as an alert to the likelihood of objectionable discrimination. If (in a pool of one thousand persons) the advantaged 95% were split equally between men and women, but the disadvantaged 5% were all women, the very strong disparity of disadvantage would, I think, make it a special case, and the fact that the

percentages of the advantaged were not greatly different (100% men and 90·5% women) would not be decisive.

[68] But that is not this case. A proportion of disadvantage of 1·44:1 is not such an extraordinary disparity as to make it necessary to resile from the absence of any significant disparity (1:1·004) in the two advantaged groups. The employment tribunal erred in law in ignoring completely the effect of an advantage-led approach.

[69] For these reasons (which are largely but not entirely the same as those of the Court of Appeal) I would dismiss this appeal. Although your Lordships had full written and oral submissions on the issue of objective justification, I think it better not to express any views on that issue.

[70] I prepared this opinion without having had the advantage of considering in draft the opinions of my noble and learned friends Lord Scott of Foscote, Lord Rodger of Earlsferry and Baroness Hale of Richmond. They would dispose of this appeal on broader grounds and so avoid entanglement in arguments which many may regard as over-elaborate, artificial and inappropriate for a subject of such social and economic importance as discrimination in employment. I would very much prefer to find a simpler and more transparent principle on which to decide the appeal, and by which tribunals can be guided in future. But the grounds on which my noble and learned friends would decide the appeal were not argued below or in this House. Nor do I find it easy to extract from their opinions a single easily-stated principle.

BARONESS HALE OF RICHMOND.

[71] The essence of indirect discrimination is that an apparently neutral requirement or condition (under the old formulation) or provision, criterion or practice (under the new) in reality has a disproportionate adverse impact upon a particular group. It looks beyond the formal equality achieved by the prohibition of direct discrimination towards the more substantive equality of results. A smaller proportion of one group can comply with the requirement, condition or criterion or a larger proportion of them are adversely affected by the rule or practice. This is meant to be a simple objective enquiry. Once disproportionate adverse impact is demonstrated by the figures, the question is whether the rule or requirement can objectively be justified.

[72] It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and the disadvantaged groups. So it is no answer to say that the rule applies equally to men and women, or to each racial or ethnic or national group, as the case may be. The question is whether it puts one group at a comparative disadvantage to the other. However, the fact that more women than men, or more whites than blacks, are affected by it is not enough. Suppose, for example, a rule requiring that trainee hairdressers be at least 25 years old. The fact that more women than men want to be hairdressers would not make such a rule discriminatory. It would have to be shown that the impact of such a rule worked to the comparative disadvantage of would-be female or male hairdressers as the case might be.

[73] But the notion of comparative disadvantage or advantage is not straightforward. It involves defining the right groups for comparison. The twists and turns of the domestic case law on indirect discrimination show that this is no easy matter. But some points stand out. First, the concept is normally applied to a rule or requirement which *selects* people for a particular advantage or

disadvantage. Second, the rule or requirement is applied to a group of people who *want* something. The disparate impact complained of is that they cannot have what they want because of the rule or requirement, whereas others can.

[74] What is the comparative advantage and disadvantage in this case? It cannot simply be being under or over the age of 65. That in itself is neither an advantage nor a disadvantage, until it is linked to what the people concerned want to have or not to have. If one wants to have a pension, then reaching pensionable age is an advantage. If one wants to go on working beyond pensionable age, then reaching that age may be a disadvantage.

[75] The advantage or disadvantage in question here is going on working over the age of 65 while still enjoying the protection from unfair dismissal and redundancy that younger employees enjoy. As Mr Allen QC for the appellants pointed out, that protection has an impact, not only when employment comes to an end, but also upon whether or not it is brought to an end, and if so, how.

[76] If that is so, it matters not that there are other men and women who have left the workforce at an earlier age and are thus uninterested in whether or not they will continue to be protected. The people who want the protection are the people who are still in the workforce at the age of 65. And the rule has no disproportionate effect upon any particular group within that group. It applies to the same proportion of women in that group as it applies to men. There is no comparison group who wants this particular benefit and can more easily obtain it.

[77] The appellants cannot object that this approach defines the advantage and disadvantage by reference to the very rule which is under attack; on the contrary, that is exactly what they have sought to do by treating the advantage and disadvantage as being under or over the age of 65. But the result is the same even if one defines the advantage and disadvantage without reference to the age limit. The advantage is to be able to enjoy protection against unfair dismissal and redundancy throughout one's working life. As my noble and learned friend Lord Walker of Gestingthorpe has demonstrated, the sex differential between those who can and those who cannot do this is negligible, even though there are more men in the group who cannot. But in my view one should not be bringing into the comparison people who have no interest in the advantage in question.

[78] This approach, defining advantage and disadvantage by reference to what people want, chimes with the definition of discrimination given by McIntyre J in the seminal Canadian case of *Andrews v Law Society of British Columbia* [1989] 1 SCR 143:

> 'discrimination may be described as a distinction, whether intentional or not but based on grounds relating to the personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group *not imposed upon others*, or which withholds or limits access to opportunities, benefits and advantages *available to other members of society*.' (Emphasis supplied.)

It also chimes with Sandra Fredman's observation, in *Discrimination Law* (2002) p 115, that: 'A disparate impact is not itself discriminatory. Unequal results are legitimate if no exclusionary barrier can be identified . . .' The sorts of cases where indirect discrimination can be established confirm this.

[79] Say members of both groups want a particular job, but age limits, educational qualifications, or size, height or physical strength requirements are applied (as in the progenitor of the indirect discrimination concept, *Griggs v Duke*

Power Co (1971) 401 US 424). These may well have a disproportionate adverse impact upon one sex, or upon different racial, ethnic or national groups. The question then is whether they can be independently justified.

[80] Say members of both groups want compensation for the loss of their jobs, but length of employment criteria, or 'last in first out' practices, or preference for full-timers over part-timers, apply. These too may well have a disproportionate adverse impact upon one sex, or upon different racial, ethnic or national groups. Again the question is whether they can be independently justified.

[81] Say members of both groups want various work-related benefits, such as occupational pensions, sick pay, holiday pay, bonuses of one sort or another, but there are length of employment criteria or differential treatment between full-timers and part-timers. These again may have a disproportionate adverse impact upon one sex, or upon different racial ethnic or national groups. Again the question is whether they can be independently justified.

[82] The common feature is that all these people are in the pool who want the benefit—or not to suffer the disadvantage—and they are differentially affected by a criterion applicable to that benefit or disadvantage. Indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage or disadvantage in question. If it were, one might well wish to ask whether the fact that they were not interested was itself the product of direct or indirect discrimination in the past.

[83] For these reasons, which are essentially the same as those given by my noble and learned friends, Lord Scott of Foscote and Lord Rodger of Earlsferry, I too would dismiss these appeals without requiring the Department [for Trade and Industry] to justify the rule.

Appeals dismissed.

Celia Fox Barrister.

Director of Public Prosecutions v Collins

[2006] UKHL 40

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, BARONESS HALE OF RICHMOND, LORD CARSWELL AND LORD BROWN OF EATON-UNDER-HEYWOOD

22 JUNE, 19 JULY 2006

Criminal law – Public electronic communications network – Message or other matter – Sending grossly offensive message or other matter – Test for determining whether grossly offensive – Communications Act 2003, s 127(1).

The respondent made a number of telephone calls over two years to the constituency and Westminster offices of his member of Parliament. He either spoke directly to members of staff or left recorded messages, to which members of staff and the MP himself later listened. In those telephone calls and recorded messages the respondent, who held strong views on immigration and asylum policy and the provision of public support to immigrants and applicants for asylum, shouted and made reference to 'wogs', 'Pakis' and 'black bastards'. Some of those who received the calls and heard the messages described themselves as shocked, alarmed and depressed by the respondent's language. The respondent was charged with sending, by means of a public telecommunications system, messages that were grossly offensive or of an obscene or menacing character, contrary to s 43(1) of the Telecommunications Act 1984. Section 43(1) of the 1984 Act was repealed, and replaced by s 127(1)(a)[a] of the Communications Act 2003, which provided, inter alia, that a person was guilty of an offence if he sent by means of a public electronic communications network a message or other matter that was grossly offensive or of an indecent, obscene or menacing character. The justices dismissed the charge on the ground that, while his messages had been offensive, they were not grossly offensive and a reasonable person would not consider them so. The prosecution appealed by way of case stated. The appeal was dismissed. The court found that it was for the justices to determine as a question of fact whether a message was grossly offensive, applying the standards of an open and just multi-racial society, and the words must be judged taking account of their context and all relevant circumstances. The prosecution appealed.

Held – It was for the justices to determine as a question of fact whether a message was grossly offensive for the purposes of s 127(1) of the 2003 Act, applying the standards of an open and just multi-racial society, and the words had to be judged taking account of their context and all relevant circumstances. There could be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test was whether a message was couched in terms liable to cause gross offence to those to whom it related. The object of s 127(1)(a) was not to protect people against receipt of unsolicited messages which they might find seriously objectionable, but to prohibit the use

a Section 127 of the Communications Act 2003, so far as material, is set out at [6], below

of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravened the basic standards of our society. Further, the act proscribed by s 127(1)(a) was the sending of the message by the defined means; the offence was complete when the message was sent. Whilst s 127(1)(a) provided no explicit guidance on the state of mind which had to be proved against a defendant to establish an offence under that subsection, a defendant had to intend his words to be grossly offensive to those to whom they related, or be aware that they might be taken to be so. Parliament could not have intended to criminalise the conduct of a person using language which was, for reasons unknown to him, grossly offensive to those to whom it related, or which might even be thought, however wrongly, to represent a polite or acceptable usage. In the instant case, the fact that the respondent had sent the messages to his member of Parliament seeking redress of his grievances as constituent and taxpayer was a relevant fact. The respondent was entitled to make his views known, and entitled to express them strongly. The question was whether, in doing so, he had used language which was beyond the pale of what was tolerable in our society. Some at least of the language used by the respondent was language which could only have been chosen because of its highly abusive, insulting, pejorative, offensive character. In the circumstances, the respondent's messages were grossly offensive and would be found by a reasonable person to be so, and they were sent by the respondent by means of a public electronic communications network. It followed that the respondent should have been convicted and, accordingly, the appeal would be allowed (see [7]–[11], [13], [15], [16], [17], [21], [23], [24], below).

Dicta of Lord Reid in *Sweet v Parsley* [1969] 1 All ER 347 at 349 considered.

Decision of the Divisional Court [2005] 3 All ER 326 reversed.

Notes

For improper use of public electronic communications network, see 45(1) *Halsbury's Laws* (4th edn) (2005 reissue) para 196.

For the Communications Act 2003, s 127, see 45 *Halsbury's Statutes* (4th edn) (2003 reissue) 1101.

Cases referred to in opinions

Brutus v Cozens [1972] 2 All ER 1297, [1973] AC 854, [1972] 3 WLR 521, HL.

Norwood v UK (2004) 40 EHRR SE 111, ECt HR.

Sweet v Parsley [1969] 1 All ER 347, [1970] AC 132, [1969] 2 WLR 470, HL.

Cases also referred to in list of authorities

DPP v Clarke (1991) 94 Cr App Rep 359, DC.

Hammond v DPP [2004] EWHC 69 (Admin), (2004) 168 JP 601, DC.

Kosmos Publications v DPP [1975] Crim LR 345, DC.

Percy v DPP [2001] EWHC 1125 (Admin), (2001) 166 JP 93, DC.

R v Anderson [1971] 3 All ER 1152, [1972] 1 QB 304, [1971] 3 WLR 939, CA.

R v Clear [1968] 1 All ER 74, [1968] 1 QB 670, [1968] 2 WLR 122, CA.

R v Garwood [1987] 1 All ER 1032, [1987] 1 WLR 319, CA.

R v Stanley [1965] 1 All ER 1035, [1965] 2 QB 327, [1965] 2 WLR 917, CCA.

Redmond-Bate v DPP (1999) 7 BHRC 375, DC.

Appeal

The Director of Public Prosecutions appealed with leave of the House of Lords Appeal Committee given on 15 November 2005 from the decision of the Divisional Court (Sedley LJ and Mitting J) on 23 June 2005 ([2005] EWHC 1308 (Admin), [2005] 3 All ER 326) dismissing an appeal by way of case stated against the acquittal of the respondent, Leslie George Collins, by the Leicester Justices on 4 October 2004 on a charge that between 1 January 2002 and 6 January 2004 he had sent grossly offensive messages by means of a public telecommunications system, contrary to s 43(1) of the Telecommunications Act 1984. Section 43(1) of the 1984 Act was repealed and replaced by s 127(1) of the Communications Act 2003 and it was agreed to treat s 127(1)(a) as if it had been effective throughout the relevant period and the charge as one of sending messages that were grossly offensive. On 28 July 2005 the Divisional Court certified that a point of law of general public importance, was involved, namely 'When deciding whether a message is grossly offensive for the purposes of s 127(1) of the Communications Act 2003, what, if anything, is the relevance of (a) the intention of the person who sent the message and (b) the reaction to the message of the recipient?'. The facts are set out in the opinion of Lord Bingham of Cornhill.

David Perry and *Louis Mably* (instructed by the *Crown Prosecution Service*) for the Director of Public Prosecutions.

Frances Oldham QC and *Esther Harrison* (instructed by *Mander Cruickshank*, Hinckley) for the respondent.

Their Lordships took time for consideration.

19 July 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, by s 127(1)(a) of the Communications Act 2003 it is an offence to send a message that is grossly offensive by means of a public electronic communications network. In this appeal by the Director of Public Prosecutions, the House is asked to consider the meaning and application of that provision.

THE FACTS AND THE PROCEEDINGS

[2] The relevant facts are simple and (save in one important respect) undisputed. The respondent, a man now aged 61, made a number of telephone calls over the two years from January 2002 to January 2004 to the constituency and Westminster offices of Mr David Taylor, the member of Parliament for North West Leicestershire, whose constituent the respondent was. On some occasions he spoke to a member of Mr Taylor's staff; on others he left recorded messages, to which members of staff and Mr Taylor himself later listened. In these telephone calls and recorded messages the respondent, who held strong views on immigration and asylum policy and the provision of public support to immigrants and applicants for asylum, ranted and shouted and made reference to 'wogs', 'Pakis', 'black bastards' and (according to the statement of facts agreed between the parties for purposes of this appeal but not the case stated by the justices) 'niggers'. Some of those who received the calls and heard the messages described themselves as shocked, alarmed and depressed by the respondent's language.

[3] The respondent was charged with sending messages of a grossly offensive, obscene or menacing character by means of a public telecommunications system between 1 January 2002 and 6 January 2004, contrary to s 43(1) of the Telecommunications Act 1984. The information issued against the respondent was formally defective, since s 43(1) of the 1984 Act was superseded by s 127(1)(a) of the 2003 Act in the course of the two-year period charged and the information was duplicitous. But no objection has at any time been taken on these grounds. It has been agreed to treat s 127(1)(a) as if it had been effective throughout the relevant period, and to treat the charge as one of sending messages that were grossly offensive.

[4] The respondent pleaded not guilty and following a trial on 4 October 2004 Leicestershire justices dismissed the charge. In a case stated for the opinion of the High Court the justices gave their reasons. They found that the racist terms used by the respondent sprang from his obvious frustration at the way his concerns were being handled. They concluded:

> 'The conversations and messages left were "offensive" but not "grossly" offensive. A reasonable person would not find the terms used to be grossly offensive.'

[5] On the Director's appeal to the Queen's Bench Divisional Court the leading judgment was given extempore after a brief argument by Sedley LJ, with whom Mitting J agreed ([2005] EWHC 1308 (Admin), [2005] 3 All ER 326, [2006] 1 WLR 308). In his judgment Sedley LJ said:

> '[4] I am bound to say that my first reaction to the question was that if these messages were offensive, it was not possible in a decent society to find that they were less than grossly offensive. One has only to visualise having to explain and justify the making of the material distinction to a black person or to one of Asian origin in order to appreciate its invidiousness.
>
> [5] But for much the same reason, I can understand the dilemma in which the justices found themselves. In order to interfere as little as possible with freedom of expression, Parliament has criminalised only grossly offensive messages. To have found the respondent's messages to be inoffensive would have been extraordinary: hence the justices' initial finding. But some added value had to be given to the word "grossly" and the question is whether the justices, despite what I have said about the character of the respondent's language, were entitled in the particular circumstances of the case to find that this additional criterion was not met.'

He concluded that the justices had been entitled to find as they had. He referred to s 127(1)(a) of the 2003 Act and (which the parties had not) the Human Rights Act 1998, suggesting that the reason for criminalising certain messages sent by post, telephone or public electronic communications network was to protect people against receipt of unsolicited messages which they might find seriously objectionable. Thus the legislation struck a balance between the respect for private life enjoined by art 8 and the right of free expression protected by art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). He continued (at [9]):

> 'This is why it is the message, not its content, which is the basic ingredient of the statutory offence. The same content may be menacing or grossly

offensive in one message and innocuous in another. As was pointed out in argument, counsel in the present case are unlikely to have exposed themselves to prosecution by discussing its facts on the telephone. A script writer emailing his or her director about dialogue for a new film is not likely to fall foul of the law, however intrinsically menacing or offensive the text they are discussing. In its context, such a message threatens nobody and can offend nobody. Here, as elsewhere, context is everything.'

The Lord Justice then considered obscene, indecent, and menacing messages and expressed his conclusions:

'[11] If (as I will assume) these are the respective meanings of menacing, obscene and indecent messages in the communications legislation, the category of grossly offensive messages can be seen to lie somewhere near the centre of the spectrum. What is offensive has to be judged (very much as the justices, by considering the reaction of reasonable people, judged it) by the standards of an open and just multiracial society. So too, therefore, what is grossly offensive, an ordinary English phrase with no special legal content, which on first principles (see *Brutus v Cozens* [1972] 2 All ER 1297, [1973] AC 854) it is for the justices to apply to the facts as they find them. Whether a telephone message falls into this category has to depend not only on its content but on the circumstances in which the message has been sent and, at least as background, on Parliament's objective in making the sending of certain messages a crime.

[12] The respondent had no idea, and evidently did not care, whether the person he was addressing or who would pick up his recorded message would be personally offended—grossly offended—by his abusive and intemperate language. It was his good fortune that none was, but this was nevertheless a fact which the justices were entitled to take into account. So was the fact that it was his member of Parliament to whom he was trying to address his opinions. Had the respondent nevertheless found himself speaking on any of his calls to a member of an ethnic minority, it might well have been impossible, however stoically the hearer might have brushed it aside, to avoid the conclusion that the message was grossly offensive: [counsel for the defendant] concedes as much. Such a conclusion would be loyal to Parliament's essential objective of protecting people from being involuntarily subjected to grossly offensive messages. It would also have to take account, however, of the fact that it is not every transmission of grossly offensive language which is punishable, but only messages which, in their particular circumstances and context, are to be regarded in the wider society which the justices represent as grossly offensive.'

THE LEGISLATION

[6] Section 127 of the 2003 Act, so far as material, provides:

'*Improper use of public electronic communications network.*—(1) A person is guilty of an offence if he—(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or (b) causes any such message or matter to be so sent.

(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—(a) sends by means of a public electronic communications network, a message that he knows to be false, (b) causes such a message to be sent; or (c) persistently makes use of a public electronic communications network.

(3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.'

The genealogy of this section may be traced back to s 10(2)(a) of the Post Office (Amendment) Act 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene or menacing character. That subsection was reproduced with no change save of punctuation in s 66(a) of the Post Office Act 1953. It was again reproduced in s 78 of the Post Office Act 1969, save that 'by means of a public telecommunication service' was substituted for 'by telephone' and 'any message' was changed to 'a message or other matter'. Section 78 was elaborated but substantially repeated in s 49(1)(a) of the British Telecommunications Act 1981 and was re-enacted (save for the substitution of 'system' for 'service') in s 43(1)(a) of the Telecommunications Act 1984. Section 43(1)(a) was in the same terms as s 127(1)(a) of the 2003 Act, save that it referred to 'a public telecommunication system' and not (as in s 127(1)(a)) to a 'public electronic communications network'. Sections 11(1)(b) of the 1953 Act and 85(3) of the Postal Services Act 2000 made it an offence to send certain proscribed articles by post.

CONCLUSIONS

[7] This brief summary of the relevant legislation suggests two conclusions. First, the object of s 127(1)(a) and its predecessor sections is not to protect people against receipt of unsolicited messages which they may find seriously objectionable. That object is addressed in s 1 of the Malicious Communications Act 1988, which does not require that messages shall, to be proscribed, have been sent by post, or telephone, or *public* electronic communications network. The purpose of the legislation which culminates in s 127(1)(a) was to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society. A letter dropped through the letterbox may be grossly offensive, obscene, indecent or menacing, and may well be covered by s 1 of the 1988 Act, but it does not fall within the legislation now under consideration.

[8] Secondly, it is plain from the terms of s 127(1)(a), as of its predecessor sections, that the proscribed act, the actus reus of the offence, is the sending of a message of the proscribed character by the defined means. The offence is complete when the message is sent. Thus it can make no difference that the message is never received, for example because a recorded message is erased before anyone listens to it. Nor, with respect, can the criminality of a defendant's conduct depend on whether a message is received by A, who for any reason is deeply offended, or B, who is not. On such an approach criminal liability would turn on an unforeseeable contingency. The respondent did not seek to support this approach.

[9] The parties agreed with the rulings of the Divisional Court that it is for the justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the justices must apply the standards of an open

and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances. I would agree also. Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a badge of honour ('Old Contemptibles'). There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.

[10] In contrast with s 127(2)(a) and its predecessor subsections, which require proof of an unlawful purpose and a degree of knowledge, s 127(1)(a) provides no explicit guidance on the state of mind which must be proved against a defendant to establish an offence against the subsection. What, if anything, must be proved beyond an intention to send the message in question? Mr Perry, for the Director, relying by analogy on s 6(4) of the Public Order Act 1986, suggested that the defendant must intend his words to be grossly offensive to those to whom they relate, or be aware that they may be taken to be so.

[11] It is pertinent to recall Lord Reid's observations in *Sweet v Parsley* [1969] 1 All ER 347 at 349, [1970] AC 132 at 148:

> 'Our first duty is to consider the words of the Act; if they show a clear intention to create an absolute offence, that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that, whenever a section is silent as to mens rea, there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.'

This passage is relevant here, since Parliament cannot have intended to criminalise the conduct of a person using language which is, for reasons unknown to him, grossly offensive to those to whom it relates, or which may even be thought, however wrongly, to represent a polite or acceptable usage. On the other hand, a culpable state of mind will ordinarily be found where a message is couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognised by the sender. The same will be true where facts known to the sender of a message about an intended recipient render the message peculiarly offensive to that recipient, or likely to be so, whether or not the message in fact reaches the recipient. I would accept Mr Perry's submission.

[12] In seeking to uphold the decisions below in the respondent's favour, Miss Oldham QC relied on the context in which the messages were sent, stressing that they were sent by him to his MP seeking redress of his grievances as constituent and taxpayer. This is undoubtedly a relevant fact. The respondent was entitled to make his views known, and entitled to express them strongly. The question is whether, in doing so, he used language which is beyond the pale of what is tolerable in our society.

[13] The justices thought not. A decision of justices on a matter of this kind is not to be disturbed at all readily, as the Divisional Court rightly recognised. But some at least of the language used by the respondent was language which can only have been chosen because of its highly abusive, insulting, pejorative, offensive character. There was nothing in the content or tenor of these messages to soften or mitigate the effect of this language in any way. Differing from the courts below with reluctance, but ultimately without hesitation, I conclude that the respondent's messages were grossly offensive and would be found by a reasonable person to be so. Since they were sent by the respondent by means of a public electronic communications network they fall within the section. It follows that the respondent should have been convicted.

[14] Miss Oldham did not contend that this conclusion would be inconsistent with art 10 of the convention, given effect by the Human Rights Act 1998, and she was right not to do so. Section 127(1)(a) does of course interfere with a person's right to freedom of expression. But it is a restriction clearly prescribed by statute. It is directed to a legitimate objective, preventing the use of a public electronic communications network for attacking the reputations and rights of others. It goes no further than is necessary in a democratic society to achieve that end. Effect must also be given to art 17 of the convention, as was held in *Norwood v UK* (2004) 40 EHRR SE 111.

[15] For these reasons, and those given by my noble and learned friends Lord Carswell and Lord Brown of Eaton-under-Heywood, I would accordingly allow the Director's appeal. At an earlier stage he undertook to the respondent that he would not, if his appeal succeeded, seek remission of the case to the magistrates' court. There will therefore be no further order.

LORD NICHOLLS OF BIRKENHEAD.

[16] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. For the reasons he gives, with which I agree, I too would allow this appeal.

BARONESS HALE OF RICHMOND.

[17] My Lords, for the reasons given in the opinion of my noble and learned friend Lord Bingham of Cornhill, with which I agree, I too would allow this appeal but make no further order.

LORD CARSWELL.

[18] My Lords, the reports of cases before appellate tribunals are strewn with instances in which the courts have reminded themselves of the importance of resisting the temptation to interfere too lightly with the findings of a lower court to which a decision has been entrusted, and have then proceeded to yield to that very temptation. The magistrates' court in this case was given the task of determining whether an expression or other matter sent by means of a public electronic communication was grossly offensive in the eyes of reasonable people, judged, as Sedley LJ put it in his judgment in the Divisional Court ([2005] EWHC 1308 (Admin) at [11], [2005] 3 All ER 326 at [11], [2006] 1 WLR 308) by the standards of an open and just multi-racial society. The justices who sit in the magistrates' court are people who are expected to apply the standards of today's society to determination of such issues. It is of importance that their determinations should not be upset lightly. Appellate tribunals should pay more

than lip service to that principle and when they do reverse them they should be clear on what basis they do so: cf *Brutus v Cozens* [1972] 2 All ER 1297 at 1299–1301, [1973] AC 854 at 862–864.

[19] The magistrates' court found (para 3 of the case stated) that one member of the staff of Mr David Taylor MP who listened to the messages on his answering machine was upset by the language used, but another was not. A third found it depressing. Mr Taylor was not personally offended but was concerned about the possible effect on his staff. The court expressed its conclusion in para 9 of the case stated:

> '. . . the conversations and messages left were "offensive" but not "grossly" offensive. A reasonable person would not find the terms used to be grossly offensive.'

[20] In the Divisional Court Sedley LJ, with whom Mitting J agreed, expressed his opinion in the following terms (at [12]):

> 'The respondent had no idea, and evidently did not care, whether the person he was addressing or who would pick up his recorded message would be personally offended—grossly offended—by his abusive and intemperate language. It was his good fortune that none was, but this was nevertheless a fact which the justices were entitled to take into account. So was the fact that it was his member of Parliament to whom he was trying to address his opinions. Had the respondent nevertheless found himself speaking on any of his calls to a member of an ethnic minority, it might well have been impossible, however stoically the hearer might have brushed it aside, to avoid the conclusion that the message was grossly offensive: Miss Harrison concedes as much. Such a conclusion would be loyal to Parliament's essential objective of protecting people from being involuntarily subjected to grossly offensive messages. It would also have to take account, however, of the fact that it is not every transmission of grossly offensive language which is punishable, but only messages which, in their particular circumstances and context, are to be regarded in the wider society which the justices represent as grossly offensive.'

The justices did not express any view on whether a reasonable person belonging to any of the ethnic minorities to whom the respondent referred in his telephone calls would find the terms used grossly offensive.

[21] I respectfully agree with the conclusion expressed by my noble and learned friend Lord Bingham of Cornhill at [11], above that it must be proved that the respondent intended his words to be offensive to those to whom they related or be aware that they may be taken to be so. I also agree with his conclusion at [8], above that it can make no difference to criminal liability whether a message is ever actually received or whether the persons who do receive it are offended by it. What matters is whether reasonable persons in our society would find it grossly offensive.

[22] These conclusions are sufficient to answer the certified question. It remains to apply the principles to the facts of the present case and the findings of the magistrates' court. I felt quite considerable doubt during the argument of this appeal whether the House would be justified in reversing the decision of the magistrates' court that the reasonable person would not find the terms of the messages to be grossly offensive, bearing in mind that the principle to which

I have referred, that a tribunal of fact must be left to exercise its judgment on such matters without undue interference. Two factors have, however, persuaded me that your Lordships would be right to reverse its decision. First, it appears that the justices may have placed some weight on the reaction of the actual listeners to the messages, rather than considering the reactions of reasonable members of society in general. Secondly, it was conceded by the respondent's counsel in the Divisional Court that a member of a relevant ethnic minority who heard the messages would have found them grossly offensive. If one accepts the correctness of that concession, as I believe one should, then one cannot easily escape the conclusion that the messages would be regarded as grossly offensive by reasonable persons in general, judged by the standards of an open and just multiracial society. The terms used were opprobrious and insulting, and not accidentally so. I am satisfied that reasonable citizens, not only members of the ethnic minorities referred to by the terms, would find them grossly offensive.

[23] I accordingly agree with your Lordships that we are entitled to reach a different conclusion from the courts below. I would allow the appeal and declare that the respondent should have been convicted of the offence charged, while making no further order.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[24] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Carswell and for the reasons they give, with which I agree, I too would allow this appeal.

[25] I add only this. The contrast between s 127(1)(a) of the Communications Act 2003—under which the respondent was charged—and s 1 of the Malicious Communications Act 1988 (a contrast struck by Lord Bingham at [7], above) is crucial to an understanding of the true nature and ambit of liability under s 127(1)(a). Whereas s 127(1)(a) criminalises without more the sending by means of a public electronic communications network of inter alia a message that is grossly offensive, the corresponding part of s 1(1) of the 1988 Act (as amended by s 43(1) of the Criminal Justice and Police Act 2001) provides that:

> 'Any person who sends to another person—(a) a letter, electronic communication or article of any description which conveys—(i) a message which is . . . grossly offensive . . . is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should . . . cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.'

[26] In short, for liability to arise under s 1(1), the sender of the grossly offensive message must intend it to cause distress or anxiety to its immediate or eventual recipient. Not so under s 127(1)(a): the very act of sending the message over the public communications network (ordinarily the public telephone system) constitutes the offence even if it was being communicated to someone who the sender knew would not be in any way offended or distressed by it. Take, for example, the case considered in argument before your Lordships, that of one racist talking on the telephone to another and both using the very language used in the present case. Plainly that would be no offence under the 1988 Act, and no offence, of course, if the conversation took place in the street. But it *would* constitute an offence under s 127(1)(a) because the speakers would certainly

know that the grossly offensive terms used were insulting to those to whom they applied and would intend them to be understood in that sense. a

[27] I confess that it did not at once strike me that such a telephone conversation would involve both participants in committing a criminal offence. I am finally persuaded, however, that s 127(1)(a) is indeed intended to protect the integrity of the public communication system: as Lord Bingham puts it at [7], above, 'to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society'. (Quite where that leaves telephone chat-lines, the very essence of which might be thought to involve the sending of indecent or obscene messages such as are also proscribed by s 127(1)(a) was not explored before your Lordships and can be left for another day.) b c

Appeal allowed.

Dilys Tausz Barrister.

Turner v News Group Newspapers Ltd and another

[2006] EWCA Civ 540

COURT OF APPEAL, CIVIL DIVISION

PILL, KEENE AND MOSES LJJ

23, 24 FEBRUARY, 16 MAY 2006

Libel and slander – Damages – Offer to make amends – Compensation determined on same principles as damages in defamation proceedings – Mitigation of damages – Evidence relevant to the damage caused – Defamation Act 1996, s 3.

The claimant commenced proceedings claiming damages for libel against the first defendant newspaper publisher and the second defendant, his former wife. The newspaper article he complained of alleged that the claimant had introduced the second defendant to a circle of 'swingers'; that he had pressured her into having sex with other men; and that such events had ruined their marriage. The first defendant made an unqualified offer to make amends under the Defamation Act 1996. As required by the 1996 Act it offered to make and publish a suitable correction and an apology and to pay compensation and costs as might be agreed or determined. However, it also gave notice that if agreement on compensation could not be reached further matters would be relied on. Section 3(5)[a] of the 1996 Act provided that where an offer to make amends had been accepted but where the parties did not agree on compensation, the amount 'shall be determined by the court on the same principles as damages in defamation proceedings'. Among the matters relied on by the first defendant was a plea of mitigation which described in some detail sexual practices engaged in by the claimant. The bulk of those allegations were later withdrawn when the second defendant, who had supplied a witness statement to the first defendant, was found to be untraceable. However, in the course of correspondence the claimant had made some limited admissions as to three of the matters alleged. At trial the judge awarded the sum of £9,000 to the claimant, taking into account in his approach to damages that while a defendant could not pray in aid in mitigation of damages specific aspects of the claimant's behaviour, as opposed to matters alleged by way of general bad reputation, evidence about the directly relevant background context was properly admissible because it was directly relevant to the damage which the claimant claimed had been caused by the defamatory publication. The claimant appealed, contending, inter alia, that the three matters relied on by the defendant in mitigation had been inadmissible.

Held – (1) The principle that, while general evidence of bad reputation possessed by a claimant was admissible in mitigation of damages, evidence of specific acts of misconduct on the part of the claimant could not be given in evidence had been in large part based upon concern about the risks of 'trials within a trial', a concern with which the court was now better equipped to deal because of its case management powers. It had never been an absolute principle, and one of the

a Section 3, so far as material, is set out at [1], below

major exceptions to it had been in respect of evidence of particular acts of misconduct by the claimant put before the jury in support of a plea of justification or fair comment which had then failed; in so far as a rational basis could be found for that exception, it lay in the direct relevance such evidence was likely to have to the subject matter of the defamatory words. As directly relevant background evidence was thus regularly allowed to be taken into account on damages in cases where it related to a defence subsequently struck out by the judge or rejected by the jury it did not make sense for the jury to consider damages in an evidential vacuum where the defence had been struck out before the calling of evidence. The underlying principle which applied where such evidence would not be otherwise before the jury was that evidence of directly relevant background context was not excluded (see [29]–[33], [42], [43], [46], [50], [51], [88], [94], [102], below); *Scott v Sampson* [1881–85] All ER Rep 628, *Plato Films Ltd v Speidel* [1961] 1 All ER 876 and *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 considered.

(2) Evidence which qualified as evidence of directly relevant background context had to be evidence which was so clearly relevant to the subject matter of the libel or to the claimant's reputation or sensitivity in that part of his life that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence related (see [56], [88], [94], below); *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 considered.

(3) Fairness required that a defendant should not be called upon to pay compensation which was unmerited or to vindicate a claimant on a false basis. A plea of mitigation based on evidence of directly relevant background context could be relied on by a defendant in the offer of amends procedure, just as it could in defamation litigation. If such a plea included hurtful allegations which could not ultimately be made out, that additional hurt would reflect in the award of damages or compensation. If the judge concluded that allegations had been made improperly without there being at the time evidential support, that too would increase the amount of compensation. Such a plea might often be especially appropriate in offer of amends cases. No defence would have been offered so there would have been no opportunity for evidence of specific acts of misconduct on the part of the claimant to have been put before the court in support of a plea of justification or fair comment or to show lack of malice. Moreover, as in offer of amends cases the claimant's reputation would have been repaired to the full extent that was possible by means of a suitable correction and apology, injury to feelings tended to play a more significant part in the assessment of salutatory compensation than was normally the case in the determination of damages in defamation litigation. In determining the extent of the injury to the claimant's feelings, evidence about his past conduct in that aspect of his life which was the subject matter of the libel might be particularly relevant (see [58]–[60], [89], [91], below); *Nail v News Group Newspapers Ltd, Nail v Jones* [2005] 1 All ER 1040 considered.

(4) In the instant case the judge had been entitled to admit in evidence the matters relied on in mitigation by the first defendant, and had not erred as a matter of principle in his assessment of compensation. Accordingly, the appeal would be dismissed (see [62]–[84], [93], [95], [102], below).

Notes

For the statutory defence of offer of amends, and for mitigation or reduction of damages, see 28 *Halsbury's Laws* (4th edn reissue) paras 160–164, paras 260–266.

For the Defamation Act 1996, s 3, see 24 *Halsbury's Statutes* (4th edn) (2006 reissue) 53.

Cases referred to in judgments

Abu v MGN Ltd [2002] EWHC 2345 (QB), [2003] 2 All ER 864, [2003] 1 WLR 2201.
Burstein v Times Newspapers Ltd [2001] 1 WLR 579, CA.
Carpenter v Associated Newspapers (16 January 2001, unreported).
Chalmers v Shackell (1834) 6 C & P 475.
Clarkson v Lawson (1830) 6 Bing 587, 130 ER 1407.
Ghannouchi v Houni Ltd [2003] EWHC 552 (QB).
Goody v Odhams Press Ltd [1966] 3 All ER 369, [1967] 1 QB 333, [1966] 3 WLR 460, CA.
Goslin v Corry (1844) 7 Man & G 342.
Houston v Smith [1993] CA Transcript 1544.
Jones v Pollard [1997] EMLR 233, CA.
Jones v Stevens (1822) 11 Price 235, 147 ER 458.
Lynch v Knight (1861) 9 HL Cas 577, 11 ER 854.
Milne v Express Newspapers plc [2004] EWCA Civ 664, [2005] 1 All ER 1021, [2005] 1 WLR 772.
Nail v News Group Newspapers Ltd, Nail v Jones [2004] EWCA Civ 1708, [2005] 1 All ER 1040.
National Coal Board v England [1954] 1 All ER 546, [1954] AC 403, [1954] 2 WLR 400, HL.
Pamplin v Express Newspapers Ltd (No 2) [1988] 1 All ER 282, [1988] 1 WLR 116n, CA.
Plato Films Ltd v Speidel [1961] 1 All ER 876, [1961] AC 1090, [1961] 2 WLR 470, HL.
Polanski v Condé Nast Publications Ltd (21 October 2003, unreported).
Scott v Sampson (1882) 8 QBD 491, [1881–85] All ER Rep 628, DC.
Sutter v Brown 1926 AD 155.
Vessey v Pike (1829) 3 C & P 512.
Waithman v Weaver (1822) Dow & Ry NP 10.
Waters v Sunday Pictorial Newspapers Ltd [1961] 2 All ER 758, [1961] 1 WLR 967, CA.

Appeal

The claimant David Turner appealed from the decision of Eady J on 12 May 2005 ([2005] EWHC 892 (QB), [2005] All ER (D) 175 (May)) awarding him compensation of £9,000 on his application for determination of the appropriate amount of compensation to be paid by the first defendant News Group Newspapers Ltd under s 3(5) of the Defamation Act 1996. The second defendant, Arisara Turner, took no part in the proceedings. The facts are set out in the judgment of Keene LJ.

Desmond Browne QC (instructed by *Campbell Hooper*) for the claimant.
Adrienne Page QC (instructed by *Farrer & Co*) for the first defendant.

Cur adv vult

16 May 2006. The following judgments were delivered.

KEENE LJ (giving the first judgment at the invitation of Pill LJ).

INTRODUCTION

[1] This case is concerned with a dispute about the amount of compensation payable in a libel case under s 3(5) of the Defamation Act 1996, a provision which deals with the situation where an offer to make amends has been accepted but where the parties do not agree on the compensation payable. In such circumstances, s 3(5) provides that the amount of compensation 'shall be determined by the court on the same principles as damages in defamation proceedings'. The issues in the present case include the scope and effect of the decision of this court in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 and in particular how far evidence of particular facts providing 'directly relevant background context' is admissible in mitigation of damages in a case under s 3(5) of the 1996 Act. We are told that this is the first case to come before this court where the *Burstein* decision has had to be considered in an offer of amends case.

[2] The appeal is brought by the claimant in the proceedings, Mr David Turner, against a decision of Eady J ([2005] EWHC 892 (QB), [2005] All ER (D) 175 (May)), who awarded compensation of £9,000 to the claimant. There were, nominally at least, two defendants to the claim, the second, Arisara Turner, being a former wife of the claimant. Her whereabouts, however, were and are unknown. The first defendant, News Group Newspapers Ltd, is the publisher of the *News of the World* newspaper.

[3] The claim arose out of an article published in that newspaper on 15 February 2004. The article formed part of a larger two-page spread, entitled 'How explosion in sex parties can be make-or-break affairs' and 'SWINGERS AND LOSERS!' The specific article about which Mr Turner complained was headed: 'ARISARA "It turned me on—but in the end it wrecked my marriage".' There then followed these words:

> 'THE swinging scene was meant to spice up sultry Arisara Turner's marriage—but ended up wrecking it.
>
> The beautiful photographer (*pictured right*) was 25 when she was introduced to a circle of middle-class swappers by her businessman husband at a Coventry club.
>
> "I was nervous and needed Dutch courage", recalled Arisara, who lives in west London.
>
> "But inside I spotted a woman eyeing me up and we ended up in a clinch as my husband watched. He couldn't seem to get enough and it turned me on.
>
> *Doctors*
>
> "But he kept pressuring me to have sex with the men too, and that I didn't like—even though they were quite well-to-do people, even policemen and doctors."
>
> "After a while I got fed up with it and decided I didn't want to go any more. That caused furious rows at home and in the end we divorced".'

[4] The photograph on the right was of the second defendant. As Eady J noted (at [4]), the claimant was not mentioned by name in the article and so would have been identifiable only by those readers who could recognise the photograph as being of one of his former wives. He and the second defendant had in fact

married in February 1999 but separated two years later and divorced in November 2001. Cohabitation was then resumed for a further period, but they separated again in September 2003.

[5] The particulars of claim relied upon eight natural and ordinary meanings of the words complained of, those meanings being that:

> '5.1 the Claimant is and/or was involved in a twilight world of swingers and wife-swapping and was depraved and immoral.
>
> 5.2 the Claimant is and/or was a member of a Coventry based sex, swinging and/or wife swapping club and/or circle.
>
> 5.3 the Claimant is and/or was accustomed to having sex with strangers and that the consequence of the Claimant's "craze" for sex with strangers was the breakdown of his marriage.
>
> 5.4 the Claimant introduced the Second Defendant to a circle of middle-class wife-swappers.
>
> 5.5 the Claimant obtained perverse enjoyment from watching the Second Defendant "in a clinch" with another woman.
>
> 5.6 the Claimant pressurised the Second Defendant to have sex with other men.
>
> 5.7 the Claimant is and/or was a swinger and/or a wife-swapper and/or a loser.
>
> 5.8 the Claimant's marriage to the Second Defendant broke down and they divorced as a consequence of swinging and/or wife-swapping.'

[6] The proceedings were begun by a claim form dated 13 April 2004. Before taking this step, Mr Turner had written to the editor of the *News of the World* to complain on 17 February 2004, referring to the allegations in the article as defamatory and seeking the editor's comments and proposals. Having received no response, he sent a further copy of the same letter on 26 February 2004 and on the same day complained to the Press Complaints Commission. Eventually, after he had sent a further letter threatening to begin proceedings, and enclosing a draft 'statement of claim', Mr Turner received a brief reply dated 26 March 2004. That came from the first defendant's legal manager, who indicated that he was making inquiries.

[7] A more substantive response followed in a letter dated 5 April 2004 from the legal manager. This did not accept that the article was inaccurate and continued:

> 'Your former wife maintains that she has told the truth. Several other people to whom we have spoken lend support to her account. We are also aware that, whilst you were married to her you arranged for her to be photographed (professionally) in "top shelf"/pornographic poses.
>
> In the circumstances, we do not think it would be appropriate [to] offer you the "proposals" you seek.'

[8] The claimant was not satisfied with that response, as he made clear in a letter dated 6 April 2004. In that letter, he referred to there being 'serious doubt' as to the reliability and integrity of his ex-wife and stated:

> 'I have never disputed the fact that Mrs Turner was during our marriage a professional free lance photographic model and that I acted in common with others, as her agent in obtaining work of (inter alia) the type you refer to.

This is widely known and I do not see that it has any relevance whatsoever to my complaint.' a

[9] The claim form in the proceedings then followed on 13 April 2004. An unqualified offer to make amends under s 2 of the 1996 Act was made by solicitors on behalf of the first defendant by letter dated 18 June 2004. As required by that statutory provision, it offered to make and publish a suitable correction of the b statement and an apology, and to pay compensation and costs 'as may be agreed or determined to be payable' (see sub-s (4)(c)). But it also gave notice that, if agreement on compensation could not be reached, further matters would be relied on. The judge rightly noted that the 18 June 2004 was the last opportunity to make an offer of amends, since such an offer could not be made once a defence had been served, and that date was when the defence was due to be served. c

[10] Amongst the 'further matters relied on' was a *Burstein* plea of mitigation attached to the letter. It consisted of 28 paragraphs which in considerable detail described what were referred to as 'lurid sexual practices' engaged in by the claimant. The bulk of these allegations were subsequently withdrawn, as I explain later, and in those circumstances the judge felt it unnecessary to set them d out in his judgment. I share that view. He stated, however, that he would have to do his best to take that document into account.

[11] The claimant accepted the offer to make amends by letter dated 9 July 2004. Negotiations then ensued as to the form of the apology and as to matters relevant to the amount of compensation. A correction and apology were e published in the *News of the World* on 15 August 2004. In the course of correspondence the claimant made some limited admissions as to the matters alleged in the *Burstein* plea. This became of importance because in due course Mrs Turner was found to be missing. She had supplied a signed witness statement to the first defendant, but in her absence the first defendant decided that it could no longer persist in the full range of allegations set out in its *Burstein* f plea. By a letter of 16 December 2004 it identified certain matters upon which it still intended to rely when it came to the assessment of compensation, but by implication the first defendant limited itself to those identified matters. It again identified those matters in a document served on 22 February 2005 and described as 'Outline of the First Defendant's Case'.

[12] These were effectively three in number. The first was the membership g of the claimant and the second defendant of a Coventry-based private members' club called Caesars, which they were said to have attended on 'fetish nights' on four or five occasions. The club was said to advertise itself as 'the Midlands Leading Fetish, BDSM and Swingers Club' (BDSM standing for 'Bondage and Discipline, Dominance and Submission, Sadism and Masochism'). h

[13] The second matter was the role of the claimant as the second defendant's manager or agent in arranging for her to be professionally photographed in pornographic poses, described by the first defendant's counsel at trial as 'open-leg shots' and 'girl-on-girl' poses. The claimant was alleged to have encouraged her in this activity, from which she made a modest income. j

[14] Thirdly, the first defendant relied on the fact that the claimant had publicised in the press in March 2001 his failed marriage and the fact that Mrs Turner had been a 'page 3' model. This occurred in an interview published in *The Sun* under the headline, 'Page 3 Thai Girl Wed Me Just To Get Into Britain'. In it he had called for her deportation. It was said that the claimant had provided a photograph of the second defendant topless and a photograph of her

with him, both of which accompanied the feature. There was also reference to similar, if more restrained, coverage in the *Mail on Sunday*.

[15] The judge found, and there is no challenge to his finding, that the claimant had been informed of the first defendant's intention to rely on these matters when it had served its original *Burstein* plea on 18 June 2004.

THE JUDGMENT BELOW

[16] Eady J approached the issue of compensation under s 3(5) of the 1996 Act on the basis that exactly the same principles were to be applied as govern an award of libel damages. That is accepted by both parties to this appeal and it appears to me to be inevitable, given the wording of that subsection. As to what those principles are, the judge acknowledged that a defendant could not pray in aid in mitigation of damages specific aspects of the claimant's behaviour, as opposed to matters alleged by way of *general* bad reputation. That followed from what has been described as the rule in *Scott v Sampson* (1882) 8 QBD 491, [1881–85] All ER Rep 628. However, he also recognised that there was an exception to that rule as held by this court in *Burstein*'s case, whereby evidence about the 'directly relevant background context' was properly admissible, because 'it is directly relevant to the damage which he [the claimant] claims has been caused by the defamatory publication': see [2001] 1 WLR 579 at 598–599 (para 42) per May LJ.

[17] In seeking to apply these principles, Eady J identified the sting of the words complained of as lying in the words: 'But he kept pressuring me to have sex with the men too, and that I didn't like.' The judge commented (at [24]):

> 'Although Mr Turner in the course of his evidence attempted to equate this allegation with his having participated in "rape", that was not how he put it in his particulars of claim or in his letter before action. For the reasons outlined in *Abu v MGN Ltd* [2002] EWHC 2345 (QB), [2003] 2 All ER 864, [2003] 1 WLR 2201 therefore, that is not a meaning he is permitted to pursue at this stage. It is, in any event, an unrealistic meaning in view of the headline to the effect that Mrs Turner claimed to have been "turned on". The sting of the libel, which the first defendant is not permitted to "justify by the back door", is that of pressuring the second defendant into consenting reluctantly to have sex with the "well-to-do people".'

He then went on to consider whether the three matters relied on by the first defendant in mitigation of damages fell within the scope of the exception identified in *Burstein*'s case. He stated (at [25]):

> 'As will emerge shortly, although the claimant had no qualms about encouraging his wife to pose for explicit photographs displaying her genitalia and indulging in various sexual activities with women, he drew the line at "boy-on-girl" because *that* he regarded as pornography. It is against that background that the decision has to be made whether the three subjects I have described are "directly relevant background context" to the allegation of pressuring her to have sex with men; or, in other words, whether I should be assessing the compensation for that allegation in "blinkers" if I were to exclude them from consideration. Since the allegation in the newspaper concerned the circumstances in which the claimant and his wife attended the Coventry club and the supposed pressure on her to indulge in sexual activities with other people, I am quite satisfied that the first two topics identified at [21] above, at least, are relevant background context. Moreover,

since the claimant complains of his distress at the infringement by the first defendant of his privacy, I am equally satisfied that his self-invited exposure in the tabloid newspapers in 2001 is relevant to the extent with which he values that privacy and would, or would not, suffer hurt feelings by tabloid exposure on the subject of his marital relations. I am not persuaded that a defendant need always establish a direct causal link between the "background context" and the fact of publication: that would be likely to lead to over-elaborate analysis in some cases, and detract from the flexibility which the Court of Appeal in *Burstein*'s case clearly intended.'

[18] The judge then dealt with the evidence on these three topics: on the visits to Caesars' club in Coventry, it was admitted by the claimant that he had visited the club with the second defendant on fetish nights on four or five occasions. He had been soberly dressed, but his then wife had worn an outfit aimed at a 'St Trinian's schoolgirl' effect. He remembered bottoms being spanked but not other more extreme activities described by a witness called by the first defendant as taking place on a visit some years after the claimant's visits. There was no wife-swapping nor did he encourage his wife to have sex with other men. The judge noted that the claimant's visits involved a drive of some 92 miles from his home in Sheffield in order to attend these fetish nights and presumably a journey of similar length back. The first defendant's case on this topic was that someone who attended such a club would be correspondingly less likely to suffer embarrassment at the allegations of 'swinging' than someone who had never done so.

[19] The judge dealt at greater length with the topic of the explicit photographs of the second defendant. There were thousands of such photographs taken, as well as video material, of which he was provided with a selection. They included detailed shots of Mrs Turner's genitalia and of sexual activity between her and other women, including digital penetration and oral sex. Photographs of her appeared in magazines such as *Men Only*, *Mayfair*, *For Men*, *International Park Lane* and *Asian Babes*. There was evidence called by the first defendant from a professional photographer, who took many of the photographs, that the initial contact was made by the claimant and that it was he who gave instructions as to what sort of photographs were to be taken, such as 'adult' and 'top shelf'. The claimant would usually say, 'the stronger the better'. He too suggested photographs with other women in a 'lesbian display', as he did a video film. There was evidence from another witness who ran a modelling agency that the second defendant 'appeared to be completely under the control of her husband' who wanted much more explicit poses of her in more hard-core pornographic magazines.

[20] The claimant's evidence on this was that, while he acted as her representative in arranging these photographic sessions, he did not have to pressurise her to do them. She enjoyed her work. In so far as this evidence conflicted with that called by the first defendant, the judge seems to have preferred the latter. In part this evidence was relied on by the first defendant as showing that the claimant would be less likely to be upset by allegations of dominant and exploitive behaviour than the average husband.

[21] As for the third matter, the press publicity instigated by the claimant about Mrs Turner and his marriage to her, the judge described the coverage in *The Mail on Sunday*, in which she was described as a glamour model who had posed in pornographic magazines and on 'the X rated Adult Channel'.

The claimant was quoted as saying that he had been 'totally ripped-off' by her when she had left him, taking luxury items worth £33,000. A few days later most of a page in *The Sun* newspaper was devoted to the same topic. The claimant, who was named, as he had been in the *Mail on Sunday* article, was described as a wealthy tycoon who 'angrily claimed that his stunning bride Arisara only wed him to escape a life of poverty in Bangkok'. He was quoted as feeling 'used and hurt'. She was termed a 'page 3 Thai girl' whose photographs had appeared in *Playboy* and *The Sun*. The claimant was said to want her to be sent home, that is to say to Thailand, on the basis that she had only married him to get a visa for the United Kingdom. Friends of Mrs Turner, however, were quoted as saying that she was treated like a slave and was totally dominated.

[22] The judge (at [44]) added this:

> 'Alongside the article appears a page-length photograph of Mrs Turner, topless. There are two other photographs, one of Mr Turner with a caption describing him as "Used", and what purports to be "David's only picture of him and Arisara". He said in evidence that he was "mad at the time" and wanted revenge, but later they resumed cohabitation.'

[23] In the light of that evidence and the legal principles he had identified, Eady J addressed the quantum of compensation. He did so by a two-stage process: first, by arriving at a figure which would have been awarded after trial where the defendant had done nothing to aggravate the hurt to the claimant's feelings and nothing to mitigate, for example by means of the publication of an apology; then at the second stage, by deciding to what extent, if any, that first figure should be discounted to give effect to any mitigation.

[24] In dealing with the first of those stages, the judge commented that the meanings of the words put forward by the claimant were not at the highest level of gravity, not suggesting criminality or dishonesty on his part. The impact of the article on his reputation appeared to be relatively minor. None of the witnesses called by him actually believed the defamatory sting of the allegations. Relatively few readers were able to identify him and they did not think that the allegations fitted him. Eady J regarded the most important element in the assessment in the present case as being the need to compensate for hurt feelings, distress and embarrassment. He took into account the impact of the article on the claimant's then fiancée but against 'the relevant background context' of the three categories of evidence introduced by the first defendant. The judge saw the claimant as being far less sensitive to intrusive publication about his marital circumstances than the average claimant would be. Reflecting all these matters, he took a figure of £15,000 as being the starting point for compensation.

[25] At the second stage, the judge had to consider what, if any, discount was then to be made because of the offer of amends and the surrounding circumstances. He took account of the fact that the first defendant had served originally a much more extensive and startling version of the *Burstein* plea, but he accepted that that plea had been put forward in good faith, relying on a witness statement made by Mrs Turner. He concluded that the first defendant had not acted improperly in putting forward that plea, but none the less he took account of the impact of it on the claimant's feelings, given that much of it could not be substantiated in the absence of Mrs Turner.

[26] Eady J held that the apology published was adequate and accorded in substance with what the claimant was entitled to expect and what he wanted. But the judge regarded the first defendant as having behaved initially in a

dismissive way towards the complainant, and he also took account of the facts that the *News of the World* for a time asserted that the words were true and that the apology was published later than it needed to be. For all these reasons he arrived at a discount of 40% which produced an award of £9,000. That covered not just the publication in the newspaper itself but also the publication, such as there may have been, on the first defendant's website.

THE ISSUES

[27] The issues raised in this appeal range from broad ones of legal principle to those related specifically to the facts of this case. Into the former category come a number of matters concerning this court's decision in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579. I propose to deal with those first.

A *Matters of legal principle*

(i) Can *Burstein*'s case be reconciled with *Plato Films Ltd v Speidel* [1961] 1 All ER 876, [1961] AC 1090?

[28] In the course of his argument, Mr Browne QC, for the claimant has launched a frontal assault on the decision in *Burstein*'s case. He contends that it was decided per incuriam, that it cannot be squared with the House of Lords' decision in the *Plato Films* case and that it is unworkable in practice. To give these submissions proper consideration, it is necessary to provide a brief survey of this aspect of the law of defamation.

[29] As I have indicated when summarising Eady J's judgment, there is a principle recognised in 1882 in *Scott v Sampson* that, while general evidence of bad reputation possessed by the claimant is admissible in mitigation of damage in defamation cases, evidence of specific acts of misconduct on the part of the claimant cannot be given in evidence. The classic formulation of this principle was provided by Cave J in that case ((1882) 8 QBD 491 at 504–505, [1881–85] All ER Rep 628 at 635).

> 'As to ... evidence of facts and circumstances tending to shew the disposition of the plaintiff, both principle and authority seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation, and to admit evidence of this kind is in effect as was said in [*Jones v Stevens* (1822) 11 Price 235, 147 ER 458] to throw upon the plaintiff the difficulty of shewing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of. Among all the cases which have been reviewed there is not one which can be cited in support of the admissibility of this evidence.'

It will be seen that the justification for this exclusionary principle was in large part a practical one, reflecting the need to prevent trials becoming extended by the investigation of new allegations about the claimant's past life. It also seems that Cave J was concerned about the lack of relevance of such evidence to the issue in the case, since it would have 'but a very remote bearing on the question in dispute'.

[30] In any event, there can be no doubt that the principle in *Scott v Sampson* was approved by the House of Lords in the *Plato Films* case. That decision was

analysed in detail by May LJ in *Burstein's* case [2001] 1 WLR 579 at 593–596 (paras 29–35), and I do not seek to repeat here all the points which he there made. Some analysis, however, is required, given the reliance placed on it by the present claimant.

[31] Viscount Simonds emphasised 'the injustice and, indeed, the cruelty of an attack upon a plaintiff for offences real or imaginary which, if they ever were committed, may have been known to few and by them have been forgotten' (see [1961] 1 All ER 876 at 881, [1961] AC 1090 at 1125). He, like Cave J, was also concerned about the inconvenience of having 'one or more trials within the original trial'. However, he recognised that in practice it might be difficult to define exactly the borderline between evidence of general bad reputation and that of specific conduct which had led to it.

[32] That was one of the considerations which led Lord Radcliffe, in a powerful speech, to dissent on this part of the case. He concluded ([1961] 1 All ER 876 at 885, [1961] AC 1090 at 1131) that—

> 'it would be wrong to hold that general evidence of reputation, which must mean reputation in that sector of a plaintiff's life that has relevance to the libel complained of, cannot include evidence citing particular incidents, if they are of sufficient notoriety to be likely to contribute to his current reputation. Such incidents are, after all, the basic material upon which the reputation rests, and I cannot see the advantage to anyone of excluding the better form of evidence in favour of the worse.'

Lord Denning, another of the majority judges, relied upon a passage from *Starkie on Slander and Libel* (2nd edn, 1830) as indicating the principle lying behind the exclusionary rule, namely that a plaintiff 'may be prepared with general evidence in support of character though he cannot be supposed to be prepared with evidence to justify his conduct through life' (see [1961] 1 All ER 876 at 886, [1961] AC 1090 at 1134). He emphasised that evidence of good or bad character had, in order to be admissible, to relate to that sector of a man's reputation which is relevant ([1961] 1 All ER 876 at 890, [1961] AC 1090 at 1140): 'Thus, if the libel imputes theft, the relevant sector is his character for honesty, not his character as a motorist. And so forth.' But Lord Denning does not seem to have been prepared to draw a rigid distinction between the reputation which a plaintiff had and that which he ought to have had. Thus he gave the following illustration of how the legal principles should work in practice ([1961] 1 All ER 876 at 889, [1961] AC 1090 at 1138):

> 'On the other hand, suppose a "notorious rogue" manages to conceal his dishonesty from the world at large. He should not be entitled to damages on the basis that he is a man of unblemished reputation. There must, one would think, be people who know him and can come and speak to his bad character.'

And he went on to say that evidence of specific misconduct could in certain circumstances be admissible, as where a newspaper alleged that a man had been convicted six times for 'dishonesty' but later finds that he has only been convicted twice. Those convictions could go before the jury. Lord Denning said this ([1961] 1 All ER 876 at 891, [1961] AC 1090 at 1142):

> 'Although the newspaper cannot justify in whole, it can justify in part. It can plead that, in so far as the words meant that he had been convicted

twice, they were true and thus bring the two convictions before the jury. In [*Clarkson v Lawson* (1830) 6 Bing 587 at 591], Sergt Wilde put the very case: If the defendant charges the plaintiff with stealing three horses, can he not justify as to one?", and Park J said [(1830) 6 Bing 587 at 594] he could. "It was the common practice", said Sir James Scarlett in one of the cases cited to your Lordships, "if a defendant could not justify all, to justify a part of the libel, and produce witnesses to prove the part justified, as a ground of mitigation and reduction of damages": see [*Waithman v Weaver* (1822) Dow & Ry NP 10 at 11]. This rule is based on sound sense. Seeing that the law does not permit a defendant, in mitigation of damages, to adduce evidence which tends to justification, it must permit him to adduce the self-same evidence when pleaded in partial justification: see [*Vessey v Pike* (1829) 3 C & P 512 at 513] by Lord Tenterden CJ. If it were not so, the plaintiff would recover damages for a character which he did not possess or deserve; and this the law will not permit.'

One notes that final reference to preventing a plaintiff from recovering damages for a character which he did not *deserve*.

[33] Lord Morris of Borth-y-Gest was again concerned about the risk of a roving inquiry into the plaintiff's character which would be hard to control, leading to trials within a trial. He too upheld the decision in *Scott v Sampson*, as did Lord Guest, who regarded it as preventing the opening of a door to collateral issues:

> 'The result might be that a trial in which the truth or falsity of one allegation was being investigated might degenerate into trials of the truth or falsity of a dozen other allegations, whether or not relevant to the subject-matter of the libel.' (See [1961] 1 All ER 876 at 895, [1961] AC 1090 at 1148.)

[34] It can be seen that the majority of the House of Lords approved the principle spelt out in *Scott v Sampson* and did so largely for practical reasons of trial management. That last aspect was one expressly noted by May LJ in *Burstein*'s case. In his judgment, with which the other two members of the court expressly agreed, May LJ observed that in the *Plato Films* case 'a main concern was to prevent libel trials from becoming roving inquiries into the plaintiff's reputation, character or disposition' (see [2001] 1 WLR 579 at 596 (para 35)). *Burstein v Times Newspapers Ltd* was a case where the defendant newspaper pleaded certain facts about the claimant's past conduct, not by way of justification but in support of the pleaded defence of fair comment. At the outset of the trial, the judge struck out that defence, because the words complained of, namely that the plaintiff used to organise bands of hecklers to go about wrecking performances of modern atonal music, were statements of fact, not comment. There was thus no issue as to liability. The judge also struck out the facts pleaded in support of the defence of fair comment and ruled that they were not admissible in mitigation of damages. Evidence as to those facts never went before the jury which decided on the amount of damages.

[35] The defendant had wanted to rely on such facts as that the claimant had co-founded a group of militant campaigners against modern atonal music known as 'The Hecklers'; that he sought through them to vilify such music and its composers; that The Hecklers in a newspaper article called upon the public to join them in booing a performance of the opera *Gawain* at Covent Garden that

evening; that the claimant did not disassociate himself from that article but rather supported it publicly; and that, at the end of the performance referred to, the claimant and The Hecklers booed and hissed.

[36] The Court of Appeal held that the judge had been wrong to exclude all of these particulars, although some might properly have been excluded as irrelevant. In a detailed analysis of the authorities, May LJ held that *Scott v Sampson* and the *Plato Films* case did not extend to excluding 'particular facts directly relevant to the context in which a defamatory publication came to be made' ([2001] 1 WLR 579 at 592 (para 28)). He emphasised both the need for such facts to be directly relevant and the ability of the court nowadays to control the conduct of a trial, saying (at 597–598 (para 40)):

> '. . . It will, generally speaking, normally be both unfair and irrelevant if a claimant complaining of a specific defamatory publication is subjected to a roving inquiry into aspects of his or her life unconnected with the subject matter of the defamatory publication. It is also in accordance with the overriding objective that evidence should be properly confined, both in its subject matter and its duration, to that which is directly relevant to the subject matter of the publication. Thus under the Civil Procedure Rules, the court now has ample power to deal justly with the problems which, in the main, gave rise to the first and third limbs of the decision in [*Scott v Sampson* (1882) 8 QBD 491, [1881–85] All ER Rep 628].'

Those were the matters which I have described as the principle in *Scott v Sampson*. May LJ went on to say (at 598–599 (para 42)):

> '. . . the evidence which *Scott v Sampson* excludes is particular evidence of general reputation, character or disposition which is not directly connected with the subject matter of the defamatory publication. It does not exclude evidence of directly relevant background context.'

Otherwise there would be a danger that the jury would be required to assess damages in blinkers (at 600 (para 47)).

[37] Aldous LJ agreed with May LJ, as did Sir Christopher Slade in a short concurring judgment. He agreed that there were matters amongst the defendant's pleaded particulars which were directly relevant background facts and which explained the context in which the defamatory publication came to be made. Consequently they were admissible. But Sir Christopher regarded the case as a special one, because the claimant had deliberately sought for himself a reputation as a militant opponent of modernist atonal music. If the jury were not to know of his activities in co-founding The Hecklers and procuring the booing of the opera *Gawain*, they would indeed be looking at the case in blinkers. Nothing, he said, in the decided cases precluded the consideration of such facts, particularly after the introduction of the Civil Procedure Rules 1998.

[38] In the present appeal it is first argued by the claimant that *Burstein*'s case was decided per incuriam. This argument is not advanced on the footing that this court in *Burstein*'s case overlooked any important judicial decision: it will be evident already that May LJ scrutinised the decisions on this topic, especially *Scott v Sampson* and the *Plato Films* case, in great detail. It is, however, submitted that the court misunderstood the reason why Parliament did not change the law when considering the Defamation Bill in 1996 so as to permit the admission of evidence of particular acts of misconduct on the part of the claimant, as recommended in 1991 by a working group of the Supreme Court Procedure

Committee, chaired by Neill LJ. This is a reference to a passage in the judgment of May LJ (at 597 (para 38)), which reads as follows:

> 'The Neill Committee's recommendations led to what became the Defamation Act 1996. Clause 13 of the Defamation Bill was drafted to implement the committee's recommendations with regard to [*Scott v Sampson* (1882) 8 QBD 491, [1881–85] All ER Rep 628]. The clause did not survive into the Act, we are told for want of parliamentary time. Various views were expressed in committee in support of and in opposition to the clause. In the circumstances, I do not think that any particular parliamentary intention can be discovered from the introduction of the clause and for its failure to survive into the Act. We are simply left with the law as it was.'

[39] Mr Browne contends that the reference there to 'want of parliamentary time' is in error, and that the clause was dropped by the government because of criticisms of it during its passage through the House of Commons Standing Committee.

[40] That may well be. We have been shown a passage from Hansard where the then Lord Chancellor, Lord Mackay, refers to the difficulty inherent in framing an alternative rule to that in *Scott v Sampson*. But the passage appearing in May LJ's judgment (at 597 (para 38)), quoted above, does not attach significant weight to why the clause did not become law, nor in my judgment should it have attached such weight. It was clear that Parliament had the opportunity to change the law on this topic in 1996, as it has had before, and that it chose not to take it. The court was well aware of that. There is no way in which any erroneous reference to a want of parliamentary time can render the decision in *Burstein*'s case per incuriam.

[41] It is then submitted that that decision cannot be reconciled with the House of Lords' decision in the *Plato Films* case, or that at the very least it should be applied with caution. Mr Browne refers to the material which it was sought unsuccessfully to have admitted in the *Plato Films* case in mitigation of damage, and quotes the editor of *Gatley on Libel and Slander* to the effect that the episodes being referred to could be argued to be part of the background context. It is argued that the *Burstein* decision represents a radical departure from the approach approved in the *Plato Films* case.

[42] In considering this argument, it needs to be borne in mind that the principle of *Scott v Sampson* (1882) 8 QBD 491, [1881–85] All ER Rep 628 has never, before or since, been absolute. There have always been important exceptions or limitations to it, and to some extent these were reflected in Lord Denning's speech in the *Plato Films* case. The essence of the principle remains, as May LJ stressed in *Burstein*'s case, that generally a claimant cannot be subjected to a roving inquiry into aspects of his life unconnected with the subject matter of the defamatory publication and specific evidence relating to such aspects cannot be called in mitigation of damage. That was the gist of the majority judgments in the *Plato Films* case, in so far as they dealt with general principles.

[43] But once one is dealing with matters which are directly relevant to the subject matter of the libel, even though they do not establish the truth of the defamatory words, the position has long been different. Perhaps the most obvious is the admission of evidence put before the jury on a plea of justification or fair comment which ultimately fails. It has long been established that evidence of specific acts properly admitted on such a plea may none the less be taken into account by the jury when assessing damages even though the plea has failed.

This goes back to the early nineteenth century (see *Chalmers v Shackell* (1834) 6 C & P 475) and has been accepted in other common law jurisdictions for many years, as can be seen in *Sutter v Brown* 1926 AD 155 at 172. But it is also well recognised in modern English law. Perhaps the best known example is to be found in this court's decision in *Pamplin v Express Newspapers Ltd (No 2)* [1988] 1 All ER 282, [1988] 1 WLR 116.

[44] That was a case where the defendants pleaded, inter alia, a defence of justification and called evidence in support thereof. On damages, the trial judge directed the jury that they could take into account, in mitigation of damages, evidence of specific acts of misconduct put before them by the defendants as part of the unsuccessful defence of justification. That direction was upheld on appeal. Neill LJ summarised the principle laid down in *Scott v Sampson*, but then added ([1988] 1 All ER 282 at 287, [1988] 1 WLR 116 at 120):

> 'So much for evidence which is directed solely to establish the plaintiff's previous bad reputation. But a defendant is also entitled to rely in mitigation of damages on any other evidence which is properly before the court and jury. This other evidence can include evidence which has been primarily directed to, for example, a plea of justification or fair comment.'

The other two members of the court adopted a similar approach.

[45] That case was followed in another Court of Appeal decision, *Jones v Pollard* [1997] EMLR 233. There again the defendants had pleaded justification and called evidence to support that plea. At the close of evidence, the bulk of the particulars of justification were struck out by the trial judge. It was none the less held by this court that the jury had been entitled to take into account, when assessing damages, the evidence put before them concerning the particulars of justification eventually struck out, so long as the evidence related to 'the relevant sector of the plaintiff's life': see [1997] EMLR 233 at 251, 252 per Hirst LJ.

[46] It is, of course, important to recognise that such evidence is restricted to that which can *properly* go before a jury in support of a plea of justification or fair comment. With that in mind, one is bound then to seek to discern the principle which lies behind these decisions that such evidence can be taken into account in mitigation of damages if the defence fails. Patently it cannot be based upon the assumption that the jury would in any event be unable in practice to ignore such evidence. It is a fundamental proposition of English law that juries, when directed to ignore evidence which they have heard, will faithfully do so, a proposition which operates as much in the criminal context as it does in the civil, and where any doubts as to its validity would have far-reaching consequences. One must therefore seek some other rationale. It seems to me that it must lie in the fact that such evidence, *properly* admitted on a plea of justification or fair comment, is likely to have some direct bearing on the subject matter of the libel, even though it falls short of establishing such a defence. It may be that this court in *Burstein's* case was seeking to formulate a principle which provided the rationale for this well-established practice.

[47] There are, of course, other well-known exceptions to the principle that evidence of specific acts of misconduct by the claimant cannot be put in on the issue of damages. In *Goody v Odhams Press Ltd* [1966] 3 All ER 369, [1967] 1 QB 333, this court held that the previous convictions of the claimant, within a relevant period of his life, were admissible in mitigation of damages. This was justified on the basis that previous convictions were a matter of public record, which is indisputable, and were cogent evidence that the claimant had a bad

reputation, because '[t]hey are matters of public knowledge': see [1966] 3 All ER 369 at 372, [1967] 1 QB 333 at 341 per Lord Denning MR. That last proposition seems more debatable, and it is interesting to observe that Lord Denning went on ([1966] 3 All ER 369 at 373, [1967] 1 QB 333 at 341) to refer not only to 'reputation' but also to 'character': '[D]amages for libel are given for injury to character and reputation: and what better guide can there be to his character and reputation than his previous convictions?'

[48] In the same way judicial strictures in previous civil litigation have also been held to be admissible in mitigation of damages, on the ground that they too show the claimant's general bad reputation and thus meet the requirements of *Scott v Sampson*: see *Waters v Sunday Pictorial Newspapers Ltd* [1961] 2 All ER 758, [1961] 1 WLR 967. This concept of what a person's general reputation consists of would not perhaps accord with most people's understanding.

[49] The reference to 'character' in the passage quoted above from Lord Denning MR in *Goody*'s case is a valuable reminder that damages in defamation are not concerned solely with injury to reputation, but are intended to reflect other factors as well. One of those is the degree of injury to the claimant's feelings. This is a long-recognised aspect of such an award. It can be traced back to *Goslin v Corry* (1844) 7 Man & G 342 at 346 and to *Lynch v Knight* (1861) 9 HL Cas 577 at 598, 11 ER 854 at 863. The extent of such injury may well depend on the character of the individual claimant and his vulnerability or invulnerability to such hurt. It is far from clear how the admission of evidence on this aspect of damages is to be reconciled with *Scott v Sampson* (1882) 8 QBD 491, [1881–85] All ER Rep 628 or *Plato Films Ltd v Speidel* [1961] 1 All ER 876, [1961] AC 1090, since it does not appear to have been addressed in either of those decisions.

[50] My analysis of these lines of authority leads me to conclude that the principle in *Scott v Sampson* and its indorsement in the *Plato Films* case were in large part based upon concern about the risks of 'trials within a trial', a concern which as May LJ observed in *Burstein*'s case the court is now better equipped to deal with than in the past because of its case management powers; that the principle has never been absolute; that one of the major exceptions to it, before and since that case, has been in respect of evidence of particular acts of misconduct by the claimant put before the jury in support of a plea of justification or fair comment which has then failed; and that in so far as a rational basis can be found for that major exception, it would seem to lie in the direct relevance such evidence is likely to have to the subject matter of the defamatory words. The problem which arose in *Burstein*'s case was that such evidence never got before the jury, because the trial judge struck out the pleaded defence of fair comment before evidence had been called, unlike the situation in *Pamplin*'s case and in *Jones v Pollard*. This court was understandably not enamoured of a situation where the question of what evidence could be taken into account in mitigation of damages depended upon a matter of procedure. I share that view. It does not make sense for the jury to consider damages in an evidential vacuum in cases where a defence has been struck out before the calling of evidence, when directly relevant background evidence is regularly allowed to be taken into account on damages in cases where it relates to a defence subsequently struck out by the judge or rejected by the jury. Certainly one would wish to identify some underlying principle which would apply in cases where such evidence was not otherwise before the jury, and that, it appears to me, is what this court did in *Burstein*'s case.

[51] I therefore do not accept that *Burstein*'s case cannot be reconciled with the House of Lords' decision in the *Plato Films* case. It represents a development of

the common law beyond the point which it had reached in 1961, but there is nothing surprising about that. Such developments are inherent in our system. In my judgment we in the present case are bound by the *Burstein* decision.

(ii) The scope of the *Burstein* decision

[52] It is contended on behalf of the claimant that the decision in *Burstein*'s case has proved difficult to apply in subsequent cases and that its meaning and scope are uncertain. Mr Browne refers to a number of first instance decisions which, on the face of them, may not seem consistent with one another. He contrasts two decisions of Gray J, *Carpenter v Associated Newspapers* (16 January 2001, unreported) and *Ghannouchi v Houni Ltd* [2003] EWHC 552 (QB) in order to illustrate the problems to which the *Burstein* decision is said to have given rise. In the latter the judge appears to have attached importance to the fact that the editor of the newspaper in which the article complained of was published did not claim to have had any of the facts sought to be relied on in a *Burstein* plea in mind when he published.

[53] In reliance on that and on the judgment of Sir Christopher Slade in *Burstein*'s case, Mr Browne submits that material is only admissible under *Burstein* if it is relevant either to how the defamatory publication came to be made or to how the claimant had himself caused a particular reputation of his to arise. It is, however, accepted that the defendant does not have to show a causal connection between such matters and the publication of the libel.

[54] That concession is clearly right. It was expressly stated in *Burstein*'s case that there was no causal connection whatever between anything the claimant may have said or done and the publication of the defamatory words (see [2001] 1 WLR 579 at 589–590 (para 24)). The latter was in no sense provoked by the claimant's conduct. As for the limitations suggested on behalf of the claimant in the present case to the *Burstein* decision, I cannot see that any of the judgments in *Burstein*'s case support the proposition that the defendant must have had the directly relevant facts in mind when publishing the words complained of. It is true that May LJ does refer to 'particular facts directly relevant to the context in which a defamatory publication came to be made' (at 592 (para 28)), but the emphasis there seems to be more on the context than on any mental process gone through by the defendant.

[55] Again, it is right that Sir Christopher Slade attached importance in his judgment in *Burstein*'s case to the fact that the claimant had sought for himself a particular kind of reputation. That, however, was not a necessary part of the principle expounded by May LJ, indorsed by Aldous LJ and 'fully' agreed to by Sir Christopher Slade (at 602 (para 53)).

[56] I accept the point made in argument that it is somewhat repetitive to use the words 'background' and 'context' in the phrase 'directly relevant background context', but that in itself does not produce obscurity. It is in any event inevitable that cases will occur where it is not easy to determine whether the test in *Burstein*'s case is met or not. That does not mean that the test is an inappropriate one, any more than is that propounded in *Scott v Sampson*: as Viscount Simonds recognised in the *Plato Films* case, the line between evidence of general bad reputation and evidence of specific conduct giving rise to such a reputation is not easy to draw. What constitutes the directly relevant background will vary from case to case, but I would myself accept the need for the courts to proceed, as Mr Browne advocates, with some caution in applying *Burstein*'s case, given that it represents a modification of the long-standing rule in *Scott v Sampson*. As Eady J

put it in *Polanski v Conde Nast Publications Ltd* (21 October 2003, unreported), one should guard against extending too creatively the concept of 'directly relevant background'. The Court of Appeal in *Burstein*'s case was concerned to avoid jurors having to assess damages while wearing blinkers. If evidence is to qualify under the principle spelt out in *Burstein*'s case, it has to be evidence which is so clearly relevant to the subject matter of the libel or to the claimant's reputation or sensitivity in that part of his life that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence relates.

(iii) *Burstein* in offer of amends cases

[57] The third matter of legal principle is whether and, if so, how far *Burstein*'s case should be applied in offer of amends cases. It is argued by the claimant that the procedure under ss 2–4 of the 1996 Act was intended to conciliate, not to intimidate a claimant, or as this court put it in *Milne v Express Newspapers plc* [2004] EWCA Civ 664 at [14], [2005] 1 All ER 1021 at [14], [2005] 1 WLR 772, the main purpose is to encourage the sensible compromise of defamation proceedings. Yet there is a risk that powerful newspapers will use a *Burstein* plea to intimidate a claimant. Mr Browne points to the original *Burstein* plea in the present case, with its shocking allegations, subsequently not pursued, and submits that that was what was happening here. Such a process, he submits, flies in the face of the intention lying behind the offer of amends procedure. At the very least, unproven allegations in a *Burstein* plea must aggravate the injury and increase the amount of compensation.

[58] For the first defendant, Miss Page QC accepts that last proposition and also accepts that if material was put forward improperly in such a plea, that too will lead to increased compensation. But she emphasises that a defendant has a statutory right to have compensation determined by the court when, for whatever reason, it cannot be agreed: see *Nail v News Group Newspapers Ltd, Nail v Jones* [2004] EWCA Civ 1708 at [45], [2005] 1 All ER 1040 at [45]. When the court comes to determine the amount of compensation, it is required by s 3(5) of the 1996 Act to apply the same principles as apply to an award of damages in defamation proceedings. Miss Page adopts a statement contained in Eady J's judgment in the present case (at [18]): 'Fairness requires that a defendant should not be called upon to pay compensation which is unmerited or to vindicate a claimant on a false basis.'

[59] I agree. There can be no doubt that a *Burstein* plea can be relied upon by a defendant in the offer of amends procedure, just as it can in defamation litigation. That follows from the terms of s 3(5), and Mr Browne accepts that the same approach has to be adopted in both situations. It follows that a defendant is entitled to fight his corner on an assessment of statutory compensation, just as he is over the question of damages in litigation. In appropriate circumstances, that may properly include reliance on a *Burstein* plea. Of course, if such a plea includes hurtful allegations which cannot ultimately be made out, that additional hurt will reflect in the award of damages or compensation. If the judge concludes that allegations were made improperly without there being at the time evidential support, that too will increase the amount of compensation. These are the risks taken by a defendant who seeks to mitigate by attacking the claimant's character. But the approach is no different from that applicable in defamation litigation.

[60] Indeed, I see the force in Miss Page's submission that a *Burstein* plea may often be especially appropriate in offer of amends cases for two reasons.

First, because no defence has been offered, there will have been no opportunity for evidence of specific acts of misconduct on the part of the claimant to have been put before the court in support of a plea of justification or fair comment or to show lack of malice. The defendant will have been deprived of that opportunity. Secondly, as this court indicated in *Nail's* case [2005] 1 All ER 1040 at [41], in offer of amends cases the claimant's reputation has been repaired to the full extent that is possible by means of a suitable correction and apology. Consequently, injury to feelings tends to play a more significant part in the assessment of statutory compensation than is normally the case in the determination of damages in litigation, particularly where the claimant is not well known. In determining the extent of the injury to the claimant's feelings, evidence about his past conduct in that aspect of his life which is the subject matter of the libel may be particularly relevant.

[61] That then brings one to the issues specific to the facts of the present case.

B *Issues specific to this case*

(i) Were the three matters relied on by the first defendant in mitigation properly admitted in evidence?

[62] This aspect of the case can be taken relatively briefly. It is accepted on behalf of the claimant that, if the approach spelt out in *Burstein's* case is valid and applicable in offer of amends cases, then it is proper to take into account the claimant's visits to Caesars' club on 'fetish nights'. Mr Browne concedes that that would be relevant to any assessment of the extent of injury to the claimant's feelings as a result of the publication of the *News of the World* article. Furthermore, the fact that the claimant acted as his then wife's agent in getting her work in 'top shelf/pornographic poses' was acknowledged by him to be 'widely known'. That being so, it is conceded that that fact is relevant to the claimant's reputation and was therefore admissible. That concession is rightly made: the evidence in question goes to his general reputation in respect of his sexual relationship with the second defendant, and is properly admissible irrespective of the decision in *Burstein's* case.

[63] The third matter relied on by the first defendant was the publicising by the claimant in the press of the failure of his marriage to a 'page 3 model'. It is said on his behalf that this evidence does not fall within the ambit of the *Burstein* decision. None of the matters referred to in the articles in the *Sun* or the *Mail on Sunday* amount to directly relevant background to the false allegation that the claimant had pressurised Mrs Turner to have sex with other men.

[64] I see the force of that argument, in so far as it goes. But it does not seek to deal with Eady J's reasoning for taking account of this piece of material, which I have set out in [17], above. As the judge said, the claimant complained of his distress at the infringement of his privacy. The degree of that distress had to be gauged against 'his self-invited exposure' in the tabloid press, which was relevant to the extent to which he valued his privacy and would suffer hurt feelings by tabloid exposure on the subject of his marital relations. In my judgment, this third piece of material was, on the basis described by the judge, properly admissible.

(ii) Did the judge err as a matter of principle in his assessment of compensation? a

[65] I put the issue in that form, since the mere fact that this court might have arrived at a somewhat different figure of compensation does not entitle us to interfere. The award has to be manifestly wrong for this court to do so. The considerations to be reflected in an award under the statutory scheme are not in doubt. They begin with the provisions of s 3(5) of the 1996 Act, not merely b the first sentence thereof, quoted at the outset of this judgment, but also the following words:

> 'The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their c publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly.'

The matters likely to be relevant were set out by this court in *Nail*'s case [2005] 1 All ER 1040 at [37]–[41], and it is unnecessary to repeat these comments here. I confine myself to the points raised on this appeal. d

[66] One general query raised on behalf of the claimant, though not pursued at length, is whether it is right in these compensation cases to use a two-stage process as the judge did here, that is to say, assessing first what the award would have been in the absence of a correction and apology, and then applying a discount to take account of those and other factors. I can see that there may be e other ways in which the judge could arrive at an eventual figure, but the two-stage approach is rational and reflects the two parts of s 3(5). There is nothing wrong with such an approach, which tends to ensure that the judge makes explicit the factors which he has taken into account.

[67] A further general point made by Mr Browne is that the court must be alert to prevent awards against those who defame others from becoming so low f that they cease to have any deterrent effect and merely become a cost item in the defendant's balance sheet. It is argued that the pendulum has swung away from excessive awards to such an extent that publishers may be tempted to take the risk of having to pay. It seems to me that that is a legitimate consideration to be borne in mind, which I do, but in itself it tells one nothing about the g appropriateness of Eady J's award in this case or the figure of £15,000 which he took as his starting point.

[68] It is convenient to consider first the arguments raised in relation to the starting point and then to deal with the issues as to the size of the discount. It is contended on behalf of the claimant that Eady J's starting point of £15,000 was far too low and the appropriate figure should have been in the range of £50,000 to h £55,000. Mr Browne refers in this context to the award substituted by this court in *Houston v Smith* [1993] CA Transcript 1544, where the defamatory allegation had been one of sexual harassment by a doctor. In the present case it is argued that the judge underestimated the gravity of the libel, which was 'tantamount to an allegation of being party to a rape'. The meaning of having 'pressurised' j Mrs Turner to have sex with other men amounted to more than urging her to do so and was akin, when read in context, to forcing her to do so against her will.

[69] I do not accept that submission. Not only do the particulars of claim not allege anything akin to rape but the context of the words in the article makes it clear that Mrs Turner was consenting, albeit reluctantly, to have sex with other men. The article makes it clear that when she got fed up, she decided not to go

anymore. The judge accurately summarised the sting of the libel in the passage from [24] of his judgment which I have quoted at [17], above. I am not persuaded that he underestimated the gravity of the libel.

[70] Nor do I regard the claimant's position and reputation as comparable to that of the general practitioner in *Houston v Smith*. In this respect his admitted role as agent for the second defendant in arranging for her to be photographed in pornographic poses for publication in magazines becomes important. That role was conceded to be 'widely known', at least amongst those who knew the claimant. He was a man who, as the judge noted, was described by his counsel as relatively unknown, unlike some 'celebrity' claimants who bring libel actions. He would not have been identifiable by most of the readers of the *News of the World* but only by those who recognised the photograph of his former wife. But those who were amongst his circle of acquaintances would have been aware of his activities in connection with the pornographic photographs of the second defendant. His reputation was thus very different from that of the claimant in *Houston v Smith*.

[71] Complaint is made on his behalf that the judge seems to have accepted the evidence of the first defendant's witnesses about the extent to which the claimant sought more explicit photographs of Mrs Turner, without dealing with the claimant's denials of this. Indeed, the judge refers to the evidence called on behalf of the first defendant as being mostly not challenged in cross-examination. He does not say that he disbelieves the claimant's evidence on this.

[72] There is not a great deal of force in these complaints. The judge was undoubtedly aware that there was, to some extent, a conflict of evidence: he refers (at [33]) to a somewhat different picture emerging from the evidence of the professional photographer called by the first defendant from that described by the claimant. In so far as there was such a conflict, Eady J clearly preferred the evidence of the first defendant's witnesses. He could have given his reasons for doing so more clearly, but that that was his finding cannot be in serious doubt.

[73] What is also apparent is that those who read the *News of the World* article and realised that it referred to the claimant generally did not believe the allegations contained in it. That was the evidence of the witnesses called by the claimant, as the judge noted. In so far as those who realised that it referred to the claimant were concerned, their reaction was, according to his own evidence, to smile or to giggle, rather than to shun him or avoid him socially. That too is relevant to any figure for compensation in respect of damage to his reputation.

[74] The injury to his feelings also has to be reflected in the starting figure, and here all three of the matters covered by the ultimate *Burstein* plea are relevant. In the light of those, the judge found (at [51]) that 'Mr Turner is far less sensitive to intrusive publications about his marital circumstances, or to being portrayed as a "loser", than would be the average claimant'. Eady J had the benefit of hearing the claimant give evidence and was in a much better position than this court to assess the extent of the hurt suffered by the claimant from the publication.

[75] It has not been shown that the judge overlooked any relevant factor in arriving at his figure of £15,000 as the starting point, nor in the unusual circumstances of this case does it seem to me that that figure in itself indicates any error of principle on his part. It was one at which he could properly arrive.

[76] That leaves the issue of the appropriate discount to allow for the apology and correction, as well as for the events connected with them. The latter include the original *Burstein* allegations, put forward on 18 June 2004 and (with the three

exceptions) not withdrawn until six months later on 16 December 2004. Those were undoubtedly serious and shocking allegations, and the fact that they were not ultimately established must reduce the size of the discount to reflect the hurt to the claimant's feelings. I am satisfied that Eady J sought to do that.

[77] He found, however, that those original *Burstein* allegations had not been put forward improperly. That is challenged on this appeal. It is accepted by Mr Browne that the first defendant had a signed witness statement from Mrs Turner which supported those allegations, but he argues that, if the first defendant was not prepared to rely on her for the purpose of a defence of justification of the original article, it should not be seen as proper for the first defendant to rely on her signed witness statement in respect of the *Burstein* plea of June 2004.

[78] One does not know why the first defendant did not choose to defend the claim on the basis of justification, though it is acknowledged that Mrs Turner's signed witness statement did not say anything about the original allegations in the published article. But I am not persuaded that the first defendant acted improperly in putting forward the original *Burstein* plea. Those allegations certainly were covered by the signed witness statement. The first defendant was entitled to rely on that. Moreover, a suggestion that the first defendant had acted in bad faith in this respect was not pursued before the judge. He was entitled to conclude that the June 2004 allegations were not improperly put forward and to refrain from reducing the discount still further for that reason.

[79] It is argued on behalf of the claimant that the published apology and correction were not prominently displayed, but instead were tucked away and included no reference to the first defendant paying damages. Eady J accepted that they were not prominent, and he expressly took that into account (at [59]), but he noted that the publication accorded in substance with what was wanted by the claimant, who had described it as 'a suitable correction and apology'. As for damages, those had not been agreed, nor had any figure for compensation under the 1996 Act. The judge took the view (at [58]) that a reference to compensation not having been agreed would not have improved the claimant's position, because it could have given the impression that the claimant was haggling or being greedy. I see the force of that and do not regard the omission of such a reference as being of significance.

[80] There were aspects of the first defendant's conduct after the claimant's first letter of complaint which were relevant to the discount. His complaint was initially ignored, and then he was told that there was no reason to think that the published words were false. Only on 18 June 2004 did the first defendant concede liability, which was four months after the defamatory publication. The apology and correction were published six months after the defamatory publication in February 2004.

[81] This court said in *Nail*'s case [2005] 1 All ER 1040 that there is no conventional or standard discount when an offer to make amends has been accepted and an agreed apology published, since each case will be different. However, the court also said (at [47]) that most such cases will exhibit substantial mitigation. I agree. The publication of the apology and correction will normally have made good, so far as is possible, the damage to the claimant's reputation, and he will have been vindicated. His feelings will have been injured, and the assuaging of that hurt may be more limited, but a significant discount will usually be appropriate. This court in *Nail*'s case was not prepared to interfere with a 50% discount, despite the distress caused to the claimant in that case, but that was a

case where the apology was not published late, as it was in the present case. Moreover, it was not a case where there had been aggravating features, such as the unsubstantiated allegations in the original *Burstein* plea in the present case.

[82] Patently one would expect a smaller discount than 50% in this case. Eady J arrived at a discount of 40%. He seems to me to have taken account of all the considerations relevant to the size of the discount. Does his figure of 40% indicate that he has none the less erred in principle in his assessment? I cannot see that it does. These are matters of fine judgment, where an appeal court must be cautious about second-guessing the figure arrived at by the judge who heard the witnesses and who is best placed to quantify the effect on the claimant's reputation and, especially, on his feelings. I am not persuaded that there is any basis on which this court would be entitled to interfere with the discount chosen by Eady J.

[83] It follows that, in my judgment, the award of £9,000 to the claimant was one at which the judge was entitled to arrive. I would dismiss this appeal.

MOSES LJ.

[84] I agree. The three categories of evidence relied upon by News Group Newspapers Ltd were relevant to the issue of the extent of the injury which the claimant asserted he had suffered. Firstly, the evidence that the claimant and his wife travelled 184 miles to and from Caesars' club and that, on occasion, she was dressed in a manner calculated to meet the lubricious gaze of others attending a 'fetish night' was relevant to prove the truth and extent of his alleged embarrassment caused by the offending article. Secondly, the evidence of his participation, as agent, in the pornographic exposure of his wife was relevant both to his reputation and to the extent of the hurt to his feelings. Thirdly, his disclosure of the breakdown of his marriage to two newspapers, which included an attack on his former wife, was relevant to the extent of the infringement on his privacy of which he complained and the consequential distress he claimed he had suffered.

[85] There seems to me to be little difficulty as to the admissibility of that evidence in the instant case. They afford but poor illustrations of the difficulty in drawing the line between that which offends the exclusionary principle enunciated in *Scott v Sampson* (1882) 8 QBD 491, [1881–85] All ER Rep 628 and that which is admissible, in accordance with the decision in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579. The sensitivities of one who is accused of pressurising, not forcing, his wife to have sex with men are bound to be less refined, if he was prepared to encourage his wife in public displays of sexual exposure.

[86] Similarly, in *Burstein*'s case, it is difficult to conceive how a fair measure of compensation could be achieved for one composer who had chosen to attack the work of a fellow, albeit renowned, composer by booing, organising others to boo and boasting that he had done so without assessing the damages payable in the light of those facts. The problem lies in the identification and articulation of the principle by which such facts are to be admitted.

[87] The purpose of the approach taken by the Court of Appeal in *Burstein*'s case is clear; it was to ensure that the claimant was properly vindicated and fairly compensated. Exclusion of the facts identified by Sir Christopher Slade (at 603–604 (paras 59, 60)) would not have achieved that result. The problem, as in so many branches of the law, lies in the expressions used to identify and describe the principle deployed to admit that evidence. May LJ referred to

relevant background context (at 598 (para 41)) or *background context directly relevant to damage* (at 600 (para 47)). Ever forgetful of the need not to read judgments as if they were statutes, the words *directly relevant background context* have been used as a label to be stuck on, by a defendant or ripped off, by a claimant. But the words themselves are no substitute for the reasoning of the court in *Burstein*'s case.

[88] The difficulty may lie, I suggest, in the fact that the label which it has been sought to apply, in subsequent cases, does not itself greatly assist in identification. Once detached, it does not, pace Keene LJ (at [56]), provide a test, since it assumes a meaning to the words of description it employs. To describe a fact as *directly relevant* has no meaning without identification of the issue to which it is alleged to be relevant. The word *context* may itself be misleading. It is accepted that, following *Burstein*'s case, facts may be admitted, notwithstanding that they did not themselves cause or provoke the publication of the defamatory material; that must follow from the decision in *Burstein*'s case itself. Further, there is no requirement that the facts should have been known to the publisher at the time of publication; there is no logic in such a requirement to achieve that which the principle seeks to achieve, a fair measure of damages. In those circumstances to ask whether the facts form part of the context in which the defamatory material was published does not seem to me to be of help to anyone save the lawyers who may gain much by endless debate as to what the label signifies. Nor does it assist to speak of the jury or judge being kept *in blinkers*, unless it is clear what is to be hidden from their eyes.

[89] Keene LJ refers to *directly relevant background* and Sir Christopher Slade similarly refers to *directly relevant background facts*; the reference to *background* draws a distinction from those facts which relate directly to the defamatory words, which ex hypothesi, after an offer of amends, cannot be used in justification or to deploy the defence of fair comment. After an offer of amends, only those facts which are directly relevant to the existence and extent of the alleged damage may be admitted, unless a claimant seeks to rebut the presumption in s 4(3) of the Defamation Act 1996. The key lies in identifying that which is directly relevant to the issue of damages. That lies, in my view, in recalling the reference by Cave J in *Scott v Sampson* to *uniform propriety* (cited by Keene LJ at [29]). A claimant's life may appropriately be considered in sectors (see Lord Denning in *Plato Films Ltd v Speidel* [1961] 1 All ER 876 at 890, [1961] AC 1090 at 1140 and *Goody v Odhams Press Ltd* [1966] 3 All ER 369 at 372, [1967] 1 QB 333 at 341). A defendant may seek to reduce the damages by adducing evidence which is directly relevant to a claimant's conduct or reputation in the particular sector to which the defamatory material relates, for the purpose of mitigating damage.

[90] Direct relevance to a particular sector of the claimant's life should be assessed by starting with a careful identification of the sector of the claimant's life to which the defamatory material relates; too broad an approach, such as *his private life* will defeat the function of the reference to *direct relevance*. Further restriction may be achieved by scrutiny of the purpose for which it is sought to adduce the facts in issue. It should be recalled that the purpose of the rule in *Scott v Sampson* was by no means only a desire to keep a case within manageable proportion. The rule serves the important function of preventing a claimant from being terrorised into submission. It is worth recalling that, alongside its failed attempt to abrogate the rule in *Scott v Sampson*, the Neill committee advised that a defendant making an offer of amends should not be permitted to attack a

claimant's character. Such an attack, once the rule had been abolished, should only be made before a jury (see the *Supreme Court Committee Report on Practice and Procedure in Defamation* (July 1991) p 79 (para VII 28)). But that advice has gone, along with the recommendation to abolish the rule.

[91] It is, therefore, important to subject the proposal to adduce facts relating to the claimant's character to scrutiny to avoid the vice, which *Scott v Sampson* seeks to avoid, reappearing in cases where an offer of amends has been made. The compulsion to accept an offer of amends imposed by the difficulty in proof under s 4(3) should not, I suggest, be used as a weapon by defendants to force acceptance of derisory offers.

[92] However, in the instant appeal, in my view the judge's assessment of what this claimant deserved was, in my view, correct.

PILL LJ.

[93] I agree that the appeal should be dismissed and there are only a few points I wish to make.

BURSTEIN

[94] Several expressions were used in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 to state the principle there established. I prefer that used by Sir Christopher Slade (at 602–603 (para 58)), by way of comment on the judgment of May LJ. What are admissible are 'directly relevant background facts'. They are admissible 'because they [are] directly relevant to the damage to the claimant's reputation suffered by him as a result of the publication'. I agree with the guide as to what facts come within that category provided by Keene LJ (at [56]): that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence relates.

THE STARTING POINT

[95] I agree with Keene LJ that, for the reasons he gives at [69]–[75] of his judgment, the judge could properly arrive at a starting point of £15,000 for the assessment of damages. In particular, I do not accept that the allegation against the claimant in the publication was 'tantamount to being party to rape'. Moreover, the claimant's own admitted and proved conduct was such that his reputation could not, in relation to the allegations made, be compared with that of a husband who valued his privacy and that of his wife.

THE DISCOUNT

[96] I am more concerned about the conduct of the first defendant when relying on the offer to make amends procedure provided by ss 2 and 3 of the Defamation Act 1996. Section 3(5) provides that: 'If the parties do not agree with the amount to be paid by way of compensation, it shall be determined by the court . . .' The courts should guard against the use of the procedure, in combination with the use of the principle in *Burstein*'s case, as a cloak for making allegations intended to deter a claimant from proceeding to a proper assessment of damages.

[97] In this case, letters to the first defendant went unanswered and the initial response, when made, was to assert that the words used were true. The offer to make amends was made at the last possible moment. It was accompanied by a *Burstein* statement so startling in content that the judge felt unable to set it out, or summarise it, in his judgment.

[98] The judge accepted, and was entitled to accept, that the matters in the statement were put forward in good faith. If they were to be put forward, they had to be put forward at that stage. Much of the material could not, in the event, be justified, however, and, that being so, putting it forward was a factor which should operate to diminish the discount to which the first defendant was entitled under the procedure. On the other hand, it must be recognised that the claimant's own conduct did leave him open to a legitimate use of the *Burstein* principle against him.

[99] In this case, the judge's wish not to analyse how much of the *Burstein* statement properly fell within the principle in that case is understandable. In my judgment, however, there is often likely to be a requirement, if the discount is to be assessed fairly, to analyse how much of the *Burstein* statement falls legitimately within the principle in that case and how much of it is 'seeking to introduce irrelevant or scandalous matter to take impermissible advantage of the court's process', a possibility, which the judge hoped would be very rare, considered at [55] of his judgment.

[100] The court should in my view be slow to interfere with the discount determined by the judge who has heard the evidence and conducted the trial. Some of the same factors are at work as in the case of apportionments under the Law Reform (Contributory Negligence) Act 1945. In that context appellate courts are very reluctant to interfere with the trial court's apportionment, though they may do so in the event of a substantial misjudgment in the factual basis of the apportionment.

[101] In *National Coal Board v England* [1954] 1 All ER 546, [1954] AC 403, the approach to apportionment under the 1945 Act was in issue. Lord Porter ([1954] 1 All ER 546 at 552–553, [1954] AC 403 at 420) stated that 'an appellate body does not interfere with the discretion exercised by the judge who tried the case'. In the present context, that discretion is likely to be a wide one because of the number of factors which need to be taken into account and weighed. I would not interfere with the apportionment in this case.

[102] For those reasons, and the reasons given by Keene LJ, I would dismiss this appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

R (on the application of Hirst) v Secretary of State for the Home Department

[2006] EWCA Civ 945

COURT OF APPEAL, CIVIL DIVISION
SIR IGOR JUDGE P, SCOTT BAKER AND HALLETT LJJ
15 JUNE, 6 JULY 2006

Prison – Release on licence – Life sentence – Right to liberty and security – Statutory scheme for recall of life prisoners while on licence – Whether statutory scheme compatible with right to liberty and security – Crime (Sentences) Act 1997, s 32 – Human Rights Act 1998, Sch 1, Pt I, art 5.

The claimant was convicted of manslaughter and sentenced to life imprisonment. A discretionary lifer panel recommended his release on life licence in April 2004 and he was released in May. Section 32[a] of the Crime (Sentences) Act 1997 dealt with the recall to prison of life sentence prisoners who had been released on licence. The Secretary of State could revoke the licence of a life prisoner released on licence on the recommendation of the Parole Board or without a recommendation where it appeared to him that it was expedient in the public interest to recall him before such a recommendation was practicable. A recalled life prisoner could make representations in writing with respect to his recall and on his return to prison was to be informed of the reasons for his recall and his right to make representations. The Secretary of State was to refer to the Parole Board prisoners recalled on the recommendation of the board who made representations and prisoners recalled without the board's recommendation. Where, on such a reference, the board directed immediate release on licence the Secretary of State was to give effect to the direction. On the revocation of the licence of any life prisoner he was liable to be detained in pursuance of his sentence and, if at large, was deemed to be unlawfully at large. On the further recommendation of the board the claimant's licence was revoked and he was recalled to prison on 3 August. He was supplied with the appropriate recall dossier. He indicated that he wished to make representations to the board at an oral hearing. On 26 August he was given the reasons for his recall. An oral hearing was fixed for 9 November. The board found that the combination of events which had taken place during his period on licence had given rise to serious concerns about the risk he represented and that his recall had been fully justified. Nevertheless the board ordered his release on licence. Article 5[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) guaranteed the right to liberty and security of the person. It provided, inter alia: '(1) Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court . . . (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him . . .

a Section 32 is set out at [6], below
b Article 5 is set out at [7], below

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful . . .' The claimant sought judicial review challenging, under art 5, a number of different aspects of his recall to custody. The judge found that there had been an impermissible delay in the process by which the claimant had been informed of the reasons for his recall contrary to art 5(2) and that there had been further impermissible delay contrary to art 5(4) in the provision of the recall dossier for which he should be awarded £1,500 in compensation. However, the judge dismissed the claimant's primary challenge which was that the entire scheme of s 32 of the 1997 Act was incompatible with art 5. The claimant appealed against that latter ruling, submitting, inter alia, that there should have been an immediate hearing to investigate the material on which the recall order was based, and to examine whether any further or fuller investigation into it should take place.

Held – The statutory scheme in s 32 of the 1997 Act was compatible with art 5 of the convention. Provided the circumstances under which the original sentence had been imposed were sufficiently reflected in those which pertained at the time when the recall order was made, the recall of a prisoner subject to a discretionary life sentence did not contravene art 5(1)(a). The recall and consequent detention followed a 'conviction by a competent court'. If they were justified then they did not have to be justified again on the basis of any of the other provisions in art 5. The claimant's recall, in the instant case, had been justified in law by the link between the discretionary sentence of life imprisonment imposed following his conviction for manslaughter and his behaviour during the short period while he was living in the community on licence which had given rise to realistic concerns for public safety. Those considerations underpinned the statutory scheme in s 32 of the 1997 Act which was designed to protect the public from the risk of harm consistently with the entitlements provided for an offender by art 5 of the convention. The creation of an additional process to investigate the material on which the recall order was made was unrealistic in the context of a perceived risk of danger to public safety. In the public interest and in the offender's interest the process to achieve a final determination into the validity of the preliminary view formed either by the Secretary of State or the Parole Board should be completed as quickly as possible. It was difficult to conceive of a process consistent with public safety which could enable a recall order to take effect while the offender remained at large. Provided the necessary causal connection existed the essential requirement was that the remaining parts of the process took place as rapidly as possible consistent with doing justice to all the relevant elements of the individual case. Accordingly, the appeal would be dismissed (see [18]–[23], below).

Weeks v UK (1987) 10 EHRR 293 and *Stafford v UK* (2002) 35 EHRR 1121 considered.

R (on the application of Noorkoiv) v Secretary of State for the Home Dept [2002] 4 All ER 515 distinguished.

Notes

For the right to liberty and security of the person, see 8(2) *Halsbury's Laws* (4th edn reissue) para 127 and for recall of life sentence prisoners, see 36(2) *Halsbury's Laws* (4th edn reissue) para 626.

For the Crime (Sentences) Act 1997, s 32, see 34 *Halsbury's Statutes* (4th edn) (2004 reissue) 1021.

For the Human Rights Act 1998, Sch 1, Pt I, art 5, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 705.

Cases referred to in judgment

R (on the application of Noorkoiv) v Secretary of State for the Home Dept [2002] EWCA Civ 770, [2002] 4 All ER 515, [2002] 1 WLR 3284.
Stafford v UK (2002) 35 EHRR 1121, [2002] ECHR 46295/99, ECt HR.
Waite v UK [2002] All ER (D) 136 (Dec), ECt HR.
Weeks v UK (1987) 10 EHRR 293, [1987] ECHR 9787/82, ECt HR.

Appeal

John Hirst appealed from part of the decision of Crane J on 21 June 2005 ([2005] EWHC 1840 (Admin), [2005] All ER (D) 223 (Jun)) in the appellant's application for judicial review of the process of his recall to HM Prison Hull on 3 August 2004 under s 32 of the Crime (Sentences) Act 1997 by which Crane J held that the scheme for recall contained in s 32 of the 1997 Act was compatible with art 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The Parole Board appeared as an interested party. The facts are set out in the judgment of the court.

Flo Krause (instructed by *AS Law*, Liverpool) for the appellant.
Parishil Patel (instructed by the *Treasury Solicitor*) for the Secretary of State for the Home Dept.
Steven Kovats (instructed by the *Treasury Solicitor*) for the Parole Board.

Cur adv vult

6 July 2006. The following judgment of the court was delivered.

SIR IGOR JUDGE P.

[1] In February 1980, following an attack with an axe on his landlady, John Hirst (the appellant) was convicted of manslaughter. He represented a very serious long-term public danger, and he was sentenced to life imprisonment.

[2] In April 2004 a discretionary lifer panel recommended the appellant's release on life licence. This took place in May. On 2 August, on the further recommendation of the Parole Board, and in accordance with the statutory regime provided by s 32 of the Crime (Sentences) Act 1997, his licence was revoked. He was recalled to prison at HMP Hull on 3 August.

[3] On his recall, the appellant was supplied with the appropriate 'recall dossier'. He indicated that he wished to make representations against his recall at an oral hearing of the Board. On 26 August he was given the reasons for his recall, and on 3 September the lifer review and recall section at the Home Office referred the matter to the Board. An oral hearing was fixed for 9 November. On 16 November, notwithstanding that the Board found that the combination of events which had taken place during the appellant's period on licence gave rise to 'serious concerns' about the risk he represented, and that his recall was 'fully justified', his release under s 32(5) of the 1997 Act was ordered.

[4] The appellant challenged a number of different aspects of his recall to custody. On 21 June 2005 Crane J upheld two of his complaints, first, that contrary to art 5(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to

the Human Rights Act 1998) (the convention) there was impermissible delay in the process by which the appellant was informed of the reasons for his recall, and second, that there was further such delay, contrary to art 5(4) of the convention, in the provision of the appropriate recall dossier (see [2005] EWHC 1480 (Admin), (2005) Times, 4 July). He concluded that the delay in providing the appellant with the reasons for his recall was sufficiently satisfied by a declaration to that effect. However, the delay in providing the appellant with the dossier required an award of £1,500 compensation.

[5] Crane J dismissed the claim that there was an impermissible delay in the Parole Board's processes between 3 September, when the case was referred to it, and 9 November, when the oral hearing took place. Finally, he rejected the appellant's primary challenge, that the entire statutory scheme for recall was incompatible with art 5 of the convention. The appellant's contention is that this conclusion was wrong in law. This gives rise to the stark issue in this appeal.

[6] Section 32 of the 1997 Act deals with the recall to prison of life sentence prisoners who have been released on licence. It provides:

> '(1) If recommended to do so by the Parole Board in the case of a life prisoner who has been released on licence under this Chapter, the Secretary of State may revoke his licence and recall him to prison.
>
> (2) The Secretary of State may revoke the licence of any life prisoner and recall him to prison without a recommendation by the Parole Board, where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable.
>
> (3) A life prisoner recalled to prison under subsection (1) or (2) above—(a) may make representations in writing with respect to his recall; and (b) on his return to prison, shall be informed of the reasons for his recall and of his right to make representations.
>
> (4) The Secretary of State shall refer to the Parole Board—(a) the case of a life prisoner recalled under subsection (1) above who makes representations under subsection (3) above; and (b) the case of a life prisoner recalled under subsection (2) above.
>
> (5) Where on a reference under subsection (4) above the Parole Board directs the immediate release on licence under this section of the life prisoner, the Secretary of State shall give effect to the direction.
>
> (6) On the revocation of the licence of any life prisoner under this section, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large.'

(Subsection (5) was substituted by the Criminal Justice Act 2003, but this aspect of the statutory scheme has no relevance to the present appeal.)

[7] Article 5 of the convention provides:

> '1. Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his

committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'

[8] The forensic attack on s 32 proceeds on the basis that it empowers the Secretary of State to effect the immediate return of a life sentence prisoner to prison, by revoking his licence, either on his own initiative (s 32(2)) or on the basis of a recommendation to that effect by the Parole Board (s 32(1)). Even when made on such a recommendation, as the Parole Board is not at that stage acting in a judicial capacity, the decision is made by the executive. In the result, the scheme provides for a return to custody upon an arbitrary decision by the executive, without the normal safeguards built in to the criminal justice process. In the written grounds of appeal, this process was described as 'systematic executive incarceration', and it was therefore incompatible with art 5 of the convention.

[9] Ms Krause went on to submit that once her client was released on licence, the link between his conviction for manslaughter and any possible recall was broken. If he was to be recalled, he was entitled to the safeguard of a system whereby some kind of initial or preliminary judicial determination should take place to decide whether the recall should or should not take effect pending the final determination. In short, therefore, a process similar to bail pending trial was required, akin to that available in appropriate cases to citizens arrested or charged with criminal offences. No provision is made for such a safeguard in s 32 or elsewhere.

[10] In the light of this challenge to the statutory scheme we sought further information about the arrangements which lead to a recommendation for licence revocation and recall. We were told that for the purposes of considering its recommendation, the Board is presented with the pre-release parole dossier, together with a report from the Probation Service (now part of the National Offender Management Service) which explains the reasons for believing

that the prisoner is in breach of his licence conditions. The assumption, of course, is that those responsible for the report will act in good faith, and there is, as far as we are aware, nothing to suggest that they do not do so. On recall, the remaining safeguards in s 32 then operate.

[11] The starting point in the analysis is obvious, but perhaps bears repetition. Section 32 addresses the recall to prison of an offender sentenced to discretionary life imprisonment. It is not even remotely related to the process by which an unconvicted citizen may be arrested and detained. In *Weeks v UK* (1987) 10 EHRR 293, the European Court of Human Rights rejected the submission that the link between Weeks's conviction and his art 5 entitlements was broken when he was released. The court explained (at 312 (para 50)):

> '. . . it was inherent in Mr. Weeks' life sentence that, whether he was inside or outside prison, his liberty was at the discretion of the executive for the rest of his life (subject to the controls subsequently introduced by the 1967 Act, notably the Parole Board).'

[12] The release of an individual made subject to a discretionary life sentence on the basis of dangerousness involves an element of risk. Before directing his release the Parole Board must be satisfied that the risk can safely be managed in the community. His release, if appropriate, should be made subject to conditions which will provide for the safety of the public. This requires careful management and control of the offender, to ensure that any form of risk to others is either anticipated, or minimised. That said however, it is now plainly understood that a post-tariff life sentence prisoner released on licence does not automatically, or by definition, fall outside the protective ambit of, or that he is outlawed from, the entitlements in art 5.

[13] In *Weeks's* case (1987) 10 EHRR 293 at 308 (para 42) the court recorded:

> '. . . the Convention presupposes not only conformity with domestic law but also, as confirmed by Article 18, conformity with the purposes of the deprivation of liberty permitted by sub-paragraph (a) of Article 5(1). Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the "conviction" in point of time: in addition, the "detention" must result from, "follow and depend upon" or occur "by virtue of" the "conviction". In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue.'

[14] In *Stafford v UK* (2002) 35 EHRR 1121, the European court returned to *Weeks's* case, recalling (at 1139 (para 65)) that the—

> 'discretionary life sentence imposed on the applicant was an indeterminate sentence expressly based on considerations of his dangerousness to society, factors which were susceptible by their very nature to change with the passage of time. On that basis, his recall, in the light of concerns about his unstable, disturbed and aggressive behaviour, could not be regarded as arbitrary or unreasonable in terms of the objectives of the sentence imposed on him and there was sufficient connection for the purposes of Article 5(1)(a) between his conviction in 1966 and recall to prison in 1977.'

[15] It is submitted on behalf of the Secretary of State that the language used in *Stafford's* case to describe the effect of the decision in *Weeks's* case, could aptly be applied to the present appeal. The fresh deprivation of liberty which Weeks underwent following the revocation of his licence was found not to constitute a

breach of art 5. Notwithstanding his release therefore, the fact of his original conviction remained relevant and the necessary causal connection between the conviction and his recall to custody was sufficiently established.

[16] *Stafford*'s case provides a further illustration of the principle, but producing a contrary result. Stafford was convicted of murder in 1967 and sentenced to life imprisonment. He was released on licence in 1979, but when he left the United Kingdom in breach of a licence condition, it was revoked. On his return in 1989 he was detained, and fined for being in possession of a false passport. However, as his licence had already been revoked, he was detained in custody. He was released, on the recommendation of the Parole Board, in March 1991. In July 1994 he was convicted of conspiracy to forge travellers' cheques and passports and sentenced to six years' imprisonment. His licence was revoked. He would have been released from prison on the expiry of the sentence imposed for conspiracy in 1996/1997, and his release on licence was recommended by the Parole Board. The recommendation was rejected. Stafford was detained in custody, not on the basis of a perceived risk that he would commit further violent offences, but because non-violent, imprisonable offences might be committed by him.

[17] Stafford's complaint that his continued detention after the expiry of his sentence for conspiracy was arbitrary was upheld. It was unrelated to the grounds which had led to the imposition of the life sentence. Stafford's release in 1979, showed that the punitive element of the sentence for murder was exhausted. The subsequent conviction for an offence of dishonesty could not justify his continued detention under the original mandatory life sentence. Nor—

> '81 . . . in contrast to the recall of the applicant in WEEKS, was the continued detention of the present applicant justified by the Secretary of State on grounds of mental instability and dangerousness to the public from the risk of further violence. The Secretary of State expressly relied on the risk of non-violent offending by the applicant. The Court finds no sufficient causal connection, as required by the notion of lawfulness in Article 5(1)(a) of the Convention, between the possible commission of other non-violent offences and the original sentence for murder in 1967.
>
> 82 . . . There was no power under domestic law to impose indefinite detention of him to prevent future non-violent offending . . . The Court cannot accept that a decision-making power by the executive to detain the applicant on the basis of perceived fears of future non-violent criminal conduct unrelated to his original murder conviction accords with the spirit of the Convention, with its emphasis on the rule of law and protection from arbitrariness.' (See (2002) 35 EHRR 1121 at 1145.)

The remaining matters of complaint in *Stafford*'s case are not relevant to the present appeal.

[18] The decision in *Weeks*'s case, and the reasoning in both *Weeks* and *Stafford*, and indeed the more recent decision of the European court in *Waite v UK* [2002] All ER (D) 136 (Dec) demonstrate that, provided the circumstances under which the original sentence was imposed are sufficiently reflected in those which pertain at the time when the recall order is made, the recall of a prisoner subject to a discretionary life sentence does not contravene art 5(1)(a). The recall and consequent detention follow a 'conviction by a competent court'. If they are justified, then they do not have to be justified again on the basis of any of the other provisions in art 5.

[19] In our judgment this appellant's recall was justified in law by the link between the discretionary sentence of life imprisonment imposed following his conviction for manslaughter and his behaviour during the short period while he was living in the community on licence. This gave rise to realistic concerns for public safety. These considerations underpin the statutory scheme in s 32, which, no doubt with the decisions of the European court in mind, was designed to protect the public from the risk of harm consistently with the entitlements provided for the appellant by art 5. Far from creating hesitation with the legitimacy of such processes, the jurisprudence of the European court endorses them.

[20] The creation of an additional process in the scheme as advocated by Ms Krause—in effect, an immediate hearing to investigate the material on which the recall order was based, and to examine whether any further and fuller investigation into it should take place with the defendant in custody, or on bail and generally at large subject to further conditions—in the context of a perceived risk of danger to public safety is unrealistic. In the public interest, and in the defendant's interest, the process to achieve a final determination into the validity of the preliminary view formed either by the Secretary of State or the Parole Board should be completed as quickly as possible. In this context the preliminary view that recall is appropriate has already been formed. Without it, the recall order should not be made. It is difficult to conceive of a process consistent with public safety which could enable a recall order to take effect while the defendant remains at large. That would not be a recall at all. It would be an inquiry into the question of whether there should be a recall. And, almost by definition, to allow such a defendant his liberty subject to conditions would in effect amount to a decision to release him subject to the very terms of licence which he appeared to have disregarded. As Ms Krause readily accepted, nothing in the decisions of the European court suggests that such a preliminary hearing is necessary, or indeed was ever in contemplation. Provided the necessary 'causal connection' exists, the essential requirement is that the remaining parts of the process take place as rapidly as possible, consistent with doing justice to all the relevant elements of the individual case.

[21] As her final submission Ms Krause sought to derive support from the decision of this court in *R (on the application of Noorkoiv) v Secretary of State for the Home Dept* [2002] EWCA Civ 770, [2002] 4 All ER 515, [2002] 1 WLR 3284, and subsequent decisions, to the same effect. However, *Noorkoiv*'s case was concerned with a different problem to the one which arises in the present appeal. It addressed the arrangements which led to the continued detention of a prisoner subject to an automatic life sentence after the expiry of the penal or tariff element of his sentence. The system for his release should have been designed to provide for the necessary assessment to be made before rather than after the expiry of the tariff period, or very rapidly indeed afterwards. This process engaged not art 5(1)(a), but art 5(4). To the extent that *Noorkoiv*'s case emphasised that continued detention in custody must be justified, it has a continuing resonance in cases like this. It does not, however, support Ms Krause's essential submission that there should be some form of preliminary inquiry into the recall order immediately the recall takes place nor that, in its absence, the statutory scheme is incompatible with the appellant's entitlement under art 5. The same difficulty undermined the submission which sought to link the requirement for a 'prompt' hearing under art 5(3), in relation to arrest or detention when art 5(1)(c) was

engaged, and the further requirement for a 'speedy' hearing under art 5(4) which applies in any circumstances where an individual is deprived of his liberty.

[22] It is, of course, necessary to emphasise that argument directed to the alleged 'incompatibility' of s 32 with art 5 is quite distinct from any argument whether, in the particular circumstances of an individual case, there was or may have been a contravention of any other of the appellant's convention rights. However, the fact that breaches may occur, or that the statutory scheme may not always operate as it should, does not render the scheme as a whole incompatible with art 5. Indeed two such breaches which had taken place in this appellant's case were identified, and he was provided with appropriate remedies.

[23] In our judgment, in agreement with Crane J, the statutory scheme in s 32 of the 1997 Act is compatible with art 5 of the convention. Accordingly this appeal is dismissed.

Appeal dismissed.

Dilys Tausz Barrister.

R v Davis
R v Ellis and others
[2006] EWCA Crim 1155

COURT OF APPEAL, CRIMINAL DIVISION
SIR IGOR JUDGE P, MITTING AND FULFORD JJ
20–24 MARCH, 19 MAY 2006

Criminal Law – Trial – Witnesses – Identity – Right to a fair trial – Protection of witnesses by order for anonymity – Whether breach of right to fair trial – Human Rights Act 1998, Sch 1, Pt I, art 6.

The defendants in two cases had been convicted after trials involving witnesses whose true identity had not been disclosed, for their own protection, and who had given evidence with voice modulation and screening. The defendants appealed, contending, inter alia, that the witness anonymity had been in breach of their right to a fair trial guaranteed by art 6[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1988) which provided, inter alia, that everyone charged with a criminal offence had rights which included the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The court also considered the convention rights of witnesses under art 2[b] of the convention, which imposed a positive obligation on the state to take appropriate steps to safeguard the lives of those within its jurisdiction and their rights to respect for private and family life under art 8[c] of the convention.

Held – The European Court of Human Rights had accepted that the convention rights of witnesses included, where necessary, the preservation of their anonymity, and had decided that the concealment of the identity of witnesses was not inconsistent with the right to a fair trial, provided that the need for anonymity was clearly established; that cross-examination of the witness by an advocate for the defendant was permitted; and that the trial was fair. The jurisprudence of the Court of Human Rights did not lead to the conclusion that a trial would inevitably be considered unfair, and a conviction unsafe, simply because the evidence of anonymous witnesses might be decisive to the outcome. The potential disadvantages to a defendant required the court to examine the application for witness anonymity with scrupulous care to ensure that it was necessary and that the witness was indeed in genuine and justified fear of serious consequences if his true identity became known to the defendant or the defendant's associates. The court should be alert to potential or actual disadvantages faced by a defendant in consequence of any anonymity ruling and should ensure that necessary and appropriate precautions were taken to ensure that the trial itself would be fair. Provided that appropriate safeguards were

a Article 6, so far as material, is set out at [20], below
b Article 2, so far as material, is set out at [29], below
c Article 8, so far as material, provides: 'Everyone has the right to respect for his private and family life, his home and his correspondence'

applied, and the judge was satisfied that a fair trial could take place, it could proceed. If not, the judge should not permit anonymity. The safeguards included the decision of the trial judge whether to exercise his discretion to allow some or all of the witnesses against the defendant to give their evidence anonymously; the decision of the trial judge at the end of the prosecution case whether it would be unsafe for the evidence of the anonymous witnesses to be considered further by the jury or whether the case as a whole should be withdrawn from their consideration; and appropriate directions in summing up, sufficient to identify the particular disadvantages under which the defence might have been labouring. The judge would probably suggest that the jury should consider whether there was any independent, supporting evidence, tending to confirm the credibility of the anonymous witnesses and the incriminating evidence they had given. On appeal, as in the instant cases, the first question was whether the court should interfere with the judgment of the trial judge to allow for witness anonymity. In most cases, as that involved a balance to be drawn between conflicting factors in a fact-specific situation the Court of Appeal would not interfere with the judge's decision unless, at the time he made it, it was plainly wrong. However, once leave to appeal was given, it might not be sufficient for the Court of Appeal to dispose of the appeal on the basis that there were no grounds for interfering with a decision made by the judge at the time when he made it. The Court of Appeal could conclude that the order for witness anonymity had had the effect of producing what in all the circumstances had been an unfair trial. If so, even if the original decision of the judge were not open to criticism, the conviction would be unsafe and it would be quashed. In the instant cases there was no reason for doubting the integrity of the trial process or the safety of the convictions. Accordingly, the appeals would be dismissed (see [27], [51], [58]–[62], [64], [108], [113], [140], below).

Kostovski v Netherlands (1990) 12 EHRR 434, *Doorson v Netherlands* (1996) 22 EHRR 330, *van Mechelen v Netherlands* (1997) 2 BHRC 486, *Re Al-Fawwaz, Re Eiderous* [2002] 1 All ER 545, *R (on the application of D) v Camberwell Green Youth Court, R (on the application of DPP) v Camberwell Green Youth Court* [2005] 1 All ER 999, *R v Sellick* [2005] 1 WLR 3257, *R v Al-Khawaja* [2006] 1 All ER 543 considered.

Per curiam. Where an order for anonymity is made a potential conflict arises for counsel between their duties to the court and their duties to their clients. The pragmatic solution is that counsel should identify the issues for his client and explain the alternatives. The choice as to whether counsel should see the witness should be made by the client on advice. Counsel should inform him that if he, counsel, were able to observe the witness he might be better able to cross-examine him. Counsel should also explain the pre-condition to such cross-examination which is that he could not flout or ignore the order of the court and could not at any stage of the trial or afterwards provide his client with any description of the witness. If counsel is instructed that he should not see the witness or counsel believes that his professional relationship would be damaged if he were unable to communicate information which his client wanted from him, then the court will order that the anonymous witnesses must be screened from counsel. In this event counsel for the Crown should be in the same position as counsel for the defendant (see [70], below).

Notes

For the right to examine witnesses, see 8(2) *Halsbury's Laws* (4th edn reissue) para 146.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 706.

Cases referred to in judgment

A-G's Ref (No 3 of 1999) [2001] 1 All ER 577, [2001] 2 AC 91, [2001] 2 WLR 56, HL.

Al-Fawwaz, Re, Re Eiderous [2001] UKHL 69, [2002] 1 All ER 545, sub nom *R (Al-Fawwaz) v Governor of Brixton Prison, R (Abdel Bary) v Governor of Brixton Prison, R (Eidarous) v Governor of Brixton Prison* [2002] 1 AC 556, [2002] 2 WLR 101.

Birutis v Lithuania [2002] ECHR 47698/99, ECt HR.

Connelly v DPP [1964] 2 All ER 401, [1964] AC 1254, [1964] 2 WLR 1145, HL.

D v National Society for the Prevention of Cruelty to Children [1977] 1 All ER 589, [1978] AC 171, [1977] 2 WLR 201, HL.

Doorson v Netherlands (1996) 22 EHRR 330, [1996] ECHR 20524/92, ECt HR.

Fitt v UK (2000) 30 EHRR 480, [2000] ECHR 29777/96, ECt HR.

Kostovski v Netherlands (1990) 12 EHRR 434, [1989] ECHR 11454/85, ECt HR.

Krasniki v Czech Republic App No 51277/99 (28 February 2006, unreported), ECt HR.

Lambeth London BC v Kay, Leeds City Council v Price [2006] UKHL 10, [2006] 4 All ER128, [2006] 2 WLR 570.

Lucà v Italy (2003) 36 EHRR 807, [2001] ECHR 33354/96, ECt HR.

Lüdi v Switzerland (1993) 15 EHRR 173, [1992] ECHR 12433/86, ECt HR.

Osman v UK (1998) 5 BHRC 293, ECt HR.

PS v Germany (2003) 36 EHRR 61, [2001] ECHR 33900/96, ECt HR.

R v Accused [1992] 1 NZLR 257, NZ CA.

R v Al-Khawaja [2005] EWCA Crim 2697, [2006] 1 All ER 543, [2006] 1 WLR 1078.

R v Bola (18 June 2003, unreported).

R v Botmeh [2001] EWCA Crim 2226, [2002] 1 WLR 531.

R v Davis [1993] 2 All ER 643, [1993] 1 WLR 613, CA.

R v Dragic [1996] 2 Cr App R 232, CA.

R v G [2004] EWCA Crim 1368, [2004] 1 WLR 2932.

R v H, R v C [2004] UKHL 3, [2004] 1 All ER 1269, [2004] 2 AC 134, [2004] 2 WLR 335.

R v Jack (7 April 1998, unreported).

R v McCoy (10 December 1999, unreported), CA.

R v Murphy [1990] NI 306, NI CA.

R v Preston [1993] 4 All ER 638, [1994] 2 AC 130, [1993] 3 WLR 891, HL.

R v Sellick [2005] EWCA Crim 651, [2005] 1 WLR 3257.

R v Taylor [1995] Crim LR 253, CA.

R v Taylor (Gary) (1994) Times, 17 August, CA.

R v Watford Magistrates' Court, ex p Lenman [1993] Crim LR 388, DC.

R v X (1989) 91 Cr App R 36, CA.

R (on the application of D) v Camberwell Green Youth Court, R (on the application of DPP) v Camberwell Green Youth Court [2005] UKHL 4, [2005] 1 All ER 999, [2005] 1 WLR 393.

Scott v R, Barnes v R [1989] 2 All ER 305, [1989] AC 1242, [1989] 2 WLR 924, PC.

Taylor v A-G [1975] 2 NZLR 675, NZ CA.

van Mechelen v Netherlands (1997) 2 BHRC 486, ECt HR.

Visser v Netherlands [2002] ECHR 26668/95, ECt HR.
Windisch v Austria (1991) 13 EHRR 281, [1990] ECHR 12489/86, ECt HR.
X v UK (1993) 15 EHRR CD 113, E Com HR.

Appeals

R v Davis

Iain Davis appealed with leave of the single judge from his conviction on 25 May 2004 of two counts of murder after a trial at the Central Criminal Court before Judge Paget QC and a jury in which an order for witness anonymity was made. The Court of Appeal invited the Attorney General to appoint a special advocate to assist the court with the issue of disclosure in the context of public interest immunity matters raised with the judge in the absence of the defence. The General Council of the Bar made written submissions. The facts are set out in the judgment of the court.

R v Ellis and others

Marcus Ellis, Michael Gregory and Nathan Martin appealed with leave of the court from their convictions on 18 March 2005 of two counts of murder and three counts of attempted murder after a trial in the Crown Court at Birmingham before Goldring J and a jury in which an order for witness anonymity was made. Rodrigo Simms appealed similarly from his conviction of two counts of murder and two counts of attempted murder. The General Council of the Bar made written submissions. The facts are set out in the judgment of the court.

Malcolm Swift QC and *Susan Rodham* (assigned by the *Registrar of Criminal Appeals*) for Davis.
Duncan Penny as special advocate.
Michael Worsley QC and *Mark Gadsden* (instructed by the *Crown Prosecution Service*) for the Crown in the case of Davis.
Nigel Rumfitt QC and *Lee Halliday-Davis* (assigned by the *Registrar of Criminal Appeals*) for Ellis.
Timothy Moloney (assigned by the *Registrar of Criminal Appeals*) for Gregory.
Anthony Barker QC and *Graham Henson* (assigned by the *Registrar of Criminal Appeals*) for Simms.
James Burbidge (assigned by the *Registrar of Criminal Appeals*) for Martin.
Timothy Raggatt QC, Michael Duck and *John Butterfield* (instructed by the *Crown Prosecution Service*) for the Crown in the case of Ellis and others.

Cur adv vult

19 May 2006. The following judgment of the court was delivered.

SIR IGOR JUDGE P.

[1] On 25 May 2004, at the Central Criminal Court, before Judge Paget QC and a jury, Iain Davis was convicted of two counts of murder. He appeals against conviction with the leave of a single judge. This is the Davis appeal.

[2] On 18 March 2005, at Birmingham Crown Court, before Goldring J and a jury, Marcus Ellis, Michael Gregory and Nathan Martin were convicted of two counts of murder and three counts of attempt murder, and Rodrigo Simms was convicted of the same counts of murder, and two of the three counts of attempt

murder. They appeal against conviction, with the leave of the court. This will be described as the Ellis appeal.

[3] There is no connection between the two cases. Leave was given in the Ellis appeal because it appeared that an important point about the anonymity of witnesses was a common and significant feature of both cases. The appeals were heard consecutively, and after hearing argument in both cases, we decided, with the agreement of all counsel, to address the issues in a single judgment.

THE DAVIS APPEAL

[4] On 1 January 2002, towards the end of a New Year's Eve party in the presence of witnesses, two men, Ashley Kenton and Wayne Mowatt were shot dead. Their deaths resulted from a surge of violence by an individual who discharged a loaded gun to assassinate Kenton, against whom he entertained an apparently short-lived grudge. The second death was 'accidental', in the sense that the victim, Mowatt, happened to be in just the wrong place at the wrong time when the bullet fired from the assassin's gun went through the Kenton's neck, and by way of a flimsy internal partition, entered the neck of and fatally injured Mowatt. A single bullet killed both men.

THE ELLIS APPEAL

[5] On 8 December 2002, Nathan Martin's brother Yohanne, was shot dead. Those responsible were believed to be members of a gang in Birmingham known as the Johnson crew. The appellants, together with a co-accused Tafarwa Beckford, who was acquitted by direction of the judge, were members of the Burger Bar crew. Both gangs were capable of extreme violence. The Johnson crew and the Burger Bar crew were, literally, deadly rivals.

[6] Shortly after 4 am on 2 January 2003, a party was taking place at the Uniseven Hair Salon in Aston, Birmingham. The guests included members of the Johnson Crew. A number of those attending the party happened to be standing in an alleyway at the rear of the premises. They included Charlene Ellis, Letisha Shakespeare, Sophie Ellis and Cheryl Shaw. A convoy of vehicles, which included a red Mondeo and a silver Vauxhall, drove to the scene. Shots were fired into the crowd. Charlene Ellis and Letisha Shakespeare received fatal gunshot wounds. Sophie Ellis and Cheryl Shaw were badly injured. A man called Leon Harris, who was sitting in a car further down the alleyway, was shot at close range by a gunman who had alighted from one of the convoy of vehicles.

[7] These shootings, and the consequent deaths and injury, were perpetrated by members of the Burger Bar crew in revenge for the death of Yohanne Martin. The female victims were not the intended targets of the attack. Unhappily they just happened to be in the wrong place at the wrong time, victims of gang warfare on the streets of Birmingham.

GENERAL BACKGROUND—GUN CRIME

[8] These cases are not untypical. There is compelling evidence of an alarming increase in gun-related crime (see *Crime in England and Wales 2003/2004*: Supplementary vol 1; *Homicide and gun crime*, published in January 2005). In an earlier case which we were asked to consider in argument, *R v Bola* (18 June 2003, unreported), Hughes J summarised the evidence then before him in a case where a woman was summarily executed in a drug-related feud:

> 'Since April 2002 there have been no less than thirty seven people injured on the streets of Nottingham in shooting incidents. Not domestic incidents,

on the streets. Three of them have been fatalities . . . The fear of gun crime has an adverse effect on the public who live in the areas of Nottingham where such things occur and particularly has had a considerable impact on the ability of the police to investigate crime. He says, and I have absolutely no reason to doubt, indeed I am confident that he is right that the experience of the police is that after an incident of this kind witnesses are frequently content to come confidentially to the investigators to tell them what they know, what they saw, to give them leads and help about what the background may be and sometimes to name names, but that such witnesses are to a very large extent frightened to be identified as co-operating with the police and unwilling, as a result, to give evidence. They fear similar incidents, and they fear retribution, either from those whom they accuse, or, more generally, from those who take the stance that co-operation with the authorities is anathema . . . the evidence . . . is entirely consonant with the experience of anybody who has practised in the criminal courts in the last few years. It describes a situation which all of us know obtains not even or mainly in Nottingham but in several major cities in England . . .'

These observations are entirely consistent with the judicial experience of each member of the court.

[9] In the Davis appeal there is undisputed evidence from a detective officer who has specialised in murder investigations for the last seven years, and in particular, gun-related violence. He said:

'Most people opt not to co-operate and do not get involved. Doors are not opened, arranged meetings result in a witness not turning up, telephone messages go unanswered and messages left at home addresses/work, although discreet are ignored. This is not a problem that exists on an occasional basis ... it is a problem that exists in practically every investigation in one way or another. Such problems exist on a daily basis. I have spoken to witnesses about a reluctance to give evidence. The common factor between all of them is fear.

They are in fear of their lives and that of their families and friends. There is a very real danger to such persons of death or serious injury, either to prevent them from giving evidence, or to punish them for giving evidence and to send a warning to those who may be thinking of assisting the police. This risk I know and the witnesses know, is not necessarily at the hands of the defendants themselves, but at the hands of the associates of the defendant. If the defendant is in custody, it is often the associates who are the physical threat.

In many but not all cases, the witness knows of the defendant and their associates. They know they have easy access to firearms and the "ease" with which they are prepared to use them.'

[10] In summary, quite apart from the ghastly callousness involved in the use of firearms to kill, and the devastation suffered by the families of the deceased, it is not an exaggeration to point out that, whether they are aware of it or not, these gun-carrying criminals are challenging the rule of law itself. One common feature of both these cases, and many others like them, is the absence of any or any significant attempt at concealment. People are gunned down in busy crowded areas. Although the offences are witnessed, those who use their guns expect to escape justice. They anticipate that the guns which have been used to

kill will also serve to silence, blind and deafen witnesses. Without witnesses, justice cannot be done.

[11] Dealing with it generally, there are in principle, two ways to address these problems. The first is a witness protection programme. However in reality, and certainly for the individual of good character, with established roots, this kind of programme is unacceptable. It requires a complete change of identity, and home, and work, not only for the witness himself or herself, but for his family, and a likely permanent separation between them, and other members of their extended family, and a subsequent life which is dominated by the need for continued security, and constant supervision of that security by police officers. This process is grossly invasive of the right of the witness and his family to private and family life. It is likely to be appropriate when the identity of the witness is already known to the defendant, and may be suitable for the professional criminal who has decided, for reasons of his own, to give evidence against his former colleagues and who is treated as a 'supergrass'. The alternative to the witness protection programme is for appropriate steps to protect and reassure the witness about the process leading to and the giving of evidence. This includes voice modulation, and screening, and other special measures, and witness anonymity. It is this last feature of possible steps to protect witnesses, and their lives and the lives of their families, that is engaged in these appeals.

[12] The administration of protective arrangements of this kind is not unduly problematic in itself. The difficulty arises from the potential conflict between them and the over-arching principle of the common law, once memorably described by Lord Bingham of Cornhill CJ as the 'birthright' of every British citizen, the right to a fair trial. The difficulties are at their most acute in cases like Davis, when there would be no point in a trial, just because without the evidence of anonymous witnesses there would be insufficient evidence on which to found a safe conviction.

INHERENT JURISDICTION

[13] The court undoubtedly possesses an inherent jurisdiction at common law to control its own proceedings, if necessary by adapting and developing its existing processes, as Lord Morris of Borth-y-Gest explained in *Connelly v DPP* [1964] 2 All ER 401 at 409, [1964] AC 1254 at 1301 'to defeat any attempted thwarting of its process'. (See also *Taylor v A-G* [1975] 2 NZLR 675, *R v Murphy* [1990] NI 306 and *R v Accused* [1992] 1 NZLR 257).

[14] The principle provided the basis for some earlier changes in the criminal process which have become familiar, but which were once regarded as unusual. Nowadays, for example, it is commonly ordered that the identity of informants should not be disclosed to the defendant, lest 'sources of information would dry up' (see *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 at 595, [1978] AC 171 at 218). Again, the practice of screening vulnerable witnesses from the defendant developed during the 1980s. Thus in *R v X* (1989) 91 Cr App R 36 this court upheld the decision of the Common Sergeant, sitting at the Central Criminal Court, that screens should be erected to enable children who had been treated indecently to give evidence screened from the defendant. The judge was required (at 40, 41) to see that—

> 'the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies . . .

a

> [W]e do not need authority to confirm us in the view that what the learned judge did here in his discretion was a perfectly proper, and indeed a laudable attempt to see that this was a fair trial: fair to all, the defendants, the Crown and indeed the witnesses.'

b

[15] Some, but not all of the steps identified by developing common law principles, have now found their way into statute. Thus, the Youth Justice and Criminal Evidence Act 1999 (ss 16–33) makes provision for a series of special measures. These include screening the witness from the accused, witnesses giving evidence by live link, the provision of aids to communication for an incapacitated witness, and a greater degree of 'privacy' in what remains a public hearing, to be applied in sexual cases, or where there is a fear that the witness may c be intimidated. These provisions, which nevertheless permit cross-examination of the witness, add to, without detracting from common law principles.

STATEMENTS READ AS EVIDENCE

[16] Sections 23–26 of the Criminal Justice Act 1988 created new exceptions to the hearsay rule. By s 23(1) a statement by a person in a document became d admissible as evidence of any fact of which direct oral evidence by him would be admissible, provided the maker of the statement is unable to attend court, because among other reasons, he is dead or unfit to attend, or because, having made a statement, he is unable to give evidence through fear. Where such evidence is admitted, of course, there is no scope for cross-examination. That e said, however, safeguards for the defendant are provided in Sch 2 of the 1988 Act, which it is unnecessary to detail, but which must be considered in the context of the disclosure obligations on the prosecution. The present purposes we need not address the subsequent statutory provisions, or the replacement of the provisions of ss 23–26 of the 1988 Act by ss 116 and 117 of the Criminal Justice Act 2003.

f [17] In *Scott v R, Barnes v R* [1989] 2 All ER 305, [1989] AC 1242 the Privy Council was faced with decisions of the Court of Appeal of Jamaica, dismissing appeals against convictions for capital murder. In *Scott v R* a special constable was shot with his own revolver in a bar and subsequently died of his wounds. The only evidence identifying Scott and his co-accused, Walters, was contained in the deposition of a witness who had died before trial. In *Barnes v R* the deceased was g shot after stopping his van and his money was stolen. Three defendants were charged with his murder. The only evidence identifying them was given by a witness, who gave evidence at the preliminary inquiry, but who was murdered before the trial. In each case, the evidence of the missing witness was read as his evidence. In the Privy Council, Lord Griffiths giving the judgment of the Board in effect summarised the common law. He underlined the discretion of the judge h to exclude such evidence. However he pointed out ([1989] 2 All ER 305 at 312–313, [1989] AC 1242 at 1259):

> 'If the courts are too ready to exclude the deposition of a deceased witness, it may well place the lives of witnesses at risk particularly in a case where only one witness has been courageous enough to give evidence against the j accused or only one witness has had the opportunity to identify the accused.'

[18] Lord Griffiths continued by indicating a number of precautions which could be taken, adding:

> 'no rules can usefully be laid down to control the detail to which a judge should descend in the individual case . . . This much however can be said,

that neither the inability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion.'

At common law this approach is unremarkable. In *R v Dragic* [1996] 2 Cr App R 232 at 239 Lord Taylor CJ, dealing with a case in which a witness was too ill to give oral evidence, observed:

'the fact that there is no ability to cross-examine, that the witness who is absent is the only evidence against the accused and that his evidence is identification evidence is not sufficient to render the admission of written evidence from that witness contrary to the interests of justice or unfair to the defendant, *per se*. What matters, in our judgment, is the content of the statement and the circumstances of the particular case . . .'

So *Scott v R*, and *R v Dragic* provide examples of cases where notwithstanding the clear disadvantages faced by the defendant, evidence of critical prosecution witnesses was adduced in statement form.

[19] The deployment of such evidence without the opportunity of cross-examination has recently been addressed in the context of the jurisprudence of the European Court of Human Rights in *R v Sellick* [2005] EWCA Crim 651, [2005] 1 WLR 3257 and *R v Al-Khawaja* [2005] EWCA Crim 2697, [2006] 1 All ER 543, [2006] 1 WLR 1078.

[20] The express language of art 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) provides that:

'Everyone charged with a criminal offence has the following minimum rights . . . to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him . . .'

Nevertheless in *R v Sellick*, exercising his powers under ss 23 and 26 of the 1988 Act, and subject to s 28 and Sch 2, the judge gave leave for the written statements of four witnesses for the prosecution to be read to the jury as their evidence. The conviction was challenged on the basis that the order deprived the defendants of an adequate opportunity to challenge their evidence. As the judgment recalls, reliance was placed on a decision of the European Court in *Lucà v Italy* (2003) 36 EHRR 807 at 815–816 (para 40) where the court observed:

'. . . it may prove necessary in certain circumstances to refer to depositions made during the investigative stage . . . If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Art.6(1) and (3)(d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Art.6.'

One of the main submissions in *R v Sellick* was that the statements were indeed the decisive or sole evidence against the appellants. Accordingly, permission to

read the statements should not have been given. Save that it arises in the context of anonymous witnesses rather than the reading of a witness statement, this is the essential argument for the present appellants.

[21] In the course of a detailed analysis of eight decisions of the European Court, Waller LJ commented ([2005] 1 WLR 3257 at [36], [37]):

> '. . . If a defendant, through fear, keeps a witness away from an English trial, then it is, as it would seem to us, the defendant who is depriving himself or herself of the right and the only right that the defendant has to examine that witness. How, we ask rhetorically, can it be said to be an infringement of the defendant's article 6 rights for him to deprive himself of that opportunity?
>
> [37] . . . the question whether article 6 has been infringed is very fact sensitive. Despite that fact-sensitivity, certain general principles have been stated from time to time . . . There is, however, no case as far we know where the Strasbourg court has actually had to deal with a key witness being kept away by fear by a defendant from a trial in the English jurisdiction.'

[22] After examining the authorities, Waller LJ suggested (at [50]) that four propositions could be discerned. After summarising them, he turned (at [51]) to the question whether there was a fifth proposition—

> 'to the effect that where the circumstances would otherwise justify the reading of the statement where the defendant has had no opportunity to question the witness at any stage of the trial process, the statement must not be allowed to be read if it is the sole or decisive evidence against the defendant . . .'

He reminded himself of the passage in *Lucà v Italy*, and other authorities in the European Court, which lent support to the proposition that if witness statements were read, then if they were the sole or decisive evidence, a breach of art 6 of the convention would be established. However, he concluded on examination that although the court undoubtedly had 'extreme circumstances in mind', neither in *Lucà v Italy*, nor any of the other authorities, was the European Court directly engaged with a case where the witness 'whose identity was well known to [the] defendant, was being kept away by fear'.

[23] The court posed itself this question (at [52]):

> 'If the European court were faced with the case of an identified witness, well known to a defendant, who was the sole witness of a murder, where the national court could be sure that that witness had been kept away by the defendant, or by persons acting for him, is it conceivable that it would hold that there were no "counterbalancing" measures the court could take which allow that statement to be read . . .'

Waller LJ addressed the problem, first, on the basis that the court was sure that the defendant 'denied himself the opportunity of examining the witnesses'. If so, he could not complain of an infringement of art 6(3)(d) provided precautions were taken to ensure the fairness of the trial process. Even if the situation were not quite as clearly established to the court's satisfaction, he suggested (at [53]):

> '. . . In our view, having regard to the rights of victims, their families, the safety of the public in general, it still cannot be right for there to be some absolute rule that, where compelling evidence is the sole or decisive evidence, an admission in evidence of a statement must then automatically

lead to a defendant's article 6 rights being infringed. That would lead to a situation in which the more successful the intimidation of the witnesses, the stronger the argument becomes that the statements cannot be read. If the decisive witnesses can be "got at" the case must collapse. The more subtle and less easily established intimidation provides defendants with the opportunity of excluding the most material evidence against them. Such an absolute rule cannot have been intended by the European court in Strasbourg.'

[24] In *R v Al-Khawaja* [2006] 1 All ER 543, [2006] 1 WLR 1078, the sole witness to an indecent assault died, after she had made a statement for use by the prosecution. Without her statement, the prosecution would have been obliged to abandon the allegation of indecent assault on her. The statement was admitted in evidence and the appellant was convicted. The argument in the appeal relied strongly on *Lucà v Italy*. The appeal was dismissed. After examining the decision in *R v Sellick*, the court concluded that there was a strong public interest in the admission of the statement made by the witness prior to her death. Although the public interest could not be 'allowed to override the requirement that the defendant have a fair trial', the court did not consider that the decisions of the European Court required the inevitable conclusion that in the circumstances which obtained in *R v Al-Khawaja*, the trial was unfair:

'. . . The provision in art 6(3)(d) that a person charged shall be able to have the witnesses against him examined is one specific aspect of a fair trial: but if the opportunity is not provided, the question is "whether the proceedings as a whole, including the way in which evidence was taken, were fair" (see [*Doorson v Netherlands*] (1996) 22 EHRR 330 at 358 (para 67) . . .' (See [2006] 1 All ER 543 at [26], [2006] 1 WLR 1078.)

ANONYMITY OF WITNESSES

[25] We can now come to the specific problem which arises in the present appeals, non-disclosure of the true identity of witnesses, together with voice modulation and screens, usually summarised as witness anonymity. The disadvantages for the defendant are not identical to the disadvantages created when cross-examination is not available. We gratefully adopt as illustrative of common law principle, as well as Strasbourg jurisprudence, the analysis in *Kostovski v Netherlands* (1990) 12 EHRR 434 at 448 (para 42):

'. . . If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.'

[26] These disadvantages are immediately ameliorated provided the defendant retains, as he normally does, the ability of his counsel to pursue a substantial degree of cross-examination of the witnesses before the jury. This familiar safeguard, directly reflected in art 6(3)(d) of the convention, is reinforced by another with which we are equally familiar in this jurisdiction, but which perhaps needs emphasis, the proper discharge of the prosecution's obligations in

relation to disclosure of material which may assist the defence or damage the prosecution case, and in particular which may serve to undermine the creditworthiness of the anonymous witness. We simply add, for completeness, that in broad terms the same considerations would apply to witnesses called by or on behalf of the defendant. In the Davis appeal, we heard evidence from an anonymous witness, described as 'Tony Pink', not his real name, called on behalf of the appellant, not the Crown. As we shall describe, there were a number of profoundly unsatisfactory aspects of his evidence, but the basis on which he asked to be allowed to give his evidence anonymously was his own genuine fear of the consequences if his identity became known.

[27] There is clear jurisdiction at common law to admit incriminating evidence given against the defendant by anonymous witnesses (see *R v Watford Magistrates' Court, ex p Lenman* [1993] Crim LR 388, *R v Taylor* [1995] Crim LR 253, and *R v Jack* (7 April 1998, unreported)). In *Re Al-Fawwaz, Re Eiderous* [2001] UKHL 69, [2002] 1 All ER 545, [2002] 1 AC 556, in extradition proceedings, the decision of the examining magistrate to receive evidence of two anonymous witnesses in support of the allegation of terrorism was upheld in the House of Lords. In *R (on the application of D) v Camberwell Green Youth Court, R (on the application of DPP) v Camberwell Green Youth Court* [2005] UKHL 4, [2005] 1 All ER 999, [2005] 1 WLR 393, in the context of s 21 of the 1991 Act, the principle was again affirmed in the House of Lords. It may therefore be wondered why we should examine the jurisprudence of the European Court of Human Rights, on which so much of the argument on behalf of the appellants depended. The point, simply expressed, is that to a significant extent in the Davis appeal, but not on close analysis to any extent at all in the Ellis appeal, the conviction was based on evidence given by anonymous witnesses.

THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE

[28] We begin by noting the argument for Al-Fawwaz, presented by Mr Edward Fitzgerald QC. Basing himself on art 6 of the convention, he contended that it was 'fundamentally unfair' for the evidence of an anonymous witness to be accepted. He pointed out that the subject of an extradition request 'is entitled to challenge the credibility of a prosecution witness before the magistrate', adding, that in the United States of America, his anonymity would not be preserved at trial. We understand this to follow from the Sixth Amendment to the United States Constitution which, in 1791, provided the defendant in a criminal trial with the right 'to be confronted with the witnesses against him'. Mr Fitzgerald also argued that reliance on 'anonymous statements as sufficient evidence to found a conviction' violated art 6(3)(d) of the convention. He drew attention to and relied on *Kostovski v Netherlands*. He also submitted that there was a breach of the principle of fairness which applied by virtue of art 5(4) of the convention. In further argument the attention of the House of Lords was also directed to *Doorson v Netherlands* (1996) 22 EHRR 330 and *Fitt v UK* (2000) 30 EHRR 480.

[29] In the context of witness anonymity three rights protected by the convention are engaged. Articles 2 and 8 are closely related to the rights, among others, of witnesses, and art 6 is specifically concerned with the protection of the defendant's right to a fair trial. Article 2 provides that the right to life 'shall be protected by law', and art 8 requires respect to be paid to the private and family life of every individual.

[30] The starting point is art 2 which imposes a positive obligation on the state to take appropriate steps to safeguard the lives of those within its jurisdiction. In *Osman v UK* (1998) 5 BHRC 293 at 321 (para 116), the court suggested that the authorities should—

> 'do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.'

When a witness's fear for his own life or for that of a member of his family is justified, the state's obligation to take positive steps to safeguard them is engaged. Indeed, the proper administration of justice requires that witnesses should not be exposed to danger or retribution for coming forward, in accordance with their duties as citizens, to offer and give evidence. When they do, the right to respect for private and family life under art 8 is also engaged. One available protective measure is witness anonymity, supported by voice modulation and screens, which, provided the witness can be examined by or on behalf of the defendant, is not prohibited by any express words in art 6.

[31] As far as we can discover, the only case which has reached the European Commission of Human Rights from the United Kingdom, on what we can fairly describe as the anonymity issue (*X v UK* (1993) 15 EHRR CD 113) was dismissed as manifestly ill-founded and is of no assistance. In the remaining 'anonymity' cases, arising from proceedings in civil law jurisdictions as far as we can discern, statements were obtained from anonymous witnesses who were not examined by or on behalf of the person charged at the hearing at which guilt or innocence was determined; and sometimes, indeed, at none of the stages in the proceedings. In *Kostovski v Netherlands* (1990) 12 EHRR 434 the applicant was convicted of armed robbery after a trial before the district court on the basis of the evidence of two anonymous witnesses who provided statements to the police which incriminated him. One confirmed the truth of his statement before an examining magistrate. Under Dutch law, only that statement was evidence in the case. Neither the applicant nor his legal advisers was present when the statements were made. Neither witness was called at the trial. Evidence was given by the examining magistrates, and one of the police officers who had interviewed the witnesses, to the effect that they had created a favourable impression upon them. Dutch procedure did not permit the defence to ask them questions designed to test the credibility of the anonymous witnesses. It was conceded that the applicant's conviction was based 'to a decisive extent' on the anonymous statements (see para 44).

[32] The court observed (at 448 (para 41)) that—

> 'As a rule these rights [ie the rights under art 6] require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.'

The observation plainly admits of exceptions to the express rights provided in art 6, but as the witnesses could not at any stage be directly questioned by the applicant or on his behalf, their anonymity 'compounded the difficulties facing the applicant'. In the circumstances, the court concluded that the applicant had not received a fair trial.

[33] In *Windisch v Austria* (1991) 13 EHRR 281, the applicant was convicted of burglary and sentenced to three years' imprisonment by the Innsbruck Regional Court. The evidence against him consisted largely of two statements made by anonymous witnesses to the police. The court heard evidence from the police officers, but not from the witnesses. Despite repeated requests, neither the applicant nor his advocate was allowed an opportunity to examine them (see 286 (para 27)). The court held that the applicant had not received a fair trial.

[34] *Lüdi v Switzerland* (1993) 15 EHRR 173 was very similar. The applicant was convicted of a drug trafficking offence and sentenced to three years' imprisonment by the Laufen District Court. The evidence against him consisted mainly of a report by an anonymous undercover agent and transcripts of telephone intercepts of calls between the agent and the applicant. Neither the applicant nor his advocates were given the opportunity directly to question the agent. They wished to demonstrate the extent to which the applicant had been induced or entrapped to commit the offence. The court held that the rights of the defence were restricted to such an extent that the applicant did not have a fair trial. Significantly, it observed (at 201 (para 49)):

> 'Yet it would have been possible to do this in a way which took into account the legitimate interest of the police authorities in a drug trafficking case in *preserving the anonymity of their agent*, so that they could protect him and also make use of him again in the future.' (My emphasis.)

In short, in each of these three decisions, the trial was unfair, not because important witnesses gave evidence anonymously, but because in addition to giving their evidence anonymously, the entitlement to cross-examine was denied. Of itself, it was not suggested that the preservation of witness anonymity made the trial unfair.

[35] In *Doorson v Netherlands* (1996) 22 EHRR 330, the need to take into account the right to life of the witness under art 2 and to family and private life under art 8, when assessing the fairness of a trial under art 6 was expressly taken into account. In complex proceedings before the Amsterdam Regional and Appellate Courts, the applicant was convicted of drug trafficking and sentenced to 15 months' imprisonment, and his appeal against conviction was rejected. His conviction was based in significant part upon the statements of two anonymous witnesses, who were questioned by the investigating judge, in the absence of the applicant's advocate. They were not available to be questioned at the trial. They were questioned by the applicant's advocate at the appeal hearing, which rectified the lack of opportunity to question them earlier. The court observed (at 358 (para 70)):

> 'It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.'

[36] The court approved as 'a relevant reason to allow them anonymity' the need to obtain evidence from them, while at the same time protecting them against the possibility of reprisals. Although there was no evidence that the applicant himself had threatened the witnesses, the court stated that 'Regard must be had to the fact, as established by the domestic courts and not contested by the applicant, that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them' (see para 71). The court added (at 359 (para 72)):

> 'The maintenance of the anonymity of the witnesses Y 15 and Y 16 presented the defence with difficulties which criminal proceedings should not normally involve. Nevertheless, no violation of Article 6(1) taken together with Article 6(3)(d) of the Convention can be found if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities.'

The court decided that the questioning of the anonymous witnesses at the appeal stage by counsel was a sufficient 'counterbalancing' procedure.

[37] Mr Malcolm Swift QC, counsel for Davis, and Mr Nigel Rumfitt QC, on behalf of Ellis, underlined the passage at 360 (para 76), echoing *Lucà v Italy* that:

> 'Finally, it should be recalled that, even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements.'

[38] In this part of the judgment, the language used by the court (at least in its English version) is ambiguous: 'anonymous statements' may mean statements made otherwise than in evidence at trial; or it may extend to anonymous evidence given at trial. The fact that the court contemplated the preservation of anonymity in *Lüdi v Switzerland* suggests that the latter was not in mind. We shall return to this point shortly. For the moment, we record that the essential question for the court was whether the proceedings were unfair. Notwithstanding the significance to the conviction of the evidence of the two anonymous witnesses, in *Doorson v Netherlands* the conclusion was that they were not.

[39] In *van Mechelen v Netherlands* (1997) 2 BHRC 486 the applicants were convicted of attempted manslaughter and robbery and sentenced to 10 years' imprisonment by the s-Hertogenbosch Regional Court. The only evidence positively identifying the applicants as perpetrators of the crime was provided by statements of anonymous police officers, who were never questioned by or on behalf of the applicants before their conviction. On appeal the court ordered that an opportunity should be given for the applicant's lawyers to question the police officers under the supervision of an investigating judge. The investigating judge, the witness and a registrar were present in one room, the defendants, their lawyers and the advocate general in another. The two were connected by a voice-only link. Questions were asked and answered through this link. The defence were unaware of the identity of the police witnesses, and were unable directly to test their reliability.

[40] The court observed (at 503 (para 56)) that 'the balancing of the interests of the defence against arguments in favour of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the

police force of the state'. It noted that their interests, and those of their families, deserved protection under the convention, adding that 'it must be recognised that their position is to some extent different from that of a disinterested witness or a victim', because they owe a general duty of obedience to the state's executive authorities and have links with the prosecution and can expect that their duties will involve giving evidence in open court. That said, the court acknowledged that, provided the rights of the defence were respected, preservation of the anonymity of an undercover agent may be necessary for his own and his family's protection, and so as not to impair his usefulness for future operations. '[A]ny measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied' (see para 58). The court stated (at 504 (para 60)):

> 'It has not been explained to the Court's satisfaction why it was necessary to resort to such extreme limitations on the right of the accused to have the evidence against them given in their presence, or why less far-reaching measures were not considered.'

The measures identified by the court included disguise and the prevention of eye contact, both of which would have improved the prospect of successful concealment of the identity of the witnesses.

[41] The court was unpersuaded that sufficient effort had been made to assess the threat of reprisals against the police officers or their families. In those circumstances, the court held that the right to a fair trial under art 6 had been infringed. The court also 'recalled that a conviction should not be based either solely or to a decisive extent on anonymous statements' (see 503 (para 55)), commenting (at 504 (para 63)), in a passage, understandably relied on here by the appellants:

> 'Moreover, the only evidence relied on by the Court of Appeal which provided positive identification of the applicants as the perpetrators of the crimes were the statements of the anonymous police officers. That being so the conviction of the applicants was based "to a decisive extent" on these anonymous statements.'

Again, in the English text, the reference to 'statements' is ambiguous. In the French text, it is not. In the first sentence, the word used is 'déclarations' In the second sentence, it is 'dépositions'. Taken together with the suggestion that the protective measures went much further than necessary and that steps could have been taken to conceal the identities of the witnesses, it appears that the objectionable feature of the proceedings was not anonymity as such, but reliance on inadequately tested depositions.

[42] In *Visser v Netherlands* [2002] ECHR 26668/95 the applicant was convicted, in April 1991, on appeal, of a kidnapping committed in 1988 (having been acquitted at the Utrecht Regional Court in June 1989). The foundation of his conviction was an identification made to police officers by an anonymous witness, one of a number of people who had made inquiries about the whereabouts of the victim before the kidnapping. At that stage the witness had not been examined before the court. On further appeal to the Supreme Court, that court directed that the witness be heard by an investigating judge. That was done in September 1993. The witness reaffirmed his wish to remain anonymous. The judge and the witness were in one room. Counsel for the applicant was permitted to submit questions, from another room, in writing, to him and to

submit further questions when the witness's statement had been made. At no stage did he have the opportunity to question him directly or to observe his demeanour. In reliance on this evidence, the Court of Appeal convicted him afresh.

[43] In 2002 the European Court held that the applicant's art 6 rights had been infringed. It reminded itself of—

> 'its rulings in a series of cases concerning reliance on witness testimony which was not adduced before the trial court that art 6(3)(d) only required the possibility to cross-examine such witnesses in situations where this testimony played a main or decisive role in securing the conviction . . .' (See para 45.)

The reason for holding that the applicant's rights were violated was that the investigating judge had not assessed the reasonableness of the witness's fear in 1988 or in 1993. No adverse finding based on the applicant's claim that his conviction was based to a decisive extent on 'the anonymous testimony' was made.

[44] We note *Birutis v Lithuania* [2002] ECHR 47698/99, when the court dealt with a now familiar problem: the conviction of an applicant on the basis of anonymous statements which were not tested by examination at trial. Although the court criticised the means adopted by the authorities 'in handling the anonymous evidence', the decision provides no assistance in determining the circumstances in which the evidence of an anonymous witness, given in person at trial, may be relied on.

[45] In *PS v Germany* (2003) 36 EHRR 61 the applicant was convicted of sexual abuse of a child. The evidence against him consisted of a statement made by the child's mother about what her daughter had told her, and evidence by a police officer who had questioned the daughter shortly after the offence. The daughter was not available to be questioned by the court or on behalf of the defendant. On appeal, the regional court ordered a psychological assessment of the daughter's credibility. The expert reported that her statements were credible. Her parents refused to bring her to the appeal court for questioning. The appeal was dismissed.

[46] The European Court noted that these procedures could not 'be considered as having enabled the defence to challenge the evidence of (the daughter), reported in Court by third persons, one of them a close relative' and accordingly held that there had been a violation of art 6.

[47] The court said (at 1143–1144 (paras 21–24)):

> 'All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage.'

In passing, we observe that this was a plain acknowledgment of permissible exceptions to the entitlements under art 6(3)(d), and that the absence of an opportunity to cross-examine an incriminating witness would not, of itself, constitute an unfair trial. The court continued:

'22. In appropriate cases, principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of a person are at stake, or interests coming generally within the ambit of Art.8 of the Convention.

23. However only such measures restricting the rights of the defence which are strictly necessary are permissible under Art.6. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.

24. Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Art.6 . . .'

[48] The last paragraph appears to clarify the ambiguity inherent in the use of the phrase 'anonymous statements' in some of the earlier decisions. The specific concern was the absence of a proper opportunity for the defence to examine, or have examined, the witness who made an incriminating, and effectively decisive, deposition, rather than the fact that the witness giving evidence critical to the conviction remained anonymous.

[49] The court used less restrictive language in its most recent reported (but not as yet final) decision, *Krasniki v Czech Republic* App No 51277/99 (28 February 2006, unreported). The applicant was convicted of retail drug trafficking on the evidence of two anonymous witnesses, 'Jan' and 'Jana'. Both were questioned during pre-trial investigations by the police and a defence lawyer. At the trial before the district court in Teplice, 'Jan' was questioned by the presiding judge, outside the court room and out of sight of the applicant and his counsel. They were only able to put questions through the presiding judge. 'Jana' could not be found and her statement was read. The applicant was convicted. His conviction was based solely on the evidence of the anonymous witnesses. The court reminded itself of its case law (*Doorson v Netherlands* and *van Mechelen v Netherlands*). It could not determine from the case file how the investigating officer or the trial judge assessed the reasonableness of the personal fear of the witnesses vis-á-vis the applicant and that, in effect, meant that the protective measures were not apparently justified. The conviction was based solely or to a decisive extent on the 'anonymous testimonies', but as we have seen, without direct cross-examination on the defendant's behalf of one crucial witness, and no cross-examination at all of the second crucial witness.

[50] This unavoidably lengthy review of the decided cases underlines the need to identify precisely the 'evidence' under consideration by the European Court when the issue of anonymous witnesses was being addressed. The 'evidence' may be 'depositions', a seemingly clear reference to out of court statements, 'statements' and 'declarations', words which are potentially ambiguous, and 'testimonies', apt to describe evidence actually given at a trial. It is also noteworthy however, that whenever the issues of witness anonymity arise, the European Court refers back to its two seminal decisions, *Doorson v Netherlands* and *van Mechelen v Netherlands*. Later cases appear to be no more than an application of established principles.

[51] The court accepted that the convention rights of witnesses, included, where necessary, the preservation of their anonymity, and in our judgment

decided that the concealment of the identity of witnesses is not inconsistent with the right to a fair trial, provided, first, the need for anonymity is clearly established, second, that cross-examination of the witness by an advocate for the defendant is permitted, and finally, the ultimate test, that the trial should be fair. In agreement with the decision in *R v Sellick* [2005] 1 WLR 3257, but applying it to the problem of anonymous witnesses in justifiable and genuine fear, whose testimony can be tested in the adversarial process, we do not accept that the jurisprudence of the court leads to the conclusion that the trial will inevitably be considered unfair, and the conviction unsafe, simply because the evidence of the anonymous witnesses may be decisive to the outcome. *R v Sellick* addressed the problem raised by the deprivation of an express right provided by art 6. That does not apply in the context of anonymous witnesses whose evidence may be tested by examination at trial. It may be, but we need not decide, more troublesome to permit a conviction to depend to a decisive extent on evidence admitted in direct contradiction of what would otherwise be an express convention entitlement than it would if the admission of the evidence did not contravene any such right, but in the final analysis, any discussion about that distinction may be less important than a close examination whether the trial overall was a fair one. That, as all the jurisprudence demonstrates, is the absolute fundamental (see *Doorson v Netherlands*), and the question whether, looked at overall the trial is unfair is, as the detailed factual judgments from the court show, fact specific.

ENGLAND AND WALES

[52] We can now return to the decision of the House of Lords in *Re Al-Fawwaz, Re Eiderous* [2002] 1 All ER 545, [2002] 1 AC 556 which, as we remind ourselves, had the advantage of argument in which attention was drawn to the decision of the European Court in *Kostovski v Netherlands*, and *Doorson v Netherlands*.

[53] Lord Slynn of Hadley observed (at [44]) that:

> '... It is obvious that at trial ... the court should be cautious about admitting anonymous statements or affidavits. But that there is jurisdiction to admit them is clear. On the basis of what was said in [*R v Taylor (Gary)* (1994) Times, 17 August], and by the European Court of Human Rights in *Doorson v Netherlands* (1996) 22 EHRR 330, both for the purposes of the [convention] and the purposes of considering whether the legal proceedings have been fairly conducted at common law, there may have to be a balance of the interests of the defence and of the protection of witnesses. It seems to me that the magistrate and the Divisional Court considered this matter carefully and were satisfied that the protection of the witness ... made it necessary in all the circumstances to preserve his anonymity and that the interests of society in prosecuting required that the evidence be taken into account ...'

[54] Lord Hutton examined the judgment of this court in *R v Taylor (Gary)* (1994) Times, 17 August, and considered *R v X* (1989) 91 Cr App R 36 and *R v Watford Magistrates' Court, ex p Lenman* [1993] Crim LR 388. He suggested that there was a degree of inconsistency between the analysis of principle in *R v Taylor (Gary)* and the judgments in *R v X* and *Ex p Lenman*, pointing out that notwithstanding the importance to the process of the accused knowing the identity of his accuser, there were cases in which the balance of fairness might

come down in favour of the prosecution 'notwithstanding that the circumstances could not be described as rare and exceptional' (see [2002] 1 All ER 545 at [86], [2002] 1 AC 556).

[55] Lord Rodger of Earlsferry directly addressed the observations of the European Court in *Doorson v Netherlands*, and concluded that the use of the evidence of anonymous witnesses was not, under the jurisprudence of the European Court itself, invariably to be treated as incompatible with convention rights. He also drew attention to *Fitt v UK* (2000) 30 EHRR 480 at 510–511 (para 45), where it was pointed out that:

> 'In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.'

[56] When the House of Lords returned to the issue of witness anonymity in *R (on the application of D) v Camberwell Green Youth Court* [2005] 1 All ER 999, [2005] 1 WLR 393, in the context of the statutory provisions which enable child witnesses to give evidence by video recorded interview and live television link, attention was drawn to decision of the European Court in *Kostovski v Netherlands* (1990) 12 EHRR 434, *Doorson v Netherlands* (1996) 22 EHRR 330, *van Mechelen v Netherlands* (1997) 2 BHRC 486 and *Visser v Netherlands* [2002] ECHR 26668/95. After reviewing these and other authorities, Lord Rodger explained ([2005] 1 All ER 999 at [10], [11]) that the distinction in the popular mind between the British and continental systems of criminal justice was sufficiently accurate—

> 'to make one anticipate that the introduction of art 6(3)(d) will not have added anything of significance to any requirements of English law for witnesses to give their evidence in the presence of the accused.
>
> [11] An examination of the case law of the European Court of Human Rights tends to confirm that much of the impact of art 6(3)(d) has been on the procedures of continental systems which previously allowed an accused person to be convicted on the basis of evidence from witnesses whom he had not had an opportunity to challenge.'

Thereafter, after considering the process by which the defendant could challenge and question witnesses giving incriminating evidence against him, Lord Rodger suggested (at [12]) that the overall impact of the decisions of the European Court was—

> 'that the defence should have an adequate and proper opportunity to challenge and question a witness on his statement at some stage. The requirements of the convention are satisfied even if that opportunity is afforded before trial . . .'

Reflecting on the impact of the Sixth Amendment of the Constitution of the United States, he observed (at [14]):

'. . . whatever its merits, this line of thought never gave rise to a corresponding requirement in English law . . .

[15] Nor has art 6(3)(d) of the convention been interpreted as guaranteeing the accused a right to be in the same room as the witness giving evidence. What matters, as *Kostovski*'s case shows, is that the defence should have a proper opportunity to challenge and question the witnesses against the accused . . . these requirements can be satisfied even where, for good reason, the accused is not physically present at the questioning . . .'

[57] Baroness Hale of Richmond underlined that a face-to-face confrontation between the defendant and the witnesses against him was not obligatory, and in the context of anonymous witnesses, she added (at [49]):

'. . . Even then the Strasbourg Court has accepted that exceptions may be made, provided that sufficient steps are taken to counterbalance the handicaps under which the defence laboured and a conviction is not based solely or decisively on anonymous statements . . .'

In context, this observation appears to reflect the concerns expressed by the European Court about the dangers of over-reliance on statements by anonymous witnesses, where the defendant, or his advocate, has no opportunity for cross-examination.

[58] Thus the House of Lords has now twice addressed the issue of anonymous witnesses in the light of the decisions of the European Court. In our view it would be quite unrealistic to consider that the observations of the House of Lords in *Re Al-Fawwaz* [2002] 1 All ER 545, [2002] 1 AC 556, arising in the context of extradition proceedings, and *R (on the application of D) v Camberwell Green Youth Court* [2005] 1 All ER 999, [2005] 1 WLR 393, in which the use of 'special measures' introduced by statute was under consideration, should, for the purpose of considering witness anonymity problems arising in the Crown Court when the statutory 'special measures' provisions do not apply, be treated as obiter dicta.

[59] The principle of judicial precedence requires us to apply the reasoning of the House of Lords. (See *Lambeth London BC v Kay, Leeds City Council v Price* [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 WLR 570.) In any event, we can detect no conflict between the decisions of the European Court and the observations of the House of Lords on the issue of witness anonymity. In our judgment the discretion to permit evidence to be given by witnesses whose identity may not be known to the defendant is now beyond question. The potential disadvantages to the defendant require the court to examine the application for witness anonymity with scrupulous care to ensure that it is necessary and that the witness is indeed in genuine and justified fear of serious consequences if his true identity became known to the defendant or the defendant's associates. It is in any event elementary that the court should be alert to potential or actual disadvantages faced by the defendant in consequence of any anonymity ruling, and ensure that necessary and appropriate precautions are taken to ensure that the trial itself will be fair. Provided that appropriate safeguards are applied, and the judge is satisfied that a fair trial can take place, it may proceed. If not, he should not permit anonymity. If he does so, and there is a conviction, it is not to be regarded as unsafe simply because the evidence of anonymous witnesses may have been decisive.

[60] Among the safeguards, first, is the decision of the trial judge whether to exercise his discretion to allow some or all the witnesses against to the defendant to give their evidence anonymously. If the only evidence against the defendant consists of wholly unsupported anonymous witnesses, whose evidence is demonstrably suspect, the judge may decide, as Hughes J did in *R v Bola*, that the Crown should not adduce it. Again, if the decisive evidence comes from an unidentified witness who cannot be cross-examined (for example, anonymous witnesses whose evidence was admitted in documentary form only, and who will not be called to give oral testimony), the judge may decide that the evidence should not be admitted. As we emphasise, these are issues for judicial decision in case specific situations, after allowing for the disclosure process, any public interest immunity (PII) decisions, and the ability to cross-examine together with the deployment of material helpful to the defendant in the course of cross-examination, or even when cross-examination may not be possible. For example, the judge may be satisfied that a wholly independent, understandably terrified witness, a stranger to the defendant, and with no possible motive to implicate him, may have made a note of a crucial car number plate at the scene of the crime, If satisfied that this witness is indeed independent, but unfit to give live evidence, the judge may admit his or her evidence, anonymously, and in statement form.

[61] At the end of the prosecution case, the judge may decide that it would be unsafe for the evidence of the anonymous witnesses to be considered further by the jury, or indeed, that the case as a whole should be withdrawn from their consideration. We are not seeking to formulate a scheme, merely to identify appropriate safeguards currently in place to ensure the fairness of the trial. Thereafter, if the case is fit to go to the jury, when the evidence is concluded, and to enable the jury properly to approach its task, the judge must give appropriate directions in his summing up, sufficient to identify the particular disadvantages under which the defence may have been labouring. (for examples of what may or may not be appropriate, see *R v Sellick* [2005] 1 WLR 3257 and *R v Al-Khawaja* [2006] 1 All ER 543, [2006] 1 WLR 1078, referring to *R v McCoy* (10 December 1999, unreported)). The judge would probably suggest that the jury should consider whether there is any independent, supporting evidence, tending to confirm the credibility of the anonymous witnesses, and the incriminating evidence they have given. We are not reinstating outdated principles relating to corroboration, nor implying that such independent evidence is a pre-requisite to conviction. We are simply reflecting the obvious consideration that independent evidence consistent with the defendant's guilt would be likely to increase confidence in the truthfulness and accuracy of incriminating anonymous witnesses. We should perhaps finally underline that these appeals themselves demonstrate the effectiveness of the safeguards. As we shall see, in the context of the Davis appeal, the defendant in a linked trial, Harvey, was acquitted by the jury after anonymous witnesses gave evidence incriminating him, and in the Ellis appeal, the cross-examination of the anonymous witnesses wholly undermined their evidence.

THE ROLE OF THE COURT OF APPEAL, CRIMINAL DIVISION

[62] The decision whether to allow witnesses to give evidence anonymously is made by the trial judge. When coming to his decision, he will usually be acting in anticipation of the evidence as a whole, and certainly in advance of the evidence of the proposed anonymous witness. As we have explained, it is clear

that the trial judge is vested with what is described as discretion to make the order. In truth, he is making a judgment whether, in all the circumstances of the specific case, some of which will already have been identified, and some of which have to be anticipated, that the trial process, viewed as a whole would be fair, and fair to what Lord Steyn described in *A-G's Ref (No 3 of 1999)* [2001] 1 All ER 577 at 584, [2001] 2 AC 91 at 118 as the 'triangulation of interests . . . the position of the accused, the victim and his or her family, and the public'. In short, a case specific decision is required.

[63] In this constitution we have recently addressed the principles relating to the exercise of the trial judge's discretion under s 78 of the Police and Criminal Evidence Act 1984. For reasons connected with an on-going trial, publication of that judgment as a whole has been postponed until the conclusion of the trial itself. However, on the basis of the elementary principle at common law summarised in the 'birthright' of the defendant to a fair trial, and repeated in art 6 of the convention, we observed:

> 'Trial judges should not admit evidence if notwithstanding the robust safeguards provided by the trial process itself, the effect of doing so would produce a trial which could properly be stigmatised at its end as an unfair trial. If this court were satisfied that the admission of the evidence would or did produce an unfair trial, the decision to admit it would not be upheld'

[64] In short, adapting those observations to the issues in the present appeals, the first question is whether the court should interfere with the judgment of the trial judge to allow for witness anonymity. In most cases, as that involves a balance to be drawn between conflicting factors in a fact-specific situation this court will not interfere with the judge's decision unless, at the time when he made it, it was plainly wrong. However, once leave to appeal is given, it may not be sufficient for the court to dispose of the appeal on the basis that there are no grounds to justify interfering with a decision made by the judge at the time when he made it. After conviction, on appeal, this court may conclude that the order for witness anonymity had the effect of producing what in all the circumstances was an unfair trial. If so, even if the original decision of the trial judge would not be open to criticism, the conviction would be unsafe, and it would be quashed. To highlight this point, we note that the decision of Goldring J in the Ellis trial to permit witness anonymity was itself the subject of an unsuccessful appeal. In a constitution presided over by Rose LJ, the Vice President, this court upheld his decision. We are bound by the decision, and should not and cannot interfere with the exercise of Goldring J's discretion. Leave to appeal having been given after conviction, a careful investigation of the fairness of the trial and the safety of the convictions in the Ellis appeal is required. That is what has taken place.

COUNSEL FOR THE DEFENDANT

[65] These appeals also raised a distinct problem for trial counsel, and the discharge of their duties to the court and their concurrent duties to their clients. Quite apart from the assistance of counsel in both appeals, the General Council of the Bar provided written submissions on the subject for which we were grateful.

[66] Having made orders for anonymity, the trial judges in both cases were content for counsel to be able to see the witness giving evidence, and to observe their demeanour whilst doing so. However, like everyone else in court, counsel were bound by the trial judge's anonymity ruling, and indeed would be in

contempt of court if they disobeyed it. Plainly, if the anonymity of the witness were ordered, it would be wholly inappropriate for counsel to provide his client with a physical description of the witness. The effect of doing so would be to dilute, if not altogether extinguish the effect of the order.

[67] So far, so obvious. The potential conflict arises from the delicate nature of the relationship between counsel and their clients. Again the principles are well understood. Thus in *R v Davis* [1993] 2 All ER 643, [1993] 1 WLR 613 in the context of the disclosure of information imparted to defence counsel in the course of an ex parte application, Lord Taylor of Gosforth CJ concluded (at 647) that counsel could not be required to give an undertaking that he would not reveal to his client or solicitors any information coming into his possession in the course of the ex parte hearing:

> 'It would wholly undermine counsel's relationship with his client if he were privy to issues in court but could reveal neither discussion nor even the issues to his client . . . whatever happens in court with defending counsel present would, in our view, have to be disclosable to his clients.'

(See also *R v Preston* [1993] 4 All ER 638, [1994] 2 AC 130, and *R v Botmeh* [2001] EWCA Crim 2226, [2002] 1 WLR 531.)

[68] In *R v H, R v C* [2004] UKHL 3, [2004] 1 All ER 1269, [2004] 2 AC 134, Lord Bingham of Cornhill underlined (at [22]) the critical importance of the nature of the relationship between client and lawyer, and the need for 'the quality of confidence' between them. This feature was recently emphasised in *R v G* [2004] EWCA Crim 1368 at [13], [2004] 1 WLR 2932 at [13], where Rose LJ identified the inevitable damage to the relationship between the lawyer 'in the know' and the client because—

> 'in addition to preventing frankness and fettering the free flow of information between lawyer and client, the order [would be] likely to nurture in the client a belief that his lawyers are putting other interests . . . above his own. The client's reasonable perception of the relationship is . . . a matter of importance . . .'

[69] This analysis highlights the critical question, how to deal with the potential conflict of duty for counsel bound by order of the court to preserve witness anonymity, and the fulfilment of a proper relationship between him and his client, the defendant.

[70] We cannot provide an answer to every possible combination of circumstances which may arise. Our pragmatic solution to the problems which arise after an order for anonymity is that counsel should identify the issues for his client, and explain the alternatives. The choice is stark, and should be made by the client, on advice. Counsel should inform him that if he, counsel, were able to observe the witness he may be better able to cross-examine him. That is a potential advantage which he would be well able to explain to his client. However, he would also have to explain the pre-condition to such cross-examination, that he could not flout or ignore the order of the court, and could not, at any stage of the trial or afterwards, provide his client with any description of the witness. That, in effect, was what happened in the Ellis trial.

[71] The alternative is that the defendant may nevertheless instruct his counsel that he should not see the witness if the opportunity to do so is subject to the prohibition on disclosure of his identity, or discussion of his physical description, or, as happened in Davis, the defendant instructs counsel that he

should inform him of the appearance of the witness. Alternatively, counsel may believe that the professional relationship with his client would be damaged if he were unable to communicate information which his client wanted from him. In situations like these, the court will order that the anonymous witnesses must be screened from counsel. In this event, again as happened here, counsel for the Crown should be in the same position as counsel for the defendant.

[72] Mr Swift invited us to consider an extreme case, or perhaps more accurately, an example of an extreme case, where counsel for the defendant received express instructions from his client, with a description given by the client of the witness believed by the client to be the prosecution witness against him. Counsel, observing the witness for himself, might very quickly establish from the descriptions, and comparing it with the actual appearance of the witness, that the defendant's belief was completely wrong. What asked Mr Swift rhetorically, should counsel do then? The short answer is that we should expect counsel to ask the court to adjourn into chambers for the problem to be discussed with the judge, and, after hearing both sides, for the judge to give the appropriate ruling. We cannot legislate in advance for all the possible case specific problems which may arise.

[73] We should perhaps add two important footnotes. First, whether or not counsel decides to observe the witness personally, at the trial each member of the jury, as well as the judge, remains able to see and observe the witness for himself. They are also able to hear the unmodulated voices of the witnesses, even if they are mechanically disguised for the defendant and public, as well as counsel. Second, if for reasons similar to those referred to at [71], above, the decision is made that counsel shall not observe the witness, the defendant cannot subsequently make a complaint to this court based on his, or his counsel's rejection of the opportunity to do so. The alternatives are clear, and the defendant has to accept the consequences of his decision, or as in the Davis case, the instructions he has given to counsel.

THE APPEAL OF DAVIS—THE ESSENTIAL FACTS AND CONCLUSION

[74] At the start of the New Year celebrations which culminated in the deaths of Kenton and Mowatt there was no trouble at a well-organised party. At its height some sixty or so people attended. They included the appellant, who was present at the party for a substantial time throughout the evening and indeed even on his own eventual case at trial, until 8.00–8.30 am. Kenton was the disc jockey responsible for the music, and the guests included some of his close friends. Towards morning a little ill temper became apparent and some of the visitors left. At about 8.00 am the organisers decided to bring the party to an end, and the disc jockey was instructed to stop the music, which he did.

[75] The killings occurred at about 9.20 am. The bullet which killed both men was a 7.62 mm Tokarev copper jacketed lead bullet, and the firing marks indicated that it was most likely to have been fired from a Tokarev self-loading pistol. The gun was fired at a close range to Kenton's neck. The bullet was recovered from Mowatt's body. Neither the cartridge case nor the gun was ever recovered.

[76] Obvious confusion was caused by the fact that one shot had caused two deaths. One anonymous witness, a close friend of Kenton, gave evidence about the incident without incriminating the appellant. It gives, and other witnesses gave, alarming evidence about the ease with which the gun came to be used. Towards the end of the party, while a group of friends, including Kenton were

leaving, a man blocked the doorway, saying something to the effect that nobody was going anywhere. Something of a verbal skirmish developed, and Kenton put down the box containing his musical equipment, and asked what was wrong. The man grabbed Kenton round the collar and Kenton grabbed him back. The man tried to throw a punch which missed; Kenton punched him back and struck him, causing the man's head to hit the door of the next flat. This flew open. The man stumbled back. He emerged from the doorway, and stepped forward two paces and fired a shot. The witness did not see how he had come into possession of the gun, but he had reached behind him, and afterwards went straight downstairs. The witness did not see the gun itself, only the flash of the shot. He had not seen the gun before.

[77] The evidence of three of Kenton's friends identified the appellant as the individual who fired the gun. A number of other anonymous witnesses gave evidence which added little, if anything, to the case against him. There was some confusion about the identity of the man who supplied Davis with the gun, and at a later trial, the man alleged by the Crown to have done so, Martin Harvey, was acquitted. It is perhaps worthy of notice that this acquittal followed a trial in which, like the trial with which we are concerned, significant evidence for the prosecution against Martin was given by anonymous witnesses. Of itself this perhaps underlines that the fairness of the trial process, and the ability of the jury to subject anonymous evidence to careful thought and judgment is not destroyed by an order that significant evidence against the defendant may be given by anonymous witnesses.

[78] We need not narrate all the evidence given by the anonymous witnesses. Three of them, known as Richard Heath, Steven Bennett and Cecil Blackburn, gave direct evidence that they actually saw the appellant shoot Kenton. Of the remaining anonymous witnesses one, Susan Jones, was not initially called by the Crown. Huge pressure was exercised by the defence to have her called and much complaint directed at the initial failure or inability of the Crown to do so. Indeed it was argued that the trial could not properly continue if she was not called, and that the jury should be discharged and a retrial ordered. The other anonymous witnesses added nothing of significance to the outcome of the trial.

[79] This forensic position was based on an essential feature of the defence case. In essence it was contended that the appellant was the victim of a corrupt plot to implicate him in these killings when he was, and was known by those who implicated him to be, an innocent man. This plot was said to be organised by a woman called Anthea Smith, a former girlfriend, who was seeking revenge for the break-up of the relationship. In earlier incidents she had thrown a bottle at the applicant's then new girlfriend and sprayed CS gas into his car. In 2001 he had had a one night stand with her, at a time when she had become involved with Richard Heath, and this led Heath to send a man named Delroy round to his partner's address to threaten him with a gun.

[80] At the time when it was thought that the witness Susan Jones could not be found, the woman allegedly responsible for the plot was positively identified to the jury as Anthea Smith. However when Susan Jones was eventually called, she declined to answer questions which might reveal her identity, although the defence maintained, and the jury was asked to consider his case as if she was the witness with a personal grudge against the appellant, an allegation which Susan Jones strongly denied. In the result, notwithstanding the allegation against her, this witness did not give any incriminating evidence against the appellant.

[81] Susan Jones said that she was present at the premises when she heard the gun shot, but she did not see who was responsible for it. That left, if the defence case was correct, a bizarre situation. The individual said to be responsible for the plot to convict the appellant gave no incriminating evidence against him, while the individuals who did incriminate him were very good friends of the deceased, who were undoubtedly present at the scene, and who, with the possible exception of Heath, had no reasons of their own to protect the man actually responsible for his death by implicating a man who was not.

[82] Heath attended the party with his girlfriend, Susan Jones. He denied any personal grievance against the appellant, or, if the man Delroy had ever threatened the appellant, that he was responsible. He denied that he had been told what to say by Susan Jones or that she had arranged for him to be a witness. He also denied that Jones had visited him when he was serving a sentence of imprisonment abroad. Complaint was made about the fact that although the defence was given information about the circumstances of this particular conviction, it was not aware that the crime had been committed abroad, and that the subsequent sentence was served there. In the context which we are considering, the complaint is trivial.

[83] Steven Bennett was asked if he knew Anthea Smith, and said that he was not sure. He did have a friend named Anthea, but did not know if she was at the party. He did not say anything about the appellant being a boyfriend of Anthea. He denied that he was trying to help the family of his friend, Mowatt, identify someone who they, Mowatt's family, believed was responsible. The defence case was that this witness's true name was Hughie Duffers. If he was, the defence sought to make something of the fact that either Heath, or Bennett, or both, were giving untruthful evidence about an incident in which the death of a drug dealer identified as 'Blue', who was shot in 1997 in a drug-related incident, and a link between Anthea and that man. Again, in the overall context of the evidence, this point does not bear the weight suggested by Mr Swift.

[84] We must now turn to further significant features of the evidence, beginning with the appellant's departure from this country shortly after the killing, to Jamaica, and then onwards on to the United States of America, using a false passport in the name of Baldock, stolen in January 2002, and showing a picture of him wearing a beard. In due course he was extradited from the United States. Before his extradition he explained that the reason he had fled England was that he was in fear of his neighbours. On his return, when interviewed, he made no comment. We shall shortly return to the defendant's evidence at trial about the reasons for his departure.

[85] In due course the defence case statement was served. It is an important document, highly material to the decision which the trial judge had to make when considering the possible anonymity of the Crown's witnesses. The relevant part reads that the defendant—

> 'was present during the party at Flat 19, Shore Road, however he at no stage had a gun and was not responsible for the shooting. He believes that the witnesses who purport to identify him are not only wrong but are likely to have a motive to implicate him. The defendant will provide details in the skeleton argument (due 7/4/04) as to the anonymity of the witnesses.'

The statement is silent on the critical issue of alibi which, again, emerged in the appellant's evidence at trial. Equally surprisingly, it was not until after the trial began that the details of the alleged improper motivation were seriously

ventilated. There was no such suggestion in the course of the appellant's interview with the police (where he confined himself to 'no comment') nor in his defence case statement, nor indeed in the defence skeleton argument on the anonymity issue. On the first day of the trial the Crown revealed the difficulties it was having in producing Susan Jones at court. It was only then that her apparent centrality to the defence case, and her alleged motive for orchestrating a conspiracy to pervert the course of justice against him emerged.

[86] We were expressly told by counsel for the Crown that the prosecution were not, and are not, in possession of any information which suggests that the family of either deceased were seeking to 'orchestrate' witnesses in the sense of persuading them to come to court to give false evidence. We were also told that the police investigation team have never been, and at the start of the appeal were not in possession of any information which suggested that any prosecution witness ever had a motive falsely to implicate either Davis, or indeed Harvey, in the murder. All the relevant information available to the police, save that relating to the identity of the witnesses, on any links between them was disclosed to the defence. Finally, it is convenient to record here that in answer to Mr Swift's request for information, we were told that neither before nor during the trial were material rewards sought by the anonymous witnesses, nor offered to any of them by anyone connected to the prosecution.

[87] Before trial the defence were provided with what are described as 'disclosure packages' in relation to each anonymous witness which contained details of all their previous convictions, as well as any links the police were able to discover between each of them and any other prosecution witness, as revealed by a trawl through the HOLMES computer system. In reality there was vast disclosure of relevant material including, for example, a list of all the party-goers who were known to the police, the previous convictions of each prosecution witness, and the identity of all the information available to the police of each and every individual said to be 'implicated' in this shooting. One was the appellant, and the other Harvey, later, as we have seen, acquitted. It is however fair to record that some of the material relevant to anonymity was put before the judge (and the defence) in a somewhat piecemeal way, and Mr Swift suggested that, given the importance to the disclosure process in every trial, but with particular emphasis where an order for witness anonymity was made, this fact, of itself, undermined the safety of the conviction.

[88] When in due course the defendant gave evidence he denied responsibility for the shooting. He said that he had left the party at about 8.00–8.30 am, after saying goodbye to a girl called Cyrona. None of that, and indeed nothing in the defence case statement directly suggested that he was absent from the premises at the time of the shooting. The reason he fled to the United States was quite unconnected with this killing. He was avoiding outstanding proceedings against him for assault, for which he believed a prison sentence would be imposed. These accounts, not previously suggested, were of course was left to the jury to evaluate. It was equally open to the jury reject them on the basis that they were virtually newly minted to bolster an untrue defence.

[89] We must now embark on a more detailed analysis of the disclosure process criticised by Mr Swift. With the encouragement of both sides, we invited the Attorney General to appoint a special advocate to assist us with the issue of disclosure in the context of PII matters raised with Judge Paget in the absence of the defence and which, in the assessment of the special advocate, may give rise to arguable grounds of appeal. The appellant submitted that the appointment of

such an advocate was a particularly important step, since special counsel did not play any part in the PII issues during the trial. In the event, Mr Penny was instructed for this purpose, and we are grateful to him for his industry and assistance.

[90] Mr Penny was provided with a considerable body of documentation (some 21 volumes of documents), that included: (a) the unedited 'disclosure packages' relating to each of the anonymous witnesses that were available to the trial judge (as well as the edited version provided to the appellant); (b) the grounds and advice on appeal, the appellant's skeleton argument, the schedule annexed thereto along with a chronology; (c) the transcripts before this court in the 'Harvey' trial (viz the summing up and the evidence of Peter Brown and Tony Pink); (d) the summing up in the present case; (e) the transcripts of the arguments on disclosure and the PII transcripts in the court below, before both Judge Roberts (on 16 April 2004) and Judge Paget thereafter; (f) The various requests made for disclosure, along with the written submissions in this regard advanced at the Central Criminal Court, together with the various responses to those requests and submissions in reply by the prosecution; (g) a document drafted by each of the parties specifically to assist Mr Penny: for the appellant 'Submissions to Special Counsel on behalf of the Appellant' dated 3 February 2006 and for the prosecution 'Note for the assistance of the Court and Special Counsel' dated 15 March 2006.

[91] The appellant also submitted we should give careful attention to whether any matters have arisen since the trial which affect the validity of Judge Paget's anonymity ruling, and generally we were asked to scrutinise whether the judge was provided with all of the documentation necessary for that purpose.

[92] Special counsel, in addition to considering the documentation set out above, was asked to focus on particular issues which were helpfully set out by Mr Swift. In order to demonstrate the care with which this disclosure process has been reviewed in the course of this appeal by special counsel, and, with his assistance, the court, it is instructive to set out in full the detailed issues Mr Swift particularly identified in his document of 3 February 2006.

> *'Matters which the appellant specifically wishes special counsel to address*
>
> Most of the arguments and issues are set out in detail in the documents produced on behalf of the appellant and therefore will not be repeated here. There are some matters which have arisen post trial which we request are dealt with in addition to the issues raised in writing.
>
> (1) Any matters arising since the hearing of the trial as detailed in para 3 of the appellant's skeleton argument.
>
> (2) In view of the evidence in the "Harvey" trial to the effect that "Peter BROWN" knew or may have known Harvey (contrary to what he said in the Davis case), any information establishing that he may have known Davis or Harvey.
>
> (3) Any information that the police had and/or should have investigated and/or should have disclosed at or before the trial of Davis, concerning: (a) knowledge on the part of the anonymous witnesses of the fatal shooting of Delroy Barnes in February 2002 which may have been targeted at Marcus Johnson (Chaos); (b) the contents of D142 (prepared by DS Groves) (this concerned the suggestion that Marcus Johnson had passed the gun); (c) Gary Mowatt's arrest in March 2002 for possession of a loaded firearm near an address linked to Harvey; (d) requests by the families of the deceased

to see the videos of the flat where the murders took place; (e) contact between the anonymous witnesses after the murders; (f) links between the anonymous witnesses; (g) family or other relationships between the families of the deceased and the anonymous witnesses (it was suggested at the Harvey trial that Cecil Blackburn was in fact a step-brother of the deceased Wayne Mowatt); (h) Heath dealing drugs or being present in Flat 18 at the time of the shooting; (i) Tony Pink ("G") having any relevant evidence to give.

(4) Any information subsequent to the trial of Davis which the police have acquired and/or should have investigated and/or disclosed concerning: (a) the threats to Harvey's solicitors by a "Tony Shockness"; (b) whether Peter Brown was a member of the Shockness family; (c) any matters set out in sub-para (3) above (requiring action post trial).

(5) In light of the suggestions at the "Harvey" trial that some of the anonymous witnesses knew each other, any information to this effect. It can no longer be conceded that the witnesses in para 3 of the advice on appeal can be treated in the "pure eye witness" category.

(6) Any evidence that supports the account given by the defence witness Tony Pink in the "Harvey" trial to the effect that "HEATH" is a man called "Crusoe" who was in fact dealing drugs from next door Flat 18 at the time he was said to be a witness to the shooting and as such undermining his credibility and honesty.

(7) Any information supporting defence assertions as to the identification of the pseudonym witnesses that should have been notified to the trial judge and could have been disclosed in any form to the defence. Any information that would suggest that any of the pseudonym witnesses have given false evidence in reply to identity are contained within the papers but include:

Bennett—Hughie Duffas
Jones—Anthea Smith
Blackburn—Patrick Booth
Heath—Crusoe
Brown—Shockness

Any information that could or does undermine the answers given by the witnesses in cross-examination, see in particular the transcript of part of the cross-examination of "Heath" (at vol XII).

(8) Bearing in mind that in both trials the suggestion was that the witnesses were being orchestrated by the Mowatt and Kenton families, any information that supports these suggestions.

(9) Details of the inquiries (and adequacy of them) made by the prosecution into the motives and credibility of the anonymous witnesses, in particular in light of the ruling on 16 April 2004 by Judge Roberts. Any intelligence including CHIS and source material from persons with knowledge of the witnesses. We need to know whether the prosecution have made all diligent, proper and full inquiries about the prosecution witnesses, in particular those who may have had a motive existing but unknown to the defence.

(10) Any matters that ought to have been but were not brought to the attention of the trial judge. Any other information which should have been disclosed to the trial judge on the topics upon which the trial judge said he was in ignorance (see transcript XII p 10E which suggests the learned judge was not aware that "HEATH" had served a sentence of imprisonment

abroad and/or had been deported back to the United Kingdom; matters raised in the argument in vol XIII; matters raised at vol XIV, p 4A where the learned judge indicates "It may sound astonishing to you if I say that I am not actually in a position to say whether what he [Heath] said is the truth or not").

(11) Details of any awards to the witnesses for the giving of evidence in financial or other terms.

(12) The timing and adequacy of disclosure.'

[93] The list of issues set out above was of considerable help to Mr Penny and the court in determining whether there were material flaws in the disclosure process resulting in prejudice to the appellant.

[94] Mr Swift submitted that as the PII argument developed in the court below, it became clear that the judge had not necessarily seen everything (either at all or until after he delivered some or all of his rulings on anonymity) that in the appellant's submission he should, including: (a) the unedited versions of some or all of the witness statements of the proposed anonymous witness; (b) the unedited version of the previous convictions of some of the proposed anonymous witnesses (eg the judge did not see Bennett's convictions until after the PII hearing on 27 April 2004, and he was initially unaware that Mr Swift cross-examined Heath on a false basis about the place where he served a sentence of imprisonment following one of his earlier conviction); (c) the photographs—in so far as they existed—of some or all the proposed anonymous witnesses (in this regard we are reminded that given some of the witnesses were of bad character, in the sense that they had criminal convictions, photographs would ordinarily have been available); (d) the relevant criminal intelligence files (and including 'street talk', information from informants and straightforward rumours); (e) the relationships that existed between some of the witnesses.

[95] Particularly bearing in mind that the judge apparently was without some or all of this material, it was submitted by the appellant that the judge should not have embarked on this exercise of ruling on the anonymity issues at the time when he did, and that having been selected to preside over this trial at a relatively late stage, he should have taken further steps to ensure that he was fully conversant with all of the potentially relevant material before he made any decisions on this important issue. As an ingredient of that submission, Mr Swift argued that the judge should have been equipped with more comprehensive information to ensure he was able to determine whether the defence 'guesses' as to the real identity of the anonymous witnesses were correct.

[96] Given those concerns, Mr Penny reviewed all of the material that was before the judge, both before and after anonymity was granted. Whilst it would be inappropriate, for self-evident reasons, to set out the submissions made to us by Mr Penny, it is clear that although the judge did not have, for instance, the complete lists of convictions of the relevant witnesses when he gave his ruling, by the time the prosecution called each of them (when, we observe, the judge was well placed to review his decision as regards the proposed anonymity) he had been provided with all the relevant criminal antecedents. Moreover, save for Susan Jones, the appellant's lawyers had been furnished with the lists of convictions when this issue was originally considered; her criminal record was disclosed when, in circumstances already outlined, she was called to give evidence on 18 May. As regards the other specific points, including the editing of some of the witness statements and the suggested lack of research into criminal

intelligence, following the thorough review conducted by Mr Penny, nothing has been revealed to cause us concern. Whilst the judge only knew the true identity of two of the anonymous witnesses, he was provided with all the information relevant for the purposes of making his decision. Moreover, in our judgment, given the fear expressed by the witnesses and unsurprisingly accepted by the judge, whether or not the defence accurately guessed their identity was essentially irrelevant to his final decision. Additionally, in the course of the trial the judge was fully informed of the editing of the witness statements. We have reviewed this material too, and, given the judge's decision on anonymity, the editing was appropriate.

[97] It is also clear that the prosecution and the judge were responsive to the changing nature of the case. By way of example, when Mr Swift (during the submissions in the court below on this issue) revealed for the first time the alleged significance and role of Susan Jones—that she was attempting (so it was said) amongst other things, to procure false testimony—disclosure was reviewed so as to ensure that this additional dimension to the case was taken into account.

[98] We accept that some material relevant to anonymity was disclosed in a piecemeal way. Therefore, having reviewed the relevant documentation, with Mr Penny's assistance, we have carefully revisited each of the judge's decisions. We have also borne in mind Mr Swift's submission that he was, on occasion, 'wrong-footed' because statements were edited without this fact being revealed until late on (for example, the statement of Bennett), the relevant information was provided at essentially the last moment (for example, the convictions of Susan Jones) and material was supplied to the defence, which resulted—at least on one occasion—in cross-examination proceeding on a false basis (for example the circumstances of one of Heath's previous convictions). Such occurrences are unfortunate and should not happen.

[99] The appellant is entitled to a fair trial, and simultaneously, the arrangements for the trial must give appropriate effect to the fears expressed by the witnesses (which the judge unsurprisingly accepted as genuine) about the dangers if their true identities were revealed. There is sometimes a tension between these competing considerations which is unlikely to lead to an entirely wrinkle-free process. As we have commented elsewhere, a further complication was that key aspects of the defence case, that the defendant was not present at the premises at the moment of the shooting, and that Susan Jones was manipulating witnesses to give false evidence, were only revealed at the last moment. However, by the time each anonymous witness was called the judge was fully aware of each of the factors that properly had a bearing on his decision as to the concealment of identity and that in the result the judge's (ultimate) decision as regards each of them was reached by him on the basis of a full understanding of all of the relevant facts. As the judge made abundantly clear, this was not a once-and-for-all decision on anonymity, but one which he kept under review throughout—indeed as he said on 27 April 2004:

> 'I am in no doubt that I need to keep my decision under review and that I must be alive to the fact that different considerations may apply to different witnesses, so that I have to look not at the nine [witnesses] as one unit but at each of the nine individually.'

[100] In the end what matters is not whether there was an entirely wrinkle-free process, but whether the trial was fair. We are confident that no error occurred during the PII proceedings which caused any significant

disadvantage to the conduct of the appellant's defence. In particular the problems which have been identified did not have and would not have had any impact on the assessment by the jury of the credibility, or otherwise, of the anonymous witnesses and ultimately, the verdict. Accordingly none of the complaints identified in argument put the fairness of the process or the safety of the conviction in doubt.

[101] Having examined all this material in detail, notwithstanding that Mr Swift was able to point out that the anonymity order had created specific disadvantages for the defence, our conclusion is that the decision to order anonymity was amply justified. We have examined the safety of the convictions in the light of the main defence, the alleged spiteful motivation of Jones, and the rather more nebulous suggestion that witnesses may have been anxious to support the Mowatt family's belief that the appellant was indeed responsible for Mowatt's death, in order to see whether the anonymity ruling precluded proper cross-examination of the anonymous witnesses. Without for one moment suggesting that counsel was not faced with unwanted difficulties, and accepting that there were one or two matters which might have been investigated more closely, our conclusion is that the anonymity ruling did not prevent proper investigation with the witnesses, and before the jury, of the essential elements of the defence case. There was significant independent evidence supportive of the evidence of the anonymous witnesses, and the jury chose to accept their evidence after cross-examination, and to reject that of the defendant. There was ample evidence to sustain the conviction. We can discern nothing in the trial process overall to lead us to the conclusion that this trial may properly be stigmatised as an unfair trial, or that the convictions were unsafe. Subject to any fresh evidence, the appeal will be dismissed.

FRESH EVIDENCE

[102] In support of a discrete ground of appeal Mr Swift applied to call Tony Pink, who was, he suggested a witness to certain important events at about the time of the fatal shooting. Mr Swift argued that his evidence importantly undermines that given at the appellant's trial by Richard Heath (whom the appellant suggests was also known as 'Crusoe'), in that if Crusoe and Heath are one and the same person, then Tony Pink contradicts Heath's account that he saw the appellant fire the fatal shot.

[103] Pink was called by the defence during the trial of Martin Harvey on Friday 15 July 2005. 'Tony Pink' is not his real name, and although the prosecution have been aware of his true identity since before his evidence last year, he has been allowed to use this pseudonym throughout these criminal proceedings in order to preserve his anonymity from the public as well as from the appellant. Mr Swift submitted the appellant only came to know of the availability of Pink as a witness after he was called during the Harvey trial. In those circumstances, Mr Worsley did not oppose the application to call Pink: the provisions of s 23 of the Criminal Appeal Act 1968 (relating to fresh evidence) were satisfied and, accordingly, we granted permission for Pink to give evidence. Additionally we agreed to arrangements (a screen and voice modulation equipment) to ensure only the members of the court could see the witness and hear his true voice.

[104] Pink made three written statements, dated respectively 6 June 2005, 6 July 2005 and 20 March 2006 which were produced and considered during

the evidence before us. He refused to give a statement to the police when asked shortly after the incident.

[105] In essence his account was that he arrived at the party with an unnamed friend at some stage after midnight and thereafter he divided his time between flats 18 and 19. He drank a couple of glasses of champagne and throughout the entirety of New Year's Eve and the early hours of the following morning he consumed four or five 'joints' of marijuana, half a tablet of the drug ecstasy and 'a few lines' of cocaine. He said these stimulants made him feel 'nice' but they did not affect his ability to recall events.

[106] Whilst in flat 18—the home of two people called Nilson and Drew—he met 'Crusoe', whom he knew from when they were both serving prison sentences. He said whilst they were together in that flat he heard the sounds of a fight on the landing outside; the front door to the flat 'caved in'; and he went to see what was happening. He put his head outside the front door, encouraged those outside to calm down and then returned to the living room of flat 18. Not long afterwards he heard the shot. At this time there were five or six people in flat 18: the witness, Crusoe, two women and one or both of Nilson and Drew. Having 'digested' what had happened, everyone then went towards the front door (which was closed, although Pink could not say whether the lock was engaged, on the latch or broken) and he was met by what he described as pandemonium. One of the victims was lying immediately outside the door and the other injured man was round the corner in flat 19. Pink said he then did all he could to 'save the life' of the man on the landing whilst someone else, a nurse (who was a 'black fella'), helped the man lying in flat 19. His evidence was that it took what seemed like an hour (or more) for the police and the ambulance crew to arrive and apart from ringing the emergency services, he was otherwise engaged in helping the injured man on the landing: this was for about three-quarters of the time it took for the emergency services to arrive. The nurse told Pink to hold the man in a particular position because friends and family were trying to make him sit up and to hug him, both of which had a suffocating tendency (although at times in his evidence Pink also said he did not hold the man or he was not doing so 'exactly'). Furthermore, importantly on Pink's account, he said he put his hand over the area where the man had been shot and from where he was bleeding, namely the side of his head, or somewhere on his head. He also saw a white man trying to help but he was not sure what he did or for how long.

[107] Pink stayed until the police arrived and he then went to hospital.

[108] Pink is a man with significant previous criminal convictions. He agreed that he has given evidence in his own defence on five or more occasions in the past when he has been on trial, and that each time the jury has not believed him.

[109] In rebuttal of this evidence, the prosecution applied (unopposed by Mr Swift) to call Martin Nilson, one of the men who lived at number 18 at the time and who gave evidence at both the appellant's and Harvey's trials. His account was significantly at variance with the testimony of Pink. He told us that he shared flat 18 with Mark Drew and they both attended the party; indeed, during the course of the night they invited some of the party-goers to their flat for drinks. At the time the door burst open, shortly before the shooting, Mark Drew together with two women (and possibly Errol, a black man who had 'Rasta hair' and/or Dane, a well-built black man with short hair) were in flat 18. Although someone else might have been in the bathroom, he had no memory of either

a man called Crusoe or a further person who could have been Pink being present inside number 18 at this stage.

[110] Furthermore, he said that as soon as he saw someone lying in the hallway, he stepped out in order to help and he turned the injured man (Ashley Kenton) over onto his back. He had served in the Swedish Marines as a mobile paramedic and, assisted by a 'frantic' woman, he tried to clear Kenton's airways using both a towel and his hands. However, he did not seem to be alive and he could see what he described as pieces of his body lying in the doorway. He undertook mouth-to-mouth resuscitation but to no effect. Thereafter he was asked to assist with the other injured man (Wayne Mowatt) and he gave those tending him some advice. He then went back to Kenton (who had remained in his view throughout) and he continued to give him first-aid. He said that at no stage did another man give any assistance to Mr Mowatt.

[111] Nilson made a statement to the police on the night of these events which was essentially wholly consistent with the evidence he gave during this appeal. Although he was possibly in error on one or two matters of detail (such as whether Drew was in the flat when the shooting occurred), the certain and unanimous view of this court is that his account was wholly honest as well as being reliable on all important issues. Apart from the happenchance that he lived next door to the where the party was taking place, he was uninvolved with the people present that night, save for Mark Drew; he returned to this country from Sweden, at short notice and at great personal inconvenience, to provide his account for a third time and without any apparent advantage to himself; and he gave evidence in a markedly convincing and compelling manner.

[112] As a qualified paramedic Nilson was the likely person to give first aid to the injured man outside his flat, and on his account all of what Pink said about how he purportedly tended Ashley Kenton, doing all he was able to save his life, could not have been true. Moreover, Pink critically misdescribed the injury over which he said he placed his hand: Ashley Kenton had been shot in the neck and not in the head, and, moreover, if Pink had really assisted him in the way he described he could not have failed to notice he was already apparently dead and that part of his body had been shot away. Therefore, Pink's description was not only contradicted by Nilson, but it was wholly at variance with the pathological findings. Although not determinative, we cannot disregard Pink's previous convictions, as well as the occasions in the past when he has been disbelieved when he has given evidence on oath, to reinforce our view that his evidence is not creditworthy. In these circumstances it has no impact on the safety of these convictions.

[113] This appeal is accordingly dismissed.

THE ELLIS APPEAL—THE ESSENTIAL FACTS

[114] Yohanne Martin was a member of the Burger Bar crew. He was shot on 8 December 2002, when he was sitting in a hired Mercedes car which was parked in West Bromwich. Another car drove slowly past and nine shots were fired into the Mercedes, killing Yohanne Martin. Members of his gang were convinced that those responsible for his death were members of or associated with the Johnson crew.

[115] The Mercedes had been hired by Yohanne Martin and his brother, the appellant Martin. They were both linked with a black Vauxhall Vectra car which Martin was using on 31 December 2002. That car, containing a driver and a passenger, was driven via the Aston Expressway and M6 motorway to Roade in

Northamptonshire, where a red Mondeo car, with a high-performance engine and factory tinted windows, was purchased. The purchasers, using a mobile phone identified as 819 telephoned the seller before their arrival. The purchaser gave a false name and address. The red Mondeo and the Vectra returned to Birmingham. The factory tinted windows were given an additional tinting on the Mondeo's arrival in Birmingham by Ramesh Jhalli, an employee of a firm known as Quicksilver. During this return journey mobile telephones were used, number 588 and number 619, one from each vehicle. The Crown's case was that the two telephones were being used by Martin and Gregory. The evidence associating them with these numbers was clear. Although Gregory did not give evidence at trial, Martin accepted that he had participated in the purchase of the Mondeo for a friend.

[116] On the night of 1–2 January trouble was plainly brewing. In a nightclub in Solihull what was described as 'chat' that is, public assertion extolling the power and strength of the Johnson crew was marked. In the result, however, the jury acquitted Jermaine Carty, who was said to be one of those most implicated in the 'chat', of firearms offences arising from the developing trouble at the nightclub. We need not examine this evidence further.

[117] The story of the shooting can be taken from the accounts of three victims. Sophie Ellis was present at the nightclub. It was announced that there would be an 'after party' at Uniseven. She went there with others. Inside Uniseven it became very hot. She saw a car drive past slowly, which she thought was a burgundy coloured car and for a split second she saw two guns, which looked the same, and were pointed out of the window of the car. She was shot and fell to the ground.

[118] Cheryl Shaw spent most of her time at the Uniseven itself. She went out twice, and on the second occasion she was standing with others, when she noticed a red Mondeo with a gun pointing outside the passenger's side window and the person inside wearing a balaclava. She heard two different kinds of shooting, machine gun fire, and single shots.

[119] Leon Harris was sitting in a parked Orion car when he heard shots which sounded like machine gun fire. He then saw a car driving towards his car. Someone got out of the driver's side of a Vectra and fired a number of shots at the Orion. The gunman was wearing a black balaclava, with slits for his eyes and his mouth, together with a hood. Leon Harris escaped from his car and ran away.

[120] These were very stark, unembellished descriptions of the incident. Bullets and cartridge cases were recovered from the scene of the crime. They were fired from three different weapons, one a smooth bore sub-machine gun, and the other two pistols. The pattern of 13 bullet marks from the machine gun on an adjacent wall, from waist to head height, suggested that the weapon was deliberately fired in a controlled manner. There were no signs of return fire. The Orion car driven by Harris had been struck by six bullets, fired from two different weapons, and it had a deflated tyre which was consistent with a seventh shot. Twenty three 9mm cartridges were recovered. They may have been fired from two separate self-loading weapons. A Llama pistol was recovered in August 2003 from an address in Ladywood. Some of the shots had been fired from that pistol.

[121] Timed closed circuit television recordings from the scene were subjected to analysis and imagery examination. It was concluded from this evidence alone, that one of the convoy of vehicles at the scene was highly likely to be a red Mondeo, and the other was possibly a Vectra. This, of course, was

consistent with eye witness evidence. Flashes of light from the vehicles were attributable either to the firing of weapons, or the opening of a car door.

[122] A good deal of material relating to telephone evidence and telephone cell sites was available. This was important evidence linking all four appellants. We shall summarise it as briefly as possible. Phone 819 was said to have been used by someone involved in the purchase of the Mondeo, and then again by someone in the Mondeo just before and after the shooting. Indeed there was no dispute that various calls by or to mobile phones 588, 819 and 836 were made throughout the period of the journey by the black Vectra to Roade, and on the return journey in both the Vectra and the Mondeo. Phone 819 was active from 30 December 2002 until shortly before 3 pm on 2 January 2003. It called phones 801 and 129. The subscriber to 809 was Gregory's mother, and 129 was Gregory's sister. Phone 129 was also called by 836 some 12 times. Phone 588 called the same number about twenty times, and it was also included in the billing records for the landline of Martin's girlfriend. Shortly before 2 pm on 31 December, the 588 phone called a mobile number used by Ramesh Jhalli. Phone 819 called 573, Gregory's girlfriend, four times, and 573 called 819 twice. At about 6.53 am on 2 January, phone 819 called 573, and 573 called it back at about 1.15 pm. Phone 573 was also stored in the memory of a phone at 5-18 Ryland Street, the home of the Gregory family. Phone 819 called each of the brothers of Gregory's girlfriend, his aunt and his uncle once.

[123] A taxi firm regularly collected a fare from Ryland Street, and took the individual to an address where Gregory's girlfriend lived. There was contact by phone 819 on 31 December. There was additional evidence linking 819 to Michael Gregory, but the details need no recitation.

[124] Martin was arrested on 24 February 2003. The SIM card for phone 836 was found loose inside a phone recovered from a compartment to the right hand side of the steering wheel. Call analysis related 836 to Martin's home address. It was also linked to him by telephone calls made to his girlfriend. Ten calls were made from this number to the landline at Gregory's address. At Martin's address, bearing his fingerprints, a box for a phone with the number ending 227 was found. The subscriber's name was Watkinson, which was the name of the business partner of the trader who sold the Mondeo. On 28 December 836 called 227. Watkinson denied that 227 was a number associated with him, but conceded that it was possible that he was the subscriber when the phone was first registered in 1998. In June 2002, he was still listed as the subscriber. The number stored in the memory of 227 also linked Martin with 836.

[125] Phone 588 was active from 30 December to 4 January. In that short period, among other calls, it called 819 on 57 occasions. The evidence suggested that both 836 and 588 were being used together, throughout 2 January 2003. It was accepted by Martin that 836 and 588 were indeed his telephones.

[126] The three best serving signals for Gregory's address were identified. Between 30 December and 2 January 35% of the calls made to or from 819 were served by those three cell sites between them, with an indication that the handset was used in the vicinity of Gregory's address at Ryland Street. Thirty six calls went through a site which served the address where Martin lived, as well as a second address in Smethwick, also associated with Martin. Over a period of roughly 24 hours between 31 December and 1 January the 819 phone made 34 calls routed through the cell site best serving Gregory's address, and during a similar period, both the 836 and 588 phones made or received calls routed through the same sites. The Crown drew attention to the fact that there was a

time when 819 did not call either 836 or 588, suggesting that the owners of these telephones were or must have been together.

[127] From 1.30 am on 2 January inward calls to 836 were on divert until 10.40 am that day. There was evidence linking Ellis with the 633 phone number, and Simms with the number 845. At the material time calls were made on the 633 phone consistent with the use of the site closest to Uniseven in Churchill Parade. Between 12.54 and 2.55 am on 2 January phone 845 made calls which placed the handset in the vicinity of Uniseven, consistently using the same cell site. From 3.07 am until about 6.30 am on the same date, phone 819 made 43 calls which were handled by eight different cell sites, which indicated that this phone was on the move. At about 3.52 am 819 called 845, using the cell site close to Ellis's address for 14 seconds. Simms's phone used a cell site which was dominant for Uniseven, and in a sequence of calls from 819 to 845 (but none the other way) 819 moved in such a way that by 4.01 am it was being served by the same cell site as Simms's phone in the vicinity of Uniseven, indeed there was positive expert evidence that the calls from Simms's number were consistent with him being inside Uniseven when the calls were made. At 4.09 am there was a five-second call to Ellis's phone at 633, which indicated that Simms's telephone had moved into a cell site area to the west of Uniseven.

[128] After the shootings a number of calls were made or received by 819 and 633, which were routed via the site which served Ellis's address. The phone belonging to Simms received a call from 819 at 4.22 am and he then received calls which routed through cell sites, one of which served Gregory's address. During the period when the red Mondeo was set alight, 819 called 633. The cell site which served the Maryhill area, where this car was burned, handled a call between the 633 and 819 phones about 45 minutes before the fire started, and if 633 was indeed at Ellis's home address at the time, it must, for whatever reason, been incapable of using one of the four other cell sites which would have given stronger signals. The data available to the expert was consistent with the 819 phone being in the vicinity of the site of the burning, and the last call using the corresponding cell site took place at 6.08 am. That was inconsistent with 819 being at Gregory's flat. The expert also accepted that it was not possible to discount the possibility that Ellis had been using his phone at home (because of the proximity of the cell site).

[129] This evidence about the use of mobile phones demonstrably belonging to the four appellants at critical times all through the night leading up to and after the shooting, taken as a whole, and when linked with the remaining evidence, provided a formidable case against them.

[130] On 13 January 2003, the home of Ellis was searched. In the garden, inside plastic bags, some clothing, including a hooded top and jeans were found. The top was closely linked by DNA evidence to Ellis. There was insufficient material on the jeans for them to be directly associated with any individual.

[131] The spent ammunition and this clothing were examined together. The primer residue in the spent ammunition contained lead, barium and antimony. The hooded top found in Ellis's garden bore two particles of firearm discharge residue, one from the front and left sleeve containing primer residue of lead, barium and antimony, with a low level silicone, and the second, from the right front and sleeve, also containing lead, barium, antimony, as well as tin with a low level silicone. The leg area of the jeans yielded one particle of primer residue of lead, barium and antimony with a low level of silicone. There was a trace of nitro-glycerine from the right of the hooded top. This evidence did not prove

directly that the residues found on the clothes must have come from the shooting outside Uniseven on 2 January. It was however consistent with it, and it was, of course, open to the jury to consider whether any inferences should properly be drawn from the additional fact that the hooded top and jeans were not found where they would normally be, in their owner's house, rather than the garden.

[132] After arrest the four appellants were interviewed. Martin denied any involvement in the offences, and offered an alibi. He told untruths about his link with the Vectra which had travelled to Northampton, and the purchase of the red Mondeo. In general terms, Gregory declined to answer any questions, stating that he did not want to remember where he had been at the New Year because of the death of his brother. Ellis denied involvement, and at first exercised his right of silence. When he was later interviewed, he denied any involvement with the red Mondeo, and at a subsequent interview, claimed that gunshot residue found on his clothing had come from fireworks or through other innocent contact. As to the telephone calls, he claimed that it was impossible for him so long after the events to recollect any specific details. However he did not believe that his phone had been in anyone else's possession. In his interviews, Simms effectively made no comment, but on the last occasion when he was interviewed he denied any involvement in the shooting or in the obtaining of the red Mondeo. He admitted that he was present at Uniseven at the material time, along with several members of his family, who he would not have endangered. He agreed that the phone 845 was his telephone, and asserted that he had received telephone calls while at Uniseven from different people asking him about the quality of the music, but as the music was loud there were several missed calls. In view of the lapse of time, he could not remember any other details. In due course alibi notices were served by Martin, Gregory and Ellis.

[133] Goldring J gave leave for four witnesses to give their evidence anonymously. As we have already recorded, his decision was upheld in this court. At that date all the information, with the exception of one prison file relating to one of the witnesses, Brown was available. By the time Brown did give evidence, the prison file had been disclosed in full. Criticisms of the disclosure process were repeatedly and fully argued before the judge. In our view, they were makeweight, and we note that it is conceded by one of the appellants, at any rate, that there was a just and appropriate level of disclosure.

[134] The judge kept his ruling under constant review. There were no less than 38 PII hearings during the trial itself. On 10 January 2005 he once again closely reviewed his decision. In the result, of the four witnesses who gave evidence anonymously, only one gave any evidence which purported to incriminate any appellant. Jarrett described the scene, without identifying anyone in the Mondeo, or saying anything which might have led to the identification of anyone in the car. Similarly, with Beattie, who indeed had to be treated as a hostile witness by the Crown. James declined to give any evidence along the lines of his witness statements. The judge observed to the jury, when he came to sum the case up, that his evidence was worthless, and whatever evidence he did give, the judge decided that it was inappropriate to remind the jury of it.

[135] That left Brown who, like the other anonymous witnesses, was seen and observed by counsel, but not the appellants or the public. Unlike counsel, they heard a modulated voice. He purported to identify some of those in the red Mondeo, but his evidence was not entirely consistent on the subject, and in any event, faced the major difficulty that other witnesses had suggested identification was not practicable.

[136] By the time Brown gave evidence, there had been full disclosure of all the material available to the Crown. He was cross-examined for five days, by four leading counsel. His credibility was severely damaged.

[137] When considering submissions that there was no case to answer, where there was no other evidence other than that of Brown, as in the case of Tafarwa Beckford, the judge directed an acquittal. He observed that it was plain that Brown had lied about many matters, and that his credibility was severely dented. In particular, the judge was concerned about Brown's assertion that the faces of the occupants of the Mondeo were visible because that assertion was contradicted by every other witness to the shooting, if Brown was indeed in the position that he said he was at the time. Despite the various complaints carefully marshalled by the different counsel on behalf of the appellants, the cross-examination of Brown illustrates that notwithstanding his anonymity, the process could be and indeed was extremely effective. In fact, Brown gave no evidence implicating Gregory, and so far as Simms was concerned, his evidence provided no more than a little confirmation of facts already independently demonstrated.

[138] Following the judge's ruling, neither Ellis nor Gregory gave evidence. Gregory called a character witness. Ellis called one alibi witness. She could not remember whether he had received any phone calls at all, but she would have remembered if the phone had rung constantly. Martin gave evidence. He admitted his involvement in the purchase of the Mondeo. He admitted the correctness of the attribution of telephone numbers to him. He offered an alibi defence. Simms admitted his presence at Uniseven. He was not involved in the crime. He remembered receiving the 819 calls. He was sure that it was a 'withheld' number, by a man who refused to give his name, and simply wanted to know who was at the party. After the shooting, there was another call, and he was instructed to say nothing about the calls he had received. He had not mentioned this when interviewed because he was terrified of the man who had rung him, who was plainly a murderer who knew his address.

[139] The case was summed up to the jury with meticulous care. The directions of law were accurate. Appropriate warnings were given. The evidence was closely analysed. The summing up was comprehensive, balanced and fair.

[140] We have reconsidered the safety of these convictions in the light of events subsequent to the earlier decision of this court upholding Goldring J's decision on witness anonymity. We cannot detect any reason for doubting the integrity of the trial process, or the safety of these convictions. These appeals are dismissed.

Appeals dismissed.

Vanessa Higgins Barrister.

8 June 2006. The court refused Davis leave to appeal to the House of Lords but certified that a point of law of general public importance had been involved in the decision, namely whether it was possible for a defendant to be convicted where the conviction was based solely or to a decisive extent upon the testimony of one or more anonymous witnesses.

Floe Telecom Ltd v Office of Communications and another

[2006] EWCA Civ 768

COURT OF APPEAL, CIVIL DIVISION

CHADWICK, SEDLEY AND LLOYD LJJ

27 APRIL, 15 JUNE 2006

Competition – Competition Appeal Tribunal – Jurisdiction – Tribunal hearing appeal and remitting matter to regulator for re-investigation – Whether tribunal having power to impose time limits on investigation by regulator – Competition Act 1998, Sch 8, para 3 – Competition Appeal Tribunal Rules 2003, SI 2003/1372, rr 19, 20.

A company, F, complained to the Director General of Telecommunications (who was the predecessor to the Office of Communications (Ofcom)) that another company, V, had abused its dominant position under Ch II of the Competition Act 1998. The Director General decided that V's conduct was objectively justifiable and F appealed against that decision to the Competition Appeal Tribunal. Under para 3(1)[a] of Sch 8 to the 1998 Act the tribunal had to determine the appeal on the merits. Under para 3(2) the tribunal could confirm or set aside the decision which was the subject of the appeal, or any part of it, under sub-para (2)(a) could remit the matter to the regulator, and under sub-para (2)(d) could give such directions, or take such other steps, as the regulator could itself have given or taken. The Competition Appeal Tribunal Rules 2003 provided for procedural matters; r 19[b] provided that the tribunal could give directions for case management, including directions as to the fixing of time limits with respect to any aspect of the proceedings and under r 20[c] the tribunal could give directions for case management conferences. The tribunal considered that the Director General's decision should be set aside and the whole decision should be remitted to Ofcom. In its judgment the tribunal stated that it would seek an undertaking from Ofcom to issue a non-infringement decision or statement of objections within five months and that in default of such an undertaking it would make an order remitting the matter to Ofcom in those terms. It also stated that it would fix a case management conference to take place in five months' time. The order of the tribunal did not in fact set a time limit for the investigation in terms although it did fix a case management conference. Ofcom considered that the tribunal could not impose a timetable in relation to a new investigation when it set aside a decision and remitted it to the regulator and, together with the Office of Fair Trading (OFT), as a similar regulator, it appealed to the Court of Appeal. The tribunal contended that para 3(1) set out its overriding function and that, although the matter had been remitted to the regulator for re-investigation, as the tribunal had not been able to determine the whole appeal on its merits on every point it had the power to impose a timetable by way of giving directions under para 3(2)(d) or as an incidental power under para 3(2)(a). It also considered

a Paragraph 3, so far as material, is set out at [12], below

b Rule 19, so far as material, is set out at [15], below

c Rule 20, so far as material, is set out at [16], below

that, because the appeal had not been fully determined, a time limit direction could be imposed under r 19 of the 2003 rules.

Held – (1) There was nothing in the relevant legislation which conferred upon the tribunal some general supervisory function in relation to the conduct by Ofcom or other regulators of the investigations which the regulators were themselves required to make in carrying out their statutory functions. The task of the tribunal was to determine appeals which came to it in accordance with the provisions of Sch 8 to the 1998 Act. In the instant case the tribunal had fulfilled that task when it had allowed the appeal and remitted the whole of the decision to Ofcom. By that order it had disposed of the appeal and could not impose time limits under r 19. It followed that the tribunal did not have power to fix a case management conference under rr 19 or 20 because there was no continuing appeal in relation to which the r 19 powers were exercisable. Para 3(1) of Sch 8 did not compel or allow the tribunal to treat the appeal as still subsisting in order to decide points which did not arise once it had set aside the decision complained of. Paragraph 3(2)(d) was limited to directions or other steps which could be the subject of an appeal, being decisions within the meaning of s 46 of the 1998 Act and there was no power to give a direction as to time as an implied incident of para 3(2)(a) (see [26], [28], [30]–[34], [40], [51], [52], [57], [59], below).

(2) The tribunal had no role in relation to the time taken by a regulator over an initial investigation. If a complainant considered that Ofcom was guilty of unreasonable delay in pursuing the initial investigation, its remedy would be to apply for judicial review. That would also be the correct remedy if the complainant considered that the regulator was guilty of unreasonable delay in proceeding with the investigation after remittal by the tribunal (see [45], [51]–[53], [57], below).

Notes

For the Competition Appeal Tribunal, see Supp to 47 *Halsbury's Laws* (4th edn) (2001 reissue) para 261A.

For the Competition Act 1998, Sch 8, para 3, see 47 *Halsbury's Statutes* (4th edn) (2004 reissue) 653.

For the Competition Appeal Tribunal Rules 2003, SI 2003/1372, rr 19, 20, see 20 *Halsbury's Statutory Instruments* (2005 issue) 586.

Cases referred to in judgments

Aberdeen Journals Ltd v Director General of Fair Trading (Aberdeen Independent Ltd intervening) [2002] CAT 4, CCAT.

A-G v BBC [1980] 3 All ER 161, [1981] AC 303, [1980] 3 WLR 109, HL.

Argos Ltd v Office of Fair Trading [2003] CAT 16, [2003] All ER (D) 529 (Jul).

Automec srl v EC Commission Case T-24/90 [1992] ECR II-2223, CFI.

Dyer (Procurator Fiscal, Linlithgow) v Watson, K v Lord Advocate [2002] UKPC D1, [2002] 4 All ER 1, [2004] 1 AC 379, [2002] 3 WLR 1488.

Freeserve.com plc v Director General of Telecommunications (BT Group plc intervening) [2003] CAT 6, [2003] All ER (D) 21 (Jun), CCAT.

General Council of Medical Education and Registration of the United Kingdom v Spackman [1943] 2 All ER 337, [1943] AC 627, HL.

R v Bolton Metropolitan BC, ex parte B [1985] FLR 343.

Appeal

The Office of Communications (Ofcom) and the Office of Fair Trading (OFT) appealed with permission of Carnwath LJ from the judgment of the Competition Appeal Tribunal (Marion Simmons QC, Michael Davey and Sheilla Hewitt) on 1 December 2004 in a complaint brought by Floe Telecom Ltd (Floe). The facts are set out in the judgment of Lloyd LJ.

Peter Roth QC and *Gerry Facenna* (instructed by the *Solicitor to the Office of Communications*) for Ofcom.

Jon Turner (instructed by the *Solicitor to the Office of Fair Trading*) for OFT.

Monica Carss-Frisk QC and *Brian Kennelly* (instructed by *Taylor Wessing*) for Floe.

Cur adv vult

15 June 2006. The following judgments were delivered.

LLOYD LJ (giving the first judgment at the invitation of Chadwick LJ).

[1] This appeal is about the powers of the Competition Appeal Tribunal (the CAT) when dealing with appeals under the Competition Act 1998 (the 1998 Act) against decisions made by regulators such as the Office of Fair Trading (OFT) or, as in the instant case, the Office of Communications (Ofcom).

[2] Floe Telecom Ltd, the respondent to this appeal, complained to the Director General of Telecommunications (DGT) (who has since been replaced by Ofcom) that Vodafone had abused its dominant position by disconnecting services which it had provided to Floe. On 3 November 2003 the DGT decided that Vodafone had not abused its dominant position in this respect, because its conduct was objectively justifiable. Floe appealed to the CAT against the decision that there had not been an infringement of the Ch II prohibition under the 1998 Act. The CAT heard the appeal and allowed it, giving its decision on 19 November 2004 ([2004] CAT 18, [2004] All ER (D) 330 (Nov)). On 1 December 2004 the CAT heard submissions as to what order it should make ([2004] CAT 22). It decided to set aside the decision and to remit the whole matter to Ofcom for reinvestigation. Ofcom had offered an undertaking to reinvestigate but there was a disagreement as to the timetable within which this could or should be done. Ofcom had said that it could and would do it on the basis that, if it decided there was no infringement, it would come to that decision within six months, and if it did not come to that conclusion it would set out its case, by a statement of objections, within 12 months.

[3] The CAT said ([2004] CAT 22 at [20]):

> 'The Tribunal therefore seeks an undertaking from OFCOM to issue a non-infringement Decision, or Statement of Objections within five months of today. In default of such an undertaking, the Tribunal will make an order remitting the matter to OFCOM in those terms.'

[4] The order it made was less peremptory. It was as follows:

> '1. Pursuant to paragraph 3(2)(a) of schedule 8 of the Competition Act 1998 (the "1998 Act"), the matter, being the Decision in its entirety, is remitted to the Respondent.
>
> 2. Pursuant to the Undertaking, the Respondent re-investigate the matter with a view to issuing either: (a) a new non-infringement decision pursuant to section 31 of the 1998 Act; or (b) a statement of objections pursuant to

rule 4 of The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004 No. 2751) in either case within 5 months of the date of this Order.

3. A further case management conference is provisionally fixed for 5 May 2005 at a time to be notified to the parties.'

[5] The question on the appeal is whether the CAT had power to set a time limit for the investigation, as it said it would at [20] of the judgment, even though it did not do so in terms in the order. A related question is whether it could fix a case management conference as it did in the order.

[6] As between the parties the question is academic. Ofcom has undertaken the further investigation. It did not do so within six months, but it applied to and obtained an extension from the CAT, and completed it within the extended time allowed. It reached the same conclusion. Floe has appealed a second time. That appeal has been heard and the CAT's decision is awaited. Nevertheless, Ofcom considers that a point of importance is raised as to whether the CAT can impose a timetable in relation to a new investigation, when it sets aside a decision and remits it to the regulator. Ofcom first applied to the CAT for the order made on 1 December 2004 to be set aside. This was refused. It then applied to the CAT for permission to appeal. That was refused. It applied to this court for permission to appeal, and OFT did likewise, being likely to be affected more frequently by such an order on the part of the CAT in future than Ofcom, because so many appeals to the CAT are against decisions of OFT. Carnwath LJ gave permission to appeal to both regulators. Moreover, with a view to ensuring that both sides of the argument were put to the court, the appellants offered to pay the reasonable costs of Floe in resisting the appeal.

[7] Thus it comes about that we have heard argument on a point which is not in terms raised by the order appealed against (except as regards the case management conference), and which does not matter at all as between the parties, and on the result of which not even an issue as to costs depends. This can fairly be described as unusual. The point which has been debated is important in relation to those who may be affected by it in future cases, and it is appropriate to consider the appeal despite the fact that the outcome of the appeal does not matter as between the parties now before the court.

THE LEGISLATION

[8] It is convenient to start by referring to the legislation under which the point arises, and first the 1998 Act. This deals in Ch I (ss 1–11 as it now stands) with the prohibition against anti-competitive agreements, which corresponds with art 81 of the EC Treaty (the Treaty), and in Ch II (ss 17–19) with the prohibition against abuse of a dominant position, corresponding to art 82 of the Treaty. Chapter III (ss 25–44) gives the OFT powers to conduct an investigation in a number of circumstances, among which is the case where there are reasonable grounds for suspecting that the Ch II prohibition has been infringed, and it also deals with investigations, enforcement and penalties. I need to refer to some of the provisions of Ch III.

[9] If as a result of an investigation the OFT proposes to make a decision that a relevant prohibition (whether under the 1998 Act or the Treaty) has been infringed, it must give written notice to the person or persons likely to be affected by that decision, and give him or them the opportunity to make representations. This arises under s 31, which has its own definition of 'decision'. If the OFT has begun an investigation but not yet reached a decision (as defined in s 31) it may

accept commitments from an appropriate person or persons to take action (or refrain from taking action) which it considers appropriate.

[10] On the other hand, if the OFT has made a decision that an agreement or conduct infringes a relevant prohibition, it may give such directions to appropriate persons under ss 32 and 33 as it considers appropriate to bring the infringement to an end. It also has power to give directions under s 35 by way of interim measures. Under s 36 it may impose penalties for any infringement which, if not paid, may be recovered by it as a civil debt under s 37. Sections 42 to 44 create offences.

[11] Coming to provisions more directly at issue on this appeal, ss 46 and 47 provide for appeals to the CAT, and they are supplemented by Sch 8. Some other categories of 'decision' within s 46 have been added by subsequent legislation, but they do not matter for present purposes. Section 46(1)–(3) are as follows:

> '(1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (3) In this section "decision" means a decision of the OFT—(a) as to whether the Chapter I prohibition has been infringed, (b) as to whether the prohibition in Article 81(1) has been infringed, (c) as to whether the Chapter II prohibition has been infringed, (d) as to whether the prohibition in Article 82 has been infringed, (e) cancelling a block or parallel exemption, (f) withdrawing the benefit of a regulation of the Commission pursuant to Article 29(2) of the EC Competition Regulation, (g) not releasing commitments pursuant to a request made under section 31A(4)(b)(i), (h) releasing commitments under section 31A(4)(b)(ii), (i) as to the imposition of any penalty under section 36 or as to the amount of any such penalty, and includes a direction under section 32, 33 or 35 and such other directions under this Part as may be prescribed.'

Section 47(1) and (2), which deal with what are described as third party appeals, are as follows:

> '(1) A person who does not fall within section 46(1) or (2) may appeal to the Tribunal with respect to—(a) a decision falling within paragraphs (a) to (f) of section 46(3); (b) a decision falling within paragraph (g) of section 46(3); (c) a decision of the OFT to accept or release commitments under section 31A, or to accept a variation of such commitments other than a variation which is not material in any respect; (d) a decision of the OFT to make directions under section 35; (e) a decision of the OFT not to make directions under section 35; or (f) such other decision of the OFT under this Part as may be prescribed.
>
> (2) A person may make an appeal under subsection (1) only if the Tribunal considers that he has a sufficient interest in the decision with respect to which the appeal is made, or that he represents persons who have such an interest.'

[12] In Sch 8 the provisions which matter for present purposes are those of para 3, sub-paras (1) to (4), which are as follows:

> '(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.

(2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may—(a) remit the matter to the OFT, (b) impose or revoke, or vary the amount of, a penalty . . . (d) give such directions, or take such other steps, as the OFT could itself have given or taken, or (e) make any other decision which the OFT could itself have made.

(3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.

(4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based.'

[13] Section 47A allows for monetary claims arising from the infringement of a relevant prohibition, which may be brought before the CAT. Section 49 provides for appeals to the Court of Appeal (or in Scotland the Court of Session) against a decision as to the amount of a penalty under s 36, from decisions on monetary claims and, under s 49(1)(c), on any point of law arising from any other decision of the CAT on an appeal under s 46 or s 47.

[14] Section 54 deals with sectoral regulators, including Ofcom, which may exercise the powers of the OFT within their relevant sectors.

[15] The other legislation to which it is necessary to refer is the Competition Appeal Tribunal Rules 2003, SI 2003/1372. These provide for appeals to be made by sending a notice of appeal to the Registrar within a stated time, which must comply with provisions as to form and content under r 8, the details of which do not matter. The rules also contain uncontroversial provisions for procedural matters in relation to appeals. Rule 19 is in a group of rules headed 'Case Management'. Paragraphs (1) and (2) are as follows:

'(1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.

(2) The Tribunal may give directions—(a) as to the manner in which the proceedings are to be conducted, including any time limits to be observed in the conduct of the oral hearing; (b) that the parties file a reply, rejoinder or other additional pleadings or particulars; (c) for the preparation and exchange of skeleton arguments; (d) requiring persons to attend and give evidence or to produce documents; (e) as to the evidence which may be required or admitted in proceedings before the Tribunal and the extent to which it shall be oral or written; (f) as to the submission in advance of a hearing of any witness statements or expert reports; (g) as to the examination or cross-examination of witnesses; (h) as to the fixing of time limits with respect to any aspect of the proceedings; (i) as to the abridgement or extension of any time limits, whether or not expired; (j) to enable a disputed decision to be referred back in whole or in part to the person by whom it was taken; (k) for the disclosure between, or the production by, the parties of documents or classes of documents; (l) for the appointment and instruction of experts, whether by the Tribunal or by the parties and the manner in which expert evidence is to be given; (m) for the award of costs or expenses, including any allowances payable to persons in connection with their attendance before the Tribunal; and (n) for hearing a person who is not a

party where, in any proceedings, it is proposed to make an order or give a direction in relation to that person.' a

[16] Rule 20 deals with case management conferences. Paragraphs (1) and (4) are as follows:

'(1) Where it appears to the Tribunal that any proceedings would be facilitated by holding a case management conference or pre-hearing review b the Tribunal may, on the request of a party or of its own initiative, give directions for such a conference or review to be held . . .

(4) The purpose of a case management conference or pre-hearing review shall be—(a) to ensure the efficient conduct of the proceedings; (b) to determine the points on which the parties must present further argument or c which call for further evidence to be produced; (c) to clarify the forms of order sought by the parties, their arguments of fact and law and the points at issue between them; (d) to ensure that all agreements that can be reached between the parties about the matters in issue and the conduct of the proceedings are made and recorded; (e) to facilitate the settlement of the proceedings.' d

THE CAT'S DECISION ON FLOE'S APPEAL

[17] Floe appealed against the decision by the DGT that Vodafone had not infringed the Ch II prohibition. The appeal came before the CAT (Marion Simmons QC, Mr Michael Davey and Mrs Sheila Hewitt) at a hearing on 19 and e 20 July 2004. They gave their decision on the appeal on 19 November 2004 ([2004] All ER (D) 330 (Nov)), holding that the DGT had failed to take into account a number of matters, spelled out at [338] and [339] of the judgment, which he ought to have taken into account. They expressed their conclusion as follows at [340]: f

'The Tribunal unanimously considers for the reasons stated above that the proper course to take in this Appeal is to set aside the Decision of the Director on the grounds of incorrect and/or inadequate reasoning and to remit "the matter" to OFCOM under paragraph 3(2)(a) of Schedule 8 to the 1998 Act.' g

[18] On 1 December 2004 a further hearing took place in order to determine the terms of the order, including questions of costs ([2004] CAT 22). The order was to be that the whole decision was to be remitted to Ofcom. Ofcom offered the CAT an undertaking in relation to its new investigation of the matter, but not one which the CAT was prepared to accept in all respects. The CAT explained h why it considered that Ofcom ought to be able to proceed with the new investigation on a shorter timescale than that offered by Ofcom, and why it ought to do so in the interests of the parties and of the wider public. It stated its conclusion at [20] of the judgment, quoted above (at [3]), and also said that it would fix a case management conference for five months ahead. Its order was, j so far as relevant, in the terms quoted above (at [4]).

[19] Ofcom then applied to have the order varied so as to remove paras 2 and 3, or for permission to appeal. That application was heard on 5 April 2005, and the CAT gave judgment on 5 May 2005 ([2005] CAT 14) rejecting the application to vary the earlier order. Its reasoning was fuller and in some respects different from that set out in the judgment of 1 December 2004. Later it refused

permission to appeal against either order, but permission was granted, as mentioned above, by Carnwath LJ.

[20] Ofcom submits that the CAT does not have power, having set aside a decision and remitted the matter to the relevant regulator, to impose on the regulator a timetable or other directions as to how the matter is to proceed. OFT supports it in this argument. Paragraph 3(2)(a) of Sch 8 to the 1998 Act does not deal with this expressly, so if the power is to exist it must be found as an implied power incidental to the provision for remittal, or in another provision of para 3, or elsewhere.

[21] In its judgment on 1 December 2004 the CAT expressed its reasons for considering that greater urgency was required, and should be possible, for the new investigation than was provided for by the undertaking offered by Ofcom. It did not deal with the question of the power to give such directions. The question of jurisdiction was argued at the later hearing, and it was addressed in the judgment given on 5 May 2005. The reasons given by the CAT for holding that it was within its powers to impose the timetable on the regulator are, in summary, as follows: (i) The overriding function of the CAT is to determine the appeal on the merits, under para 3(1) of Sch 8 to the 1998 Act, and this shows that the obligation of the CAT may not have been discharged or fulfilled on remission, even of the entire matter, to the regulator. (ii) In the present case, though the matter was remitted to the regulator for reinvestigation, the CAT had not been able to determine the whole appeal on its merits on every point. (iii) It can make such an order by way of giving directions under para 3(2)(d), since a direction to complete an investigation within a given time is one which a regulator could give to itself. (iv) It could, in any event, have made such an order as an incidental power under para 3(2)(a). (v) Moreover, because the appeal has not been fully determined, r 19 of the Competition Appeal Tribunal Rules 2003 applies and a time limit direction can be imposed under r 19(2)(h), viewing the remittal as being under r 19(2)(j) as well as under para 3(2)(a). (vi) In addition, the imposition of the time limit was necessary because Ofcom's proposal on 1 December 2004 to act in accordance with a longer timescale showed an intention to act in breach of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The CAT had to be able to impose a shorter time limit in order to prevent a breach of art 6. (vii) Submissions had been addressed to the CAT as to the relevance of Community law, but it did not find it necessary to base its decision on any such point.

[22] The CAT did refer to previous decisions of its own as precedents. Each of them, however, was somewhat different from the present case, and in none was the point as to jurisdiction taken. In *Freeserve.com plc v Director General of Telecommunications (BT Group plc intervening)* [2003] CAT 6, [2003] All ER (D) 21 (Jun), the CAT set aside a decision of the DGT by which he had rejected a complaint by Freeserve, and dismissed the rest of the appeal. The DGT offered an undertaking to provide a fuller statement of his reasoning on the point on which the CAT had found it inadequate. On that basis the CAT did not remit the matter. It did direct that the new statement be issued within three months, rather than the two month period suggested by the DGT, with provision for an application for an extension. Later there had to be two further extensions: see [2003] CAT 15 and [2003] CAT 22.

[23] In *Aberdeen Journals Ltd v Director General of Fair Trading (Aberdeen Independent Ltd intervening)* [2002] CAT 4 a decision was set aside and the matter

remitted to the Director General of Fair Trading (DGFT), with a direction that a new notice under the then relevant rules be issued within two months. However it seems to have been accepted that the original appeal remained in being, and the second appeal, after the DGFT's second decision, was consolidated with the original appeal: see [2003] CAT 11, [2003] All ER (D) 137 (Jul). In *Argos Ltd v Office of Fair Trading* [2003] CAT 16, [2003] All ER (D) 529 (Jul) a decision was referred back, the appeal being treated as still subsisting, and it was dealt with together with the second appeal against the later decision.

THE EXTENT OF THE CAT'S STATUTORY POWERS

[24] It is natural that the CAT should attach importance to the provision in para 3(1) of Sch 8 to the 1998 Act which requires it to determine the appeal on the merits. This distinguishes an appeal of this kind from an appeal against a decision releasing, or not releasing, commitments under s 31A of the 1998 Act; such appeals, by virtue of para 3A of Sch 8, are to be decided on judicial review principles. Paragraph 3(1) does two things: it makes it clear that the appeal is on the merits, and it also limits the appeal to the points taken in the notice of appeal.

[25] If the appellant challenges a decision by a regulator, and establishes, on grounds taken in the notice of appeal, that the decision was wrong, whether as a matter of procedure or because of some misdirection of law or because the CAT takes a different view of the facts on the evidence before it, the CAT has a choice of a number of courses open to it. It may set aside the decision and remit the case to the regulator. It may feel able to decide itself what the correct result should have been, so that no remission or reference back is necessary. It may wish to retain for itself the task of deciding the eventual outcome but require further findings from the regulator, in which case it will not remit but may refer all or part of the decision back under r 19(2)(j) of the Competition Appeal Tribunal Rules 2003, with a view to deciding the appeal with the benefit of the result of that referral.

[26] It seems to me that the CAT's decision of 5 May 2005 invests para 3(1) with more significance than it can bear. It does not, for example, require the CAT to investigate and rule on every point taken in the notice of appeal, if they do not all need to be decided in order to determine the outcome of the appeal, namely whether the relevant decision is to stand, to be varied or to be set aside. In the present case, the CAT said on 5 May 2005 ([2005] CAT 14 at [63]):

> 'This requires the Tribunal to arrive at a decision on the merits of the matter before it and not merely to quash or set aside the competition authority's decision or to remit the matter to the competition authority for a reconsideration by the authority of the matter *de novo*. The powers set out in sub-paragraph 3(2) of Schedule 8 are subordinate to this overriding function of the Tribunal provided for in sub-paragraph 3(1).'

In the same vein, at [70] it said this:

> 'As noted above, in our view sub-paragraph 3(2) is to be read in the context of the Tribunal's overriding function set out in sub-paragraph 3(1). In that context the power to remit the matter to the competition authority under sub-paragraph 3(2)(a) may not necessarily fulfil the overriding obligation of the Tribunal which is to determine the merits of the appeal by reference to the grounds of appeal. There may be cases, as was the position in this appeal, where it transpires that notwithstanding the competition authority's

investigation of the matter there is a deficit of evidence which makes it difficult for the Tribunal to reach a conclusion as to the merits of the appeal.'

Later, at [72] it said this:

> 'In this appeal on the material and submissions before us we were not yet in a position to determine the merits of all of Floe's grounds of appeal in particular with regard to: (a) whether OFCOM's interpretation of the relevant legislation was in conformity with relevant European legislation; (b) whether OFCOM's new interpretation of Vodafone's licence, contrary to the view expressed in the Decision, was indeed correct; and (c) if OFCOM's new interpretation is correct, whether Vodafone's conduct was or was not objectively justified for the purposes of the Chapter II prohibition. Therefore, the substance of the merits of the issues which were conveniently set out in Floe's "First Alternative Argument" and "Second Alternative Argument" have not yet been determined and accordingly remain before the Tribunal. In all these circumstances the Tribunal is not functus officio if it sets aside the decision of the competition authority and exercises its powers provided for by sub-paragraph 3(2) of Schedule 8.'

[27] It was on that basis that the CAT considered that it had before it a subsisting appeal and could have made the directions under r 19: see [77].

[28] A case may occur where the setting aside of the decision and remittal of the matter to the regulator does not dispose of the appeal entirely; I would not wish to exclude that possibility altogether, but the facts would have to be very unusual. The CAT considered the variety of courses open to it at [86]–[87]; I have mentioned the principal options at [25], above. However, with respect to the CAT, it seems to me that, in the present case, once it had set aside the decision and remitted the matter to Ofcom by the order dated 1 December 2004, there was nothing left of the appeal. Paragraph 3(1) did not compel or allow the CAT to treat the appeal as still subsisting in order to decide points which did not arise once it had set aside the decision complained of. Correspondingly, since there was no longer a subsisting appeal, r 19 did not apply. That rule applies in the course of an appeal, allowing the CAT to give directions to secure the just, expeditious and economical conduct of the appeal. Once the appeal has been determined, by the setting aside of the decision challenged and the remittal of the whole matter to the regulator, r 19 no longer applies. I respectfully disagree with what is said at [77] and [78] of the CAT's judgment on this point, and with [86] in so far as it suggests that the CAT may set aside the decision and remit the matter to the regulator but still treat the appeal as subsisting. As regards what is said at [79], it seems to me that the powers under r 19 remain exercisable up to the moment when the appeal has been determined. They do not expire at the beginning of the hearing of the appeal.

[29] Of course, if the decision is not remitted to the regulator, but the power under r 19(2)(j) is used to refer some point back in a pending appeal, then r 19 will apply and, for example, the CAT can give a direction as to the time within which the matter so referred is to be dealt with. This was not such a case.

[30] It follows that the CAT did not have power to fix a case management conference under r 19 or r 20, because there was no continuing appeal in relation to which the r 19 powers were exercisable.

[31] The time limit direction must therefore be justified, if at all, under para 3. Miss Carss-Frisk QC, for Floe, submitted, first, that a time limit direction is a

direction such as the CAT is empowered to give by para 3(2)(d), being a direction which the regulator could have given, albeit to itself. I prefer the submissions of Mr Roth QC, for Ofcom, and Mr Turner for OFT, that directions referred to in para 3(2)(d) are directions such as the regulator can impose under the 1998 Act, in particular under ss 32, 33 and 35. It is no answer to that to say that a distinction has to be drawn between a direction, under (d), and a decision, under (e), on the basis that a direction is itself a decision, and that therefore a direction or other step in (d) must refer to something which is not a decision. Subparagraph (e) speaks of 'any other decisions', so it contemplates that a direction or other step under (d) is also a decision. The content of the two subparagraphs could just as well have been set out in a single subparagraph, for example as 'give such directions or take such other steps as, or make any other decision which, the OFT could itself have given, taken or made'. I do not think that the distinction between direction and decision which Miss Carss-Frisk seeks to draw, and which the CAT did draw, could have been made on wording such as that. The choice of a different drafting technique, perhaps to avoid an overlong subparagraph, cannot alter the meaning of either phrase.

[32] Moreover, it seems to me that the whole of para 3 is focused on decisions affecting third parties. That is certainly true of the word 'decision' in the opening words of para 3(2). Although 'decision' is defined by s 46(3) only for the purposes of that section, the same word when used at the beginning of para 3(2) must mean a decision as so defined. The same is plainly true of the word in para 3(4) and, as it seems to me, also in para 3(3), which gives a decision made by the CAT the same force and effect as a decision of the regulator; that must mean effect as against third parties. In that context, it seems to me that the only sensible interpretation of paras 3(2)(d) and (e) is that they both deal with matters affecting third parties as well. Paragraph (d) does not extend to 'directions', if that is an appropriate word, which the regulator could have given to itself by way of the internal management of an investigation.

[33] For that reason I respectfully disagree with the CAT's reasoning at [69]. If there is a power to impose a time limit on the new investigation it would have to be as an incident of the power to remit under para (a).

[34] The CAT was heavily influenced in its view that there was such a power incidental to the express power under para 3(2)(a) by its view that it had an overriding function to determine all points taken in the grounds of appeal on their merits, and that therefore allowing the appeal by setting aside a regulator's decision did not necessarily complete the performance by the CAT of its functions in the particular case. The CAT, as a statutory body, has the task of deciding such appeals as are brought to it in accordance with the provisions of the 1998 Act and the rules, but it does not have a more general statutory function, of supervising regulators. On that basis it seems to me that the CAT's reasoning is based on a misconception of the relationship between the CAT and the regulators. When a decision is set aside and remitted to the relevant regulator, that particular matter is then to be dealt with by that regulator in accordance with its own statutory duties and functions. The regulator will have received a complaint and will have embarked on an investigation, but will not have concluded that investigation, because the decision by which it purported to do so will have been set aside. Accordingly, as part of its current tasks, it will have the incomplete investigation to consider and process. If it comes to another decision, further rights of appeal may arise under ss 46 or 47, but otherwise the CAT has no role in relation to the regulator's conduct. If the regulator fails to discharge its

duties, then it may be amenable to an application for judicial review in the Administrative Court but, unless and until it has given a decision which is subject to a statutory right of appeal, the CAT will have no jurisdiction in the matter.

[35] Of course the CAT can properly express its own view as to how urgently the case should be dealt with after remission, just as it may express opinions on other aspects of the consequent reinvestigation. But it does not seem to me to be a proper or necessary incident of the power to remit that the CAT should be able to give directions to the regulator in relation to the conduct of the further investigation, any more than it could give the regulator such directions about an initial investigation. In principle it seems to me unlikely that the CAT should be regarded as needing to have such powers or, to put it differently, that Parliament should have intended to confer such powers by implication. If it was intended that the CAT should have powers of that kind, I would expect them to have been identified expressly.

[36] As a general matter it is not the function of the CAT to supervise the relevant regulators. It seems to me that some assistance on this question, as regards the relationship between a competition authority and an appeal body, may be found at para 77 of the decision of the Court of First Instance in *Automec srl v EC Commission* Case T-24/90 [1992] ECR II-2223 at 2275, as follows:

> 'In that connection, it should be observed that, in the case of an authority entrusted with a public service task, the power to take all the organizational measures necessary for the performance of that task, including setting priorities within the limits prescribed by the law—where those priorities have not been determined by the legislature—is an inherent feature of administrative activity. This must be the case in particular where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition. Consequently, the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law.'

[37] The relationship between the Commission and the Court of First Instance is not quite the same as that between a regulator and the CAT under the 1998 Act, in particular because there is a general appeal to the CAT on the merits in cases of the present kind, but the policy there stated seems to me to be applicable by analogy. The CAT cannot know what are the competing demands on the resources of the particular regulator at the given time. It may well be that it cannot properly be told of this by the regulator because of issues of confidentiality as to current investigations. It cannot, therefore, form any proper view as to the relative priority of one case as compared with others.

[38] Similar policy reasons, and a similar view of the relationship between a public body which is subject to judicial review and the court dealing with an application for judicial review, seem to me to underlie the refusal of the Administrative Court, when quashing a decision and remitting it, to instruct the authority as to when or how it is to proceed with the matter, other than that it is to do so in accordance with the law as laid down in the court's judgment: compare *General Council of Medical Education and Registration of the United Kingdom v Spackman* [1943] 2 All ER 337 at 346, [1943] AC 627 at 647 per Lord Wright.

[39] The CAT cited *R v Bolton Metropolitan BC, ex parte B* [1985] FLR 343 as an example of the court instructing a public authority to take a decision within a given time. In that case, however, the nature of the relief sought was an order that the council perform a duty which it had failed or refused to do, and the issue was whether the duty was subject to a time constraint. The judge, having held that the council was obliged to take a decision forthwith, ordered it to do so and specified the latest time by which it could properly do so. That is not a relevant analogy to the present type of case.

[40] For those reasons, it seems to me that the CAT was wrong to hold that it had power to direct the time within which the new investigation was to be carried out following the setting aside of the DGT's decision by its order of 1 December 2004. It could certainly express its own view as to the urgency of the matter. But by that order it had disposed of the appeal and could not impose time limits under r 19. Nor could it give such a direction under Sch 8, para 3(2)(d), which is limited to directions or other steps which could be the subject of an appeal, being decisions within the meaning of s 46 of the 1998 Act. There is no power to give such a direction as an implied incident of para 3(2)(a). Nor could it direct the hearing of a case management conference under r 19 or r 20, since there would be no subsisting appeal in relation to which the case management conference could be held.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS, ART 6

[41] The CAT also held that it was necessary that it should be able to impose a time limit on the new investigation, and that it should impose such a time limit in the present case, in order to ensure that art 6 of the European Convention on Human Rights was complied with as regards the implementation of its order within a reasonable time.

[42] Ofcom accepts that, on the particular facts of this case, art 6 is engaged, though it would not normally take that position as regards investigations under the 1998 Act. The reason why the article is accepted as applying is that its decision involved determining the legality of Floe's gateway services for the purposes of the Wireless Telegraphy Act 1949.

[43] It is also accepted, consequently, that Floe's art 6 rights include a right to have the Ofcom investigation completed within a reasonable time, including the new investigation following the CAT decision (as well, of course, as the appeal to the CAT itself). Decisions of the European Court of Human Rights establish that the decisions of the impartial tribunal which is required for compliance with art 6 must be implemented effectively and within a reasonable time.

[44] The CAT considered that it had the power to impose a time limit in order to ensure such compliance, even if it did not have such a power on any other basis, and that it should impose one because the timescale proposed by Ofcom would extend beyond a reasonable time after the CAT's decision. This seems to me to raise two questions: first, is it for the CAT to see that its decisions are implemented in a reasonable time, and second, if so, could it properly come to the conclusion that Ofcom's proposed timetable would not comply?

[45] I would answer each of those questions in the negative. So far as the first is concerned, the CAT has no role in relation to the time taken by a regulator over an initial investigation even if, as in the present case (however exceptional it may be), art 6 applies at that stage. If the complainant considered that Ofcom was guilty of unreasonable delay in pursuing the initial investigation, its remedy would be to apply for judicial review in the Administrative Court. In my

judgment that would also be the correct remedy if the complainant considered that the regulator was guilty of unreasonable delay in proceeding with the investigation after remittal by the CAT.

[46] I consider that further support is given to that division of functions, as between the CAT dealing with statutory appeals on the one hand, and the Administrative Court dealing with breaches by a regulator of its duties in other cases on the other hand, by the fact that it must inevitably be very difficult, and normally impossible, for the CAT, or for anyone, to determine in advance that it would be a breach of a person's rights under art 6 for a particular investigatory process to be carried out in accordance with one timescale rather than another, at any rate as between the rival contentions at issue in the present case. The CAT accepted that whether the right to implementation within a reasonable time had been infringed or not would depend on a consideration of all the circumstances. Necessarily that involves looking at the circumstances as they were at the time by which it is said that the breach has occurred. I do not see how, in any normal case, that exercise could properly be undertaken in advance, at any rate so as to be able to determine that a process which would take between 6 and 12 months in the future would not comply, whereas a process which would take five months would not infringe art 6 rights. It would be appropriate for the Administrative Court to consider such a question after the event, if an application for judicial review is made to it, whereas it does not seem to me an appropriate exercise for the CAT to undertake in advance.

[47] In *Dyer (Procurator Fiscal, Linlithgow) v Watson, K v Lord Advocate* [2002] UKPC D1, [2002] 4 All ER 1, [2004] 1 AC 379, Lord Bingham said at [52]:

> 'In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.'

[48] In the judgment on 5 May 2005 the CAT referred to the fact that this would be a reinvestigation, so that Ofcom would not be starting from scratch. It also referred to the importance of the issue for Floe and to the importance of Ofcom dealing with matters promptly in a fast-moving sector of the economy such as telecommunications, a point recognised in the Communications Act 2003. On the other hand, in its judgment on the original appeal it had said, [2004] All ER (D) 330 (Nov) at [283], that Ofcom might 'feel that it should invite comments more widely than usual before adopting a new Decision'.

[49] I do not see how the CAT could have concluded that it would be a breach of Floe's art 6 rights if a new decision that there had not been an infringement of the Ch II prohibition was not reached until six months after the CAT's order.

In fact Ofcom was not able to reach a decision within five months. It applied to the CAT for an extension of eight weeks, which was allowed. It reached its decision within that extended period, on 28 June. The decision on the application for an extension, [2005] CAT 17, was not referred to before us. I have read it and though I will refer to it, it does no more than confirm the view which I had reached before seeing it. I therefore consider it unnecessary to invite further submissions about it. The CAT was reluctant to grant an extension. It did so after taking into account Ofcom's assurance that the investigation was being prioritised, but (understandably) without saying more about the reasons for allowing the extension. On the face of it the grant of the extension appears to be inconsistent with any proposition that Ofcom's failure to reach a decision by the end of five months was in fact a breach of Floe's art 6 rights. That is consistent with my impression that, save in the most unusual case, it would not be possible to say in advance that the timescale within which a regulator proposes to undertake and carry out a new investigation would be a breach of the complainant's art 6 rights, and that it was not possible to do so in the present case.

[50] The point under art 6 would not matter unless it were the only basis on which the CAT could be said to have power to set a time limit for a new investigation. In my judgment there is no other basis, but art 6 does not provide such a basis either, both because it is not for the CAT to monitor compliance with art 6 by a regulator, except in relation to proceedings pending before it, and because it could not properly proceed on the basis that Ofcom would have been in breach of art 6 if it had followed the timetable which it had itself proposed.

CONCLUSION

[51] For those reasons I consider that the CAT was wrong to order a case management conference and was wrong to consider that it could have ordered the new investigation to be carried out within a given time. Since the case management conference has happened, there is no point in setting aside the order that it should take place. No order was in fact made that the new investigation be carried out within any given time, and in any event the investigation has been carried out. It does not seem to be necessary to make any order on this appeal, since no further relief is needed by any party, and the court's judgments make clear the position in law on the point debated before us.

SEDLEY LJ.

[52] For reasons which Lloyd LJ has explained, this is not really an appeal at all. The order made by the Competition Appeal Tribunal (CAT) was that the Office of Fair Trading (OFT) should reinvestigate the matter 'with a view to' issuing an appropriate instrument within five months of the date of the order. This was on no view more than an exhortation. It might therefore have been inapt for inclusion in a formal order, but it could not be legally objectionable. The real issue was the power to which the CAT laid claim in its judgment but which it had not in the event purported to exercise. The judgment of Lloyd LJ, with which I respectfully agree but to which I add a little below, is thus, by consent of the parties, declaratory rather than remedial.

[53] It does not follow from Lloyd LJ's conclusions that, once remission has been ordered, parties are at the mercy of the OFT in respect of time. Any undue delay falls within the supervisory jurisdiction of the High Court and can be met with a mandatory order. If such an order is sought it may well be relevant that the CAT has expressed a view, whether in its judgment or in its order, as to the

time within which the remitted matter needs or ought to be dealt with. But this will not be the only factor. The OFT has other demands on its resources and is entitled, within reason, to set its own priorities. The High Court is unlikely to compel it to readjust these to accommodate a particular case unless the interests of justice and good administration plainly require it.

[54] It is not necessary for us to decide whether, as Mr Turner submits is the case, defiance or breach of an order of the CAT by the OFT is justiciable as a contempt of court. It is evident from *A-G v BBC* [1980] 3 All ER 161, [1981] AC 303 (to which no reference was made before us) that the question is not a straightforward one. The CAT is not a court of record and possesses no powers of enforcement. Nor does it appear to possess a court of record's ultimate sanction of exclusion from the suit. But breach of an order of the High Court, if one is made in aid of a decision of the CAT, can certainly be a contempt.

[55] Nor, secondly, does it follow that the CAT cannot attach appropriate conditions to an order for remission. Take a case remitted because manifestly necessary expert advice had not been obtained by the OFT, or because it has relied on advice or evidence from an unqualified person. Although the CAT might be content to spell out in its judgment what should or should not happen on remission, it is implicit in its statutory powers that its formal order may require the OFT to obtain the necessary expert advice. In such a case, too, enforcement through the High Court would if necessary be available. The CAT may lack teeth of its own, but its orders can still bite.

CHADWICK LJ.

[56] As Lloyd LJ has explained, this appeal arises from an indication given by the Competition Appeal Tribunal (CAT) that, in the absence of an acceptable undertaking from the Office of Communications (Ofcom), the CAT would make an order remitting the decision under appeal upon terms which required Ofcom to issue a non-infringement decision or a statement of objections within five months of that date. Ofcom declined to give an undertaking on those terms or on other terms acceptable to the CAT. If the CAT had made an order in the terms which had been indicated at [20] of its judgment of 1 December 2004 ([2004] CAT 22), I would have no doubt that this appeal should be allowed and that the order of that date (to the extent that it imposed those terms) should be set aside.

[57] I reach that conclusion for the reasons which Lloyd LJ has set out in his judgment. I agree with his view that, once the CAT had decided to remit the whole of the decision under appeal to Ofcom for further consideration, this was not a case in which the powers conferred by r 19 of the Competition Appeal Tribunal Rules 2003, SI 2003/1372, remained exercisable. The appeal had been fully determined. And I agree with his view that there is nothing in the relevant legislation which confers upon the CAT some general supervisory function in relation to the conduct by Ofcom or other regulators of the investigations which the regulators are themselves required to make in carrying out their statutory functions. The task of the CAT is to determine appeals which come to it under ss 46 and 47 of the Competition Act 1998; and to do so in accordance with the provisions in Sch 8 to that Act. For the reasons which Lloyd LJ has explained, the CAT had fulfilled that task when it allowed the appeal and remitted the whole of the decision to Ofcom. There was nothing left for the CAT to do in relation to the appeal which had been brought to it.

[58] But—for whatever reason—the CAT did not make an order in the terms which had been indicated at [20] of its judgment of 1 December 2004.

The order which it made on 1 December 2004 contained the direction that Ofcom 're-investigate the matter with a view to issuing' either a non-infringement decision or a statement of objections within the period of five months from that date. As Sedley LJ has observed, an order in that form is no more than exhortatory as to the time within which a non-infringement decision or statement of objections is to be issued. Failure to issue a decision or a statement within the period of five months would not amount to a breach of the order. The CAT's view as to the need for urgency and as to the time within which Ofcom should be able to issue a decision or a statement would be relevant—but not, necessarily, determinative—if subsequent delay came to be the subject of judicial review proceedings in the High Court; but that is another matter. And, in that context, the fact that the CAT's view was reflected in the order gives that view no more force than if it had been expressed in the judgment; as, perhaps, would have been a more appropriate course in the present case.

[59] It follows, in my view, that there is no reason for this court to make any order in relation to para 2 of the order of 1 December 2004. The paragraph contains no error which this court needs to correct. Nor is there any need to set aside para 3 of the order; although I agree with Lloyd LJ that the CAT went beyond its powers in purporting to fix a case management conference in relation to the future management of an appeal which it had finally determined. In the events which have happened para 3 of the order of 1 December 2004 is spent.

[60] The point which the parties wished this court to resolve is addressed in our judgments. The appellants have undertaken to pay the reasonable costs of the respondent in resisting the appeal. Subject to any submissions which the parties may wish to make as to the costs incurred before the CAT, I would dispose of this appeal by making no order.

The court made no order.

Kate O'Hanlon Barrister.

Bradford & Bingley plc v Rashid

[2006] UKHL 37

HOUSE OF LORDS

LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD WALKER OF GESTINGTHORPE, LORD BROWN OF EATON-UNDER-HEYWOOD AND LORD MANCE

24 MAY, 12 JULY 2006

Limitation of action – Acknowledgment – Debt – Whether acknowledgments confined to admissions of debts which were indisputable as to quantum as well as liability – Limitation Act 1980, s 29(5).

Evidence – Without prejudice correspondence – Correspondence forming part of negotiations – Privilege from admission in evidence – Creditor inviting debtor to make proposals for paying debt – Debtor's agent writing letters to creditor acknowledging debt and offering to pay smaller sum – Creditor bringing proceedings for recovery of debt and seeking to rely on letters to defeat limitation defence – Whether letters inadmissible under without prejudice rule.

The claimant creditor was the mortgagee under a legal mortgage of a property created by the defendant debtor. Payments due under the mortgage fell into arrears, and the last such payment was made in January 1991. At that point, time started to run for the purposes of the 12-year limitation period for recovering the principal mortgage debt. The property was subsequently sold, leaving a shortfall on the mortgage debt of £15,000. In 2001 there was an exchange of correspondence between the parties. The creditor wrote to the debtor, inviting his proposals for repayment. In reply, the debtor's agent wrote a letter to the creditor (the first letter), stating that the debtor was not in a position to repay 'the outstanding balance, owed to you'. The creditor's solicitors responded by stating that the creditor was willing to consider writing off a substantial amount of the debt if the debtor were in a position to raise a lump sum payment in full and final settlement. The debtor's agent then wrote a further letter to the creditor (the second letter), stating that the debtor was willing to pay approximately £500 towards the 'outstanding amount' as a final settlement. Neither of the letters written by the debtor's agent was marked 'without prejudice'. In the event, nothing was paid by the debtor, and in June 2003 the creditor issued proceedings against him for recovery of the debt. The debtor's sole defence was that the claim was statute-barred because it had been brought after the expiry of the limitation period. In response, the creditor sought to rely on the letters written by the debtor's agent as acknowledgments of the debt which, by virtue of s 29(5)[a] of the Limitation Act 1980, had started time running afresh. At trial, the deputy district judge held that the second letter was written without prejudice and was therefore inadmissible, but that the first letter was not and, since it was a valid acknowledgment of the debt, the claim was not statute-barred. He therefore gave judgment for the creditor. The debtor's appeal was allowed by the judge who held that both letters were written without prejudice, that they were therefore both inadmissible and that accordingly the claim was statute-barred. That decision was affirmed by the Court of Appeal which agreed with the judge that there had been

a Section 29, so far as material, is set out at [53], below

an attempt to negotiate on the part of the debtor and that, in those circumstances, the public policy foundation for the without prejudice rule had been made out in respect of the correspondence. On the creditor's appeal to the House of Lords, a further issue arose as to whether the letters from the debtor's agent were, in fact, acknowledgments for the purposes of s 29(5) of the 1980 Act. In contending that they were not, the debtor submitted that the letters did not acknowledge what sum was outstanding, and that there was no acknowledgment within s 29(5) unless there was an admission of a definite amount due or an amount ascertainable by mere calculation.

Held – (1) For the purposes of s 29(5) of the 1980 Act, acknowledgments were not confined to admissions of debts which were indisputable as to quantum as well as liability. In the instant case, each of the letters constituted a clear acknowledgment for the purposes of s 29(5) (see [1], [21], [22], [37], [59], [60], [79], below); *Dungate v Dungate* [1965] 3 All ER 818 approved.

(2) Neither of the letters was protected by the without prejudice rule from being admitted in evidence as an acknowledgment because (per Lord Hope of Craighead, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood and Lord Mance) there was no dispute to be compromised. The correspondence treated the debt as an undisputed liability and dealt only with whether, what and to what extent the debtor could meet that liability. The debtor had simply been asking for a concession: he was not giving one. Accordingly (Lord Hoffmann concurring on a different ground), the appeal would be allowed (see [1], [19], [20], [33], [37], [39], [43], [73], [76], [77], [80], [83], [84], [94], below).

Notes

For without prejudice communications, see 17(1) *Halsbury's Laws* (4th edn reissue) paras 887–888 and for acknowledgments, see 28 *Halsbury's Laws* (4th edn reissue) paras 1080, 1084–1086, 1092.

For the Limitation Act 1980, s 29, see 24 *Halsbury's Statutes* (4th edn) (2006 reissue) 781.

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Scott Paper Co v Drayton Paper Works Ltd (1927) 44 RPC 151, *on appeal* (1927) 44 RPC 529, CA.
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Surrendra Overseas Ltd v Government of Sri Lanka [1977] 2 All ER 481, [1977] 1 WLR 565.
Thomson v Austen (1823) LJOSKB 99.
Turner v Railton (1796) 2 Esp 474, 170 ER 424.
Unilever plc v Procter & Gamble Co [2001] 1 All ER 783, [2000] 1 WLR 2436, CA.
Unsworth v Elder Dempster Lines Ltd [1940] 1 All ER 362, [1940] 1 KB 658.
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Watson-Towers Ltd v McPhail 1986 SLT 617, Ct of Sess.
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Stewart v Muirhead (1890) 29 NBR 273, New Brunswick, CA.
Three Rivers DC v Governor and Company of the Bank of England (No 5) [2004] UKHL 48, [2005] 4 All ER 948, sub nom *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, [2004] 3 WLR 1274.
Wallace v Small (1830) M & M 446, 173 ER 1219.

Appeal

The claimant, Bradford & Bingley plc, appealed with permission of the Appeal Committee of the House of Lords given on 17 November 2005 from the decision of the Court of Appeal (Buxton, Latham LJJ and Sir Martin Nourse) on 22 July 2005 ([2005] EWCA Civ 1080, [2005] All ER (D) 330 (Jul)) dismissing its appeal from the decision of Judge Hawkesworth QC in the Bradford County Court on 14 December 2004 allowing an appeal by the defendant, Mohammed Rashid, from the order of Deputy District Judge Heaton giving judgment for Bradford & Bingley in the sum of £22,127·86 (inclusive of interest) in its claim against Mr Rashid for the recovery of a debt. The facts are set out in the opinion of Lord Brown of Eaton-under-Heywood.

Justin Fenwick QC and *Nicole Sandells* (instructed by *Addleshaw Goddard*, Leeds) for Bradford & Bingley.

Christopher Nugee QC and *William Hanbury* (instructed by *Williscroft & Co*, Bradford) for Mr Rashid.

Their Lordships took time for consideration.

12 July 2006. The following opinions were delivered.

LORD HOFFMANN.

[1] My Lords, the chief question is whether a letter containing an acknowledgement of a debt for the purposes of s 29(5) of the Limitation Act 1980 is inadmissible on the ground that the letter formed part of a negotiation with a view to the creditor giving the debtor time to pay or accepting a lesser amount. In common with all of your Lordships, I consider that the letter was admissible. But there is some difference of opinion over the reasons and I must therefore state my own. There is also a subsidiary question as to whether the letters contained acknowledgements within the meaning of the Act. They are set out in the speech to be delivered by my noble and learned friend Lord Brown of Eaton-under-Heywood and I agree with him and my noble and learned friend Lord Hope of Craighead that references in the letter of 26 September 2001 to an 'outstanding balance' and in the letter of 4 October 2001 to an 'outstanding amount' are plain acknowledgements of the existence of a debt. It is clear on the authorities that nothing more is needed.

[2] The more complex question is why the letters are admissible. There is no doubt that they formed part of a negotiation. They were written in reply to an invitation from the building society to make them an offer. Judge Hawkesworth QC, sitting in the Bradford County Court and hearing an appeal from the deputy district judge, who had admitted one of the letters and given judgment for the building society, regarded this as sufficient to exclude the letters on the grounds that they were impliedly written without prejudice. He said:

> 'What was in issue was enforcement, and it seems to me there is equally a public policy issue in encouraging the parties to reach agreement as to the repayment of a debt as there is in encouraging them to agree as to the existence of a debt.'

[3] The Court of Appeal agreed ([2005] EWCA Civ 1080, [2005] All ER (D) 330 (Jul)). I doubt whether anyone could object to the general sentiment expressed. Even when the indebtedness cannot be denied, the parties should be encouraged

to agree on the method by which it should be discharged, if necessary giving the debtor time to pay. But the question is how this policy can best be given effect and here, it seems to me, the judge and the Court of Appeal took a rather one-sided view of the matter. They looked only at encouraging the debtor to be open with his creditor without fear of what he said being used against him. But it takes two to negotiate and there is also a public policy in encouraging the creditor not to initiate legal proceedings. The acknowledgement rule plays an important part in furthering this policy because it means that a creditor, negotiating on the basis that his debt has been acknowledged, can proceed with the negotiations and give time to pay without being distracted by the sound of time's winged chariot behind him. It is also unfair that a debtor who does not dispute his indebtedness should be able to ask for time and use that indulgence to rely on the statute. A good example is the celebrated case of *Spencer v Hemmerde* [1922] 2 AC 507, in which a member of the Bar borrowed £1,000 for two months in 1910 and then did not pay it back. In 1915 there was a correspondence in which the creditor pressed for payment and the debtor acknowledged his indebtedness but sought to gain time. In consequence of this correspondence the creditor, as Viscount Cave put it (at 509), 'stayed his hand'. When proceedings were commenced in 1920, the debtor pleaded the statute of limitations. As the law then stood, it was also necessary that there should be not only an acknowledgement but also an inference of a promise to pay. The issue before the House was whether such a promise could be inferred. There was no suggestion that the letters might be excluded as written in the course of negotiations—a significant omission to which I shall in due course return. However, it is difficult to escape the conclusion that the House, in deciding that the letters were sufficient to lift the time bar, was influenced by the injustice of a debtor asking for time to pay an acknowledged debt and then pleading the statute. As counsel for the creditor said (at 510), 'the debtor . . . was asking for an indulgence, and by means of those letters he obtained the indulgence which enabled him to set up the statute'.

[4] The policy of encouraging negotiation therefore requires that the law should give effect to two objectives: first, the objective furthered by the normal without prejudice rule, which allows the parties to speak freely without fear that their statements will be relied upon as admissions if negotiations should break down, and secondly, the objective of the special acknowledgement rule in the 1980 Act, which allows a creditor to give time to negotiate for the payment of an admitted indebtedness without fear that the claim will become statute barred. These two objectives may sometimes appear to pull in opposite directions, although I hope to demonstrate that upon a proper analysis they do not.

[5] The Court of Appeal, as I have said, did not recognise any possibility of conflict because they gave no weight to the policy of the acknowledgement rule. In fact, I think that the decision of the Court of Appeal would largely destroy that rule. In the nature of things, most acknowledgements will be coupled with attempts to obtain time to pay or remission of part of the debt. As Lord Sumner said in *Spencer*'s case (at 526):

> 'as a rule the debtor who writes such letters has no intention to bind himself further than he is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure.'

In other words, he intends to initiate or pursue a negotiation as to how and how much of the debt should be paid. It is of course possible that a debtor in arrear might write an acknowledgement unaccompanied by any suggestion that he should be allowed time to pay. But, looking at the examples of acknowledgements which have been admitted and construed as such in the past, I think that such cases would be unusual. Certainly in *Spencer*'s case there was material upon which counsel for the debtor, if the thought had occurred to him, could have argued that his client's letters formed part of an attempt at negotiation. Likewise in *Dungate v Dungate* [1965] 3 All ER 818, [1965] 1 WLR 1477, the debtor's letter saying:

> 'Keep a check on totals and amounts I owe you and we will have account now and then . . . Sorry I cannot do you a cheque yet. Terribly short at the moment . . .'

—bears a strong family resemblance to the letters in this case. The same is true of the acknowledgement in the Canadian case of *Phillips v Rogers* [1945] 2 WWR 53 at 56:

> 'Re your correspondence re Mr C H Phillips claim $1300 which he is prepared to settle November 1st for $700. Please thank Mr Phillips for the kind offer. I have no idea where I am going to get $700 and meet your demands by November 1st unless I rob a bank and I really don't think a case of this kind warrants such drastic action on my part. If Mr Phillips or yourself have any ideas how I can get that amount of money, honestly I shall be pleased to consider them.'

[6] These three letters must be typical of those written by hard-pressed debtors since time immemorial and they all either respond to invitations to negotiate terms of payment or attempt to initiate such negotiations. If the acknowledgements they contain are excluded by the without prejudice rule, that will be an end of the rule.

[7] In the Court of Appeal, Sir Martin Nourse did not accept this. He said (at [29]): 'each of these cases depends in the end on its own facts and it is difficult to believe that this case will serve as a precedent for any other.'

[8] This seems to me to make things worse rather than better. The court disavows any statement of principle by which the correspondence in cases like *Spencer v Hemmerde, Dungate v Dungate and Phillips v Rogers* can be distinguished. This would be bound to lead to fine distinctions and a good deal of litigation.

[9] It is therefore necessary to find a principle which would preserve the acknowledgement rule without doing damage to the without prejudice rule. The solution proposed by my noble and learned friend Lord Hope of Craighead, based on Scottish authority, is to deny altogether the application of the without prejudice rule to unqualified admissions, even if made in the course of negotiations for a settlement. In Scotland, this is based upon a fairly recent line of authority going back to the decision of Lord Wylie in *Watson-Towers Ltd v McPhail* 1986 SLT 617.

[10] The *Watson-Towers* case was a motion for summary judgment for the value of goods which had been supplied subject to a reservation of title clause. The pursuer's evidence consisted of a letter from the defender making an offer

expressed to be without prejudice but which attached a schedule listing the goods in its possession. Lord Wylie held (at 618) that the schedule was admissible because it was, on the true construction of the letter, not a 'hypothetical admission or concession for the purpose of securing a settlement' but a statement of fact.

[11] This case was followed by Lord Sutherland in *Daks Simpson Group plc v Kuiper* 1994 SLT 689, another motion for summary judgment in a claim against a director for an account of secret commissions. In a letter expressed to be without prejudice, the director had said that he was prepared to accept that he had received such commissions in stated amounts. Lord Sutherland said (at 692):

> 'I see no objection in principle to a clear admission being used in subsequent proceedings, even though the communication in which it appears is stated to be without prejudice.'

[12] In support of this view, Lord Sutherland referred not only to the *Watson-Towers* case but also to the Canadian case of *Kirschbaum v Our Voices Publishing Co* [1972] 1 OR 737, in which also the judge had distinguished (at 739) between whether an admission in a letter without prejudice was 'to concede a fact hypothetically, in order to effect a settlement, or to declare a fact really to exist.' He might have added a reference to Lord Kenyon in *Turner v Railton* (1796) 2 Esp 474 at 475, 170 ER 424 at 425:

> 'Concessions made for the purpose of settling the business for which the action is brought, cannot be given in evidence; but facts admitted I have always received.'

[13] This limitation on the scope of the without prejudice rule, confining it to admissions which can be construed as made hypothetically rather than without qualification, is not limited to the use of these admissions as acknowledgements under s 29(5) or its Scottish equivalent. It is entirely general. As such, I think that, with all respect to the Scottish judges, including my noble and learned friend Lord Hope, it goes too far. There is nothing in the modern English authorities to encourage a dissection of correspondence or, still worse, conversations, to ascertain whether admissions of fact were made hypothetically or without qualification. It has frequently been said that the purpose of the rule is to encourage parties engaged in settlement negotiations to express themselves freely and without inhibition. It is well established that the rule applies to any genuine attempt at negotiation, whether or not the communications are expressly said to be without prejudice, and I think it would be most unfortunate if the law introduced a new requirement that the parties should preface anything they said with a standard disclaimer that any admissions of fact were to be taken to be hypothetical and solely for the purposes of the negotiation.

[14] It is true that the adoption of such a rule would preserve the acknowledgement rule, because an acknowledgement would by definition be an unqualified admission of liability. But I think that such a remedy would be to throw out the baby with the bathwater and that a more precisely targeted principle is needed.

[15] Another possible solution is to say that negotiations over the mode of payment of an admitted debt are not really negotiations for the purposes of the without prejudice rule. The debtor is seeking an indulgence rather than a

compromise. This is in some ways an attractive solution and I would be willing, if pressed by there being no other, to adopt it. But I feel somewhat uneasy about it because, first, it also has wider implications than saving the acknowledgement rule and secondly, it may in some cases be ineffective to do so. For example, it is clear from the authorities that an admission of indebtedness in general terms, as in this case, is sufficient to constitute an acknowledgement. The procedural bar against bringing the action is lifted and the creditor is free to prove his debt in the ordinary way. But assume that this acknowledgement is made in the course of negotiations about both the amount of the debt and the mode of payment. It would be difficult to say that there was no genuine negotiation to settle the question of the amount for which the debtor was liable. If the negotiations break down and the amount of the debt is later contested in court, one would expect any admissions as to the amount made in the course of negotiations to be excluded by the without prejudice rule. But would the acknowledgement be admissible for the purposes of s 29(5)? If the test is whether the parties were genuinely negotiating over liability rather than the concession of an indulgence, it would have to be excluded. And this would be the case even if the dispute over liability was relatively trivial. It would be hard to distinguish cases on such uncertain grounds. But the public policy of encouraging such negotiations to proceed, once liability has in principle been conceded, without putting the creditor at risk of finding himself time-barred also seems to me a strong one.

[16] The solution which I would therefore favour, and which I think is in accordance with principle, is that the without prejudice rule, so far as it is based upon general public policy and not upon some agreement of the parties, does not apply at all to the use of a statement as an acknowledgement for the purposes of s 29(5). That, I would infer, is what everyone thought in *Spencer*'s case [1922] 2 AC 507. It is in accordance with principle because the main purpose of the rule is to prevent the use of anything said in negotiations as evidence of anything expressly or impliedly admitted: that certain things happened, that the party concerned thought he had a weak case and so forth. But when a statement is used as an acknowledgement for the purposes of s 29(5), it is not being used as *evidence* of anything. The statement is not evidence of an acknowledgement. It *is* the acknowledgement. It may, if admissible for that purpose, also be evidence of an indebtedness when it comes to deciding this question at the trial, but for the purposes of s 29(5) it is not being used as such. All that an acknowledgement does under s 29(5) is to allow the creditor to proceed with his case. It lifts the procedural bar on bringing the action. Questions of evidence to prove the debt will arise later.

[17] The distinction between adducing a statement as evidence of something expressly or impliedly asserted in the statement and simply as evidence that the statement was made is well known in the law of evidence (see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965) and was the basis upon which the Court of Appeal in *Muller v Linsley & Mortimer (a firm)* [1996] PNLR 74 decided that without prejudice correspondence was admissible to prove that a party was acting reasonably in settling a claim against a third party. In a judgment with which Swinton Thomas and Leggatt LJJ agreed, I said (at 79):

> 'Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made.'

I gave as examples letters used to prove a settlement reached as a result of negotiations, a statement amounting to an act of bankruptcy (*Re Daintrey, ex p Holt* [1893] 2 QB 116, [1891–4] All ER Rep 209) and correspondence used to explain delay in commencing or prosecuting litigation.

[18] After a detailed examination of the cases in *Unilever plc v Procter & Gamble Co* [2001] 1 All ER 783 at 793, [2000] 1 WLR 2436 at 2446 Robert Walker LJ expressed some doubt as to whether the 'large residue of communications which remain protected [as being outside the recognised exceptions to the without prejudice rule] can all be described as admissions'. I would certainly accept that the without prejudice rule is capable of excluding statements which are not being used as evidence of the truth of what they expressly or impliedly admit. For example, I do not think that a litigant could be cross-examined to credit on without prejudice correspondence to show that he has made previous inconsistent statements. And I have no doubt that the *Unilever* case was rightly decided. It was obvious to everyone in that case that the alternative to settlement of the patent dispute was litigation. The without prejudice meeting was held with a view to discussing settlement and the notion that any reference to the consequences of failure should be admissible as a threat of litigation contrary to s 70 of the Patents Act 1977 was absurd. But, as I pointed out in *Muller's* case, the thread which runs through most of the alleged exceptions to the without prejudice rule is that the statement is not being used as evidence of the truth of anything expressly or impliedly asserted or admitted. The fact that acknowledgements used for the purposes of the Limitation Act fall within the same category, combined with the public policy of preserving the acknowledgement rule, seem to me to provide strong grounds for holding that the without prejudice rule does not apply to them. That produces a clear rule, easy to apply and having no side-effects, which preserves the acknowledgement principle without otherwise restricting the scope of the normal without prejudice privilege. It is of course open to the parties to agree that whatever they say in negotiations will not be capable of being used even as an acknowledgement for the purposes of s 29(5), but in such a case the creditor will be alerted to the fact that the debtor intends to rely upon the statute.

[19] For those reasons I would allow the appeal and restore the decision of the deputy district judge.

LORD HOPE OF CRAIGHEAD.

[20] My Lords, I agree with all my noble and learned friends, whose speeches I have had the advantage of reading in draft, that the appeal should be allowed. But my reasons are not entirely the same as theirs. So I should like to explain in my own words why I have reached the same conclusion as they have done.

[21] I have no difficulty in regarding the letter of 26 September 2001 as an acknowledgment of the appellants' claim within the meaning of s 29(5) of the Limitation Act 1980. In *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 2 All ER 481 at 489, [1977] 1 WLR 565 at 575 Kerr J said that the debtor can only be held to have acknowledged the claim if he has in effect admitted his legal liability to pay that which the plaintiff seeks to recover. But his acknowledgment need not identify the amount of the debt. As Diplock LJ said in *Dungate v Dungate* [1965] 3 All ER 818 at 820, [1965] 1 WLR 1477 at 1487, his acknowledgment will be sufficient if the amount for which he accepts legal liability can be ascertained by extrinsic evidence.

[22] In its letter of 26 September 2001 the advice centre stated that the respondent was not in a position to pay 'the outstanding balance, owed to you'. It

seems to me that the plain meaning of those words is that the respondent was admitting that he owed the appellants a sum of money which for the time being he was unable to pay. There could not be a clearer way of acknowledging that the respondent was under a legal liability to pay the outstanding balance. It is not disputed that the amount of the balance was capable of being determined by extrinsic evidence. In *Dungate's* case [1965] 3 All ER 818 at 820, [1965] 1 WLR 1477 at 1487, having construed the letter on which the plaintiff relied which referred to 'amounts I owe you' as an acknowledgment under the Act, Diplock LJ said that this did not seem to him to differ from the statement which was held to be an acknowledgment in *Spencer v Hemmerde* [1922] 2 AC 507. The wording of the letter of 26 September 2001 is no less clear, and I think that the same result must follow. The wording of the letter of 4 October 2001 is slightly different. It refers to 'the outstanding amount'. But the key to the meaning of that phrase lies in its use of the definite article. This indicates that there is an amount representing the respondent's present state of indebtedness which is readily ascertainable. I think that this letter too was an acknowledgment within the meaning of the statute.

[23] The more difficult issue is whether these acknowledgments are protected by the 'without prejudice' privilege. As Sir Robert Megarry VC said in *Chocoladefabriken Lindt and Sprungli AG v Nestlé Co Ltd* [1978] RPC 287 at 288, the mere failure to use that expression does not conclude the matter. The question is whether the letters were written in an attempt to compromise actual or pending litigation and, if so, whether it can be inferred from their terms and their whole context that they contained an offer in settlement for which the party who made the offer can claim privilege which prevents the acknowledgments from being relied upon for the purposes of the Act. In the present case the context in which the letters were written offers little, if anything, by way of guidance on this issue. The first letter was not written in response to an invitation to negotiate as to what, if anything, was due. It was written in response to an invitation to say how the amount due was to be repaid. So everything, it seems to me, turns on the wording of the letters themselves and the meaning that is to be attached to them.

[24] The guiding principle is that parties should be encouraged so far as possible to resolve their dispute without resort to litigation, and that they should not be discouraged by the knowledge that anything that is said in the course of such negotiations may be used to their prejudice in the course of the proceedings: *Cutts v Head* [1984] 1 All ER 597 at 605, [1984] Ch 290 at 306, per Oliver LJ. In *Savings and Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630 at [57], [2004] 1 All ER 1125 at [57], [2004] 1 WLR 667, Rix LJ observed that the public interest in encouraging parties to speak frankly to one another in aid of reaching a settlement is very great and ought not to be sacrificed save in truly exceptional and needy circumstances. As to how this rule is to be applied in practice, in *Jones v Foxall* (1852) 15 Beav 388 at 396, 51 ER 588 at 591 Romilly MR deplored attempts to convert offers of compromise into admissions of acts prejudicial to the party making them. In *Unilever plc v Procter & Gamble Co* [2001] 1 All ER 783 at 796, [2000] 1 WLR 2436 at 2448–2449 Robert Walker LJ said that, while the protection of admission against interest is the most important practical effect of the rule, it would be contrary to the underlying objective of giving protection to the parties to dissect out identifiable admissions and withhold protection from the rest. This approach directs attention to the question whether the writer of the letter was seeking a compromise and, if so, what was the issue between the parties that he was seeking to resolve. If the admission was within the scope of the subject matter of the compromise, it is to be given the benefit of the privilege.

[25] The cases that have been decided on this issue in Scotland indicate that the judges there have adopted the same guiding principle as that described by Oliver LJ in *Cutts v Head* [1984] 1 All ER 597 at 605, [1984] Ch 290 at 306. But they take a more pragmatic approach to the question how it is to be applied in practice. They are more willing to find that admissions in a document which contains an offer to compromise are to be treated as admissible. Offers, suggestions or concessions made in the course of negotiations are, of course, given the benefit of the privilege. But they are distinguished from clear admissions or statements of fact which, although contained in the same communication, did not form part of the offer to compromise. On such admissions or statements, if they can be clearly identified as such, the other party is entitled to rely. Another important difference in the practice which is adopted in Scotland is that professional advisers who wish to take advantage of the without prejudice rule are expected to say so expressly, and invariably do so. Authority is lacking on the question whether the rule can be invoked where the letter in question omits these words. There has been no discussion of the extent of the protection that the rule gives in that situation. The Scottish cases to which your Lordships have been referred must be understood in the light of this background. They are all cases where the standard phrase was used, and they all proceed on the basis that its use is not conclusive. Scrutiny of the communication is permitted to determine the extent of the protection that was being claimed. An admission which was made in plain terms is admissible, if it falls outside the area of the offer to compromise.

[26] In *Watson-Towers Ltd v McPhail* 1986 SLT 617, the pursuers sought summary decree, relying on a letter which had been written on the defenders' behalf offering to settle the claim for payment of goods supplied to them. The offer was said to be made without prejudice. The pursuers had supplied a quantity of steel and aluminium plates to a company which later went into receivership. The letter proposed a sum in settlement of the pursuers' claim, which was based on a reservation of title clause. But attached to it was a schedule which specified the amount of the plates that were held in stock on the date of the offer by the joint receivers of the company. Lord Wylie found that the schedule was not part of the offer to compromise. He said that the reference to the plates in stock as specified in the schedule was simply a statement of fact. It was not a hypothetical admission or a concession for the purpose of securing a settlement. He held that the without prejudice privilege did not attach to it, and that the pursuers were entitled to rely upon it as an admission for the purposes of their motion for summary decree.

[27] *Daks Simpson Group plc v Kuiper* 1994 SLT 689 was another case in which the pursuers who were seeking summary decree founded on a letter which had been written by the first defender's solicitor expressly without prejudice. The sums in question were amounts of commission which the first defender had obtained in secret from the pursuers' customers. The letter contained a statement that the first defender was prepared to accept that the first four commission payments stated in a draft settlement agreement listing a number of commission payments paid to him were correct. The total of these four payments was the amount for which the pursuer sought summary decree. Lord Sutherland rejected the first defender's argument that the whole contents of the letter were covered by the privilege and granted summary decree for that amount. Among the authorities to which he was referred were the *Watson-Towers* case and *Cutts v Head*. His attention was also drawn to the Canadian case of *Kirschbaum v Our Voices Publishing Co* [1972] 1 OR 737, where the court said that the question to be considered is what was the view and intention of the party in making the

statement: whether it was to concede a fact hypothetically in order to effect a settlement or to declare a fact really to exist.

[28] Lord Sutherland accepted the general principle as described by Oliver LJ in *Cutts v Head*. He then summarised his approach in these words (at 692):

> '"Without prejudice" in my view means, without prejudice to the whole rights and pleas of the party making the statement. If, however, someone makes a clear and unequivocal admission or statement of fact, it is difficult to see what rights or pleas could be attached to such a statement or admission other than perhaps to deny the truth of the admission which was made. I see no objection in principle to a clear admission being used in subsequent proceedings, even though the communication in which it appears is stated to be without prejudice. I would adopt what is said by Lord Wylie in *Watson-Towers* and the Canadian view expressed in *Kirschbaum*.'

[29] The claims in the *Watson-Towers* case and the *Daks Simpson* case were both brought within the relevant time limit. So the court was not concerned in those cases with the question which arises here, which is whether the debt has been acknowledged for the purpose of prolonging the limitation period. But that was one of the questions which came before the Inner House in *Richardson v Quercus Ltd* 1999 SC 278. In that case the pursuer was the owner of a flat on the second and top floors of a building which had been damaged by renovation works carried out by the defenders to the basement and ground floor of the same building. He relied on a letter by the defenders' loss adjusters dated 2 June 1992 which confirmed that they had no objection to the pursuer instructing the necessary remedial works to his property but which stated that it was written 'without prejudice to liability'. This letter, taken together with previous correspondence, was held to amount to a relevant acknowledgment within the meaning of s 10(1) of the Prescription and Limitation (Scotland) Act 1973 of the subsistence of an obligation to make reparation which would otherwise have been extinguished by the five-year negative prescription. That subsection provides that in order to constitute a relevant acknowledgement there must be an unequivocal written admission clearly acknowledging that the obligation still subsists.

[30] It was accepted in *Richardson*'s case that the principles set out in the *Daks Simpson* case provided the appropriate test. The principal issue was whether the letter was of sufficient substance to overcome the without prejudice docquet. Lord Prosser dealt (at 283–284) with the question whether the letter of 2 June 1992 had to be looked at for this purpose in isolation, as the defenders contended, or under reference to extraneous facts or prior correspondence:

> 'It is clear that what was said in *Daks* was not intended to cover all possible situations, and it appears to me that each situation must be judged upon its own facts. As will appear from what I say in relation to the two principal grounds of appeal, I am satisfied that in considering the issues raised by sec 10(1)(a) and (b) it is not appropriate to look at individual letters or individual events in isolation only. If, looking at them in conjunction and taking this letter into account, it appears that there is no clear indication, or no clear acknowledgment by written admission, that the obligation still subsists, then it may well be that along with a conclusion to that effect, one might conclude that the terms of this letter lacked sufficient substance to

overcome the words "without prejudice to liability". But if overall the substance of this letter, taken with the substance of prior events or writings, could be seen as satisfying the conditions set out in sec 0(1), it would in my opinion be quite wrong to have decided *a priori* that the terms of this letter were of insufficient substance to overcome the docquet. If the terms of this letter, whether alone or with other material, are sufficient to satisfy either of those conditions in sec 10(1), then in my opinion they are sufficient to render the docquet ineffectual.'

[31] The South African case of *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (4) SA 722 (T) to which Lord Mance has drawn our attention seems to me to be entirely consistent with *Richardson's* case. In *Kapeller's* case a clear admission by an insurer of liability in the course of without prejudice negotiations about quantum was sufficient to restart the limitation period. That in a nutshell is exactly what the Court of Session decided in *Richardson's* case. In the Canadian case of *Kirschbaum,* to which Lord Sutherland referred in the *Daks Simpson* case, Haines J sitting in the Ontario High Court adopted the same approach. The question in that case was whether discovery of letters written without prejudice should be permitted so that the parties might explore the question whether they contained admissions of fact which could be taken into account at the trial. Answering that question in the affirmative, the judge said (at 738–739) that contrary to popular belief the proposition that the shibboleth 'without prejudice' written on a letter protects it from subsequent use as an admission was not accurate:

'[T]he question to be considered is, what was the view and intention of the party in making the admission; whether it was to concede a fact hypothetically, in order to effect a settlement, or to declare a fact really to exist.'

[32] In *The Law of Evidence in Canada* Sopinka, Lederman and Bryant (2nd edn, 1999) (para 14.204), the authors summarise the competing theories discussed in Wigmore *Evidence* (Chadbourn rev, 1972) vol 4 (para 1061). They state that the proposition that all admissions in the course of negotiation towards settlement are without prejudice whether those words are used or not and are not admissible in evidence is clearly the one that is accepted in Ontario. But *Kirschbaum's* case has not been overruled or disapproved, so the proposition to which the authors refer must be read subject to the qualification that is set out in that case. This brief comparative exercise shows that, while there may be room for some difference of view as to the application of that qualification in particular cases, the general approach which is taken to this issue in Scotland is far from unorthodox. It cannot be said to be out of line with that which is taken elsewhere.

[33] How then do the letters of 26 September 2001 and 4 October 2001 stand up to examination? Neither of them contained the words 'without prejudice', so the issue is whether they are protected by the public policy rule. It seems to me that the first letter does two things. It contains a clear admission that there is a balance of debt that is still outstanding and then there is a request for time to pay. The Court of Appeal ([2005] EWCA Civ 1080, [2005] All ER (D) 330 (Jul)) agreed with the judge that it was written as part of an attempt to negotiate. But there is no suggestion in this letter that the amount of the debt itself was open to

compromise. The only issue that was being opened up for compromise was how that debt was to be paid off. In my opinion there is nothing in this letter that entitles the respondent to the without prejudice privilege. The second letter, on the other hand, contains both an admission and an offer to compromise. The admission is that there is an amount which is still outstanding. The offer is to pay £500 in full and final settlement of it. But it does not contest the outstanding amount. On the contrary, it is based on what the respondent can offer to pay, not on what he believes to be due. In my opinion this too is not an offer of the kind that attracts the without prejudice privilege on public policy grounds.

[34] In these circumstances I do not think that we need to resolve the question whether, if the admissions are covered by the without prejudice rule, they can nevertheless be admitted as acknowledgments for the purpose of setting a new time limit under the 1980 Act. There is, as Lord Brown of Eaton-under-Heywood points out at [63], below, no absolute rule that admissions of liability which are contained in communications expressly written without prejudice cannot be admitted for this purpose. But I would respectfully suggest, differing from my noble and learned friend, that the position is the same in cases where the admission is made in the course of correspondence which attracts the protection on grounds of public policy. There is, as he points out, a public interest in prolonging the limitation period in the case of an acknowledged claim, as this tends to keep claims that are still capable of settlement out of court. So there is a balance to be struck between the public interest in that respect and the public interest in preventing statements made in the course of negotiations being used at the trial as admissions of liability. It would be bizarre if a claimant who had been dissuaded from taking proceedings time and time again both before and after the expiry of the limitation period by prolonged correspondence which contained repeated statements that liability was admitted, and which sought to negotiate only on the matter of quantum, was to be deprived of his claim on limitation grounds when negotiations broke down simply because the admissions were made in letters which contained proposals as to the amount that was to be paid in settlement of that liability. This suggests to me that there is something wrong with an absolute rule that will always exclude an admission made in the course of negotiations from being relied upon as an acknowledgment for the purposes of the 1980 Act.

[35] Like Lord Hoffmann (at [9], above), therefore, I would wish to find a solution which preserves the acknowledgment rule without damaging the without prejudice rule. But I must repeat the point that I have already made (at [25], above) that the Scottish cases were not concerned with the situation which arises where the acknowledgment is contained in a communication which lacks the without prejudice docquet. The only case which deals with the acknowledgment rule is *Richardson v Quercus Ltd* 1999 SC 278, where the acknowledgment was contained in a letter written by loss adjusters which was expressed to be without prejudice to liability. It is not right to say, as Lord Hoffmann does at [9], above, that Scottish authority denies altogether the application of the without prejudice rule to unqualified admissions made in the course of negotiations for settlement. The issue was treated in that case as one of construction, to be determined according to the words used and in the light of the surrounding circumstances. But the Scottish approach suggests to me that a solution less radical than that which Lord Hoffmann proposes could usefully be adopted where the without prejudice rule is invoked in the absence of a docquet to this effect. I have the same misgivings about his solution as those which have been expressed by Lord Walker of Gestingthorpe and Lord Brown. I venture to

suggest that the solution which I propose is less objectionable. It is based on the way the without prejudice rule operates in the docquet cases. The qualification that applies in those cases is capable of providing a common sense answer to the problem that arises in the non docquet cases also.

[36] The appellants' case is that one or other or both of these letters contains an acknowledgment for the purposes of s 29(5)(a) of the 1980 Act. The letters seem to me to provide all that is needed to satisfy this requirement. Why else, one might ask, were they written other than to acknowledge there was a claim that could still be maintained against the respondent? The purpose of the first letter was to obtain time to pay, and the purpose of the second was to persuade the appellants to accept a lesser sum in final settlement of an amount which was admitted to be outstanding. The only explanation that can be given for writing to the appellants in these terms is that the respondent appreciated that there was a claim which they still could enforce against him. That was why he was seeking to find ways of avoiding that result. It seems to me that they provide a good example of an acknowledgment in writing of the kind that the statute contemplates. They contain an express and unequivocal admission of the existence of debt. In my opinion the appellants would have been entitled to found on that admission as an acknowledgment for the purposes of the statute, even if there had been other material in the letters which attracted the without prejudice privilege.

LORD WALKER OF GESTINGTHORPE.

[37] My Lords, I have had the great advantage of reading all my Lords' opinions in draft. On two basic conclusions your Lordships are unanimous, and I am in agreement with those conclusions: Mr Rashid (through his agent) gave an acknowledgment within the meaning of s 29(5) of the Limitation Act 1980, and it was not protected by the 'without prejudice' rule from being admitted in evidence as an acknowledgment. There is however no unanimity as to why it was admissible in evidence as an acknowledgment.

[38] In common with all your Lordships I think that the Court of Appeal failed to see that there are two public interests engaged in this appeal ([2005] EWCA Civ 1080, [2005] All ER (D) 330 (Jul)). There is the interest in encouraging the settlement of disputes so as to avoid (or at least shorten) litigation; that the Court of Appeal did recognise. But it is also in the public interest that a debtor who acknowledges his debt, and so induces his creditor not to have immediate resort to litigation, should not then be able to claim that the debt is statute-barred because the creditor held his hand. That is, as Lord Hoffmann says, the policy behind the acknowledgment rule, to which Parliament, in enacting the Limitation Act 1939, gave a broader and simpler scope (for the earlier history see the *Fifth Interim Report (Statutes of Limitation)* of the Law Revision Committee (1936) Cmd 5334, para 19).

[39] In the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood Mr Rashid's acknowledgment was not protected for two reasons: it was not expressed to be 'without prejudice', and there was no dispute as to liability to be compromised, the only element of negotiation being directed to obtaining time for payment (any reduction in the amount to be paid, as suggested in the agent's second letter, would have been a matter of pure indulgence on the part of the lender). On this point my noble and learned friends Lord Hope of Craighead and Lord Mance appear to take much the same view as Lord Brown.

[40] Lord Hoffmann (at [15] and [16], above) expresses doubts about the soundness and practicality of a distinction between compromise as to liability and compromise (or indulgence) as to time for payment, and proposes that an acknowledgment should be recognised as outside the rule since the relevant statement is not *evidence* of an acknowledgment (or of anything else); it *is* the acknowledgment. This proposed principle is a development of the thoughts which my Lord (as Hoffmann LJ) expressed in *Muller v Linsley & Mortimer (a firm)* [1996] PNLR 74.

[41] I have to say that I was initially much attracted to this solution. But on reflection I have the same difficulty with it as is expressed in Lord Brown's opinion. It is indeed well established in the law of evidence that the hearsay rule applies only to statements which are to be relied on as evidence of the truth of the matters stated. As Lord Wilberforce said in *Ratten v R* [1971] 3 All ER 801 at 805, [1972] AC 378 at 387:

> 'Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on "testimonially", ie as establishing some fact narrated by the words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the Board in *Subramaniam v Public Prosecutor* ([1956] 1 WLR 965 at 970):
>
> > "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."'

So in *Ratten*'s case evidence was admitted that a woman making a telephone call was in a hysterical state, and in *Subramaniam*'s case evidence of threats was admitted as relevant to the issue of duress.

[42] Like Lord Brown, I do not see how this principle can easily be applied to an acknowledgment. An acknowledgment of a debt is in its very nature an express admission (just as a payment on account is an implied admission) of the existence of a debt. To say that it does not matter whether the admission is true or false (so as to equate it with the threats in *Subramaniam*'s case) seems to me rather unreal. Few debtors would see any advantage in making a false admission of a debt, as a sort of latter-day indebitatus assumpsit. Just as the law would be complicated and distorted by a rule which protected only 'qualified' or 'hypothetical' admissions, so it would in my opinion tend to be complicated and distorted by a rule under which one and the same statement was admissible as an acknowledgment for the purposes of s 29(5) of the Limitation Act 1980, but not as an admission against interest. It would not, as I see it, be relying on the distinction between testimonial and non-testimonial use, but on a more elusive distinction between different types of testimonial use.

[43] For these reasons, and for the reasons more fully set out in the opinion of Lord Brown, I too would allow this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[44] My Lords, a debtor's written acknowledgment of his debt or other liquidated pecuniary claim starts time running afresh under the Limitation Act 1980. Such is the effect of ss 29(5) and 30. In what circumstances, however, can an acknowledgment be rendered inadmissible in evidence pursuant to the without prejudice rule? That critically is the issue before your Lordships. A subsidiary issue arises as to whether either or both of the documents relied upon by the appellants in the present case in fact constitutes an acknowledgment of their claim within the meaning of the 1980 Act.

[45] The facts of the case can be briefly told. The appellants (Bradford & Bingley) were mortagees under a legal mortgage of 60 Duckworth Terrace, Bradford, created by the respondent (Mr Rashid) to secure repayment of the sum of £50,300 advanced towards the purchase of the property. Payments due under the mortgage speedily fell into arrears, and the last such payment was made on 3 January 1991. On 2 October 1991, following a possession order, the property was sold for £47,000 leaving a shortfall owing by Mr Rashid to Bradford & Bingley of £15,583 (the debt). On 14 June 1994 Bradford & Bingley notified Mr Rashid of the debt (having in the meantime had difficulty in tracing his whereabouts), indicating that they might be prepared to waive part of it were he to make a substantial immediate payment. Nothing of relevance then occurred until Bradford & Bingley returned to the matter in 2001, asking Mr Rashid to complete a draft income/expenditure form and to make an 'offer of repayment'. Following Mr Rashid's completion and return of the form (with a nil offer of repayment), solicitors for Bradford & Bingley wrote on 25 June 2001 saying that that was not acceptable and inviting Mr Rashid's 'proposals for repayment as a matter of urgency'.

[46] The next three letters are the most important ones. On 26 September 2001 an advice centre wrote to Bradford & Bingley's solicitors on Mr Rashid's behalf:

> 'Please find attached Mr Rashid's financial statement, which clearly indicates that at present he is not in a position to repay the outstanding balance, owed to you. However, my client requests that once his financial situation is stable he will start to repay. This could be in year 2003/04. Please could you take the above into consideration and reassess this matter and of course his financial situation.'

[47] On 2 October 2001 Bradford & Bingley's solicitors replied:

> 'Our client is not willing to hold this matter without payment. Our client requires Mr Rashid's proposals for repayment. Should your client be in a position to raise a lump sum payment in full and final settlement, our client is willing to consider writing off a substantial amount of this debt.'

(For whatever reason the letter of 2 October 2001 was not available in the courts below.)

[48] On 4 October 2001 the advice centre replied:

> 'I have informed my client Mr M. Rashid of the contents of your letter. He is willing to pay approximately £500 towards the outstanding amount as a final settlement. He is only able to afford this amount by borrowing from friends and family.'

The correspondence before your Lordships ends at this point. None of it was marked without prejudice. Nothing in the event was paid. It is the letters of 26 September 2001 and 4 October 2001 that Bradford & Bingley seek to rely on as acknowledgments for the purposes of the 1980 Act.

[49] Eventually, on 17 June 2003, Bradford & Bingley issued proceedings claiming £15,583 plus statutory interest. The sole defence advanced was that of limitation, pursuant to s 20(1) of the 1980 Act (allowing a period of 12 years for an action brought to recover 'any principal sum of money secured by a mortgage') in respect of the debt; s 20(5) (allowing six years for an action to recover arrears of interest payable in respect of any monies secured by a mortgage) in respect of the interest claim. It is clear that the 12-year period prescribed by s 20(1) for recovering the principal mortgage debt began to run on 3 January 1991 when Mr Rashid made his last payment on account (see *West Bromwich Building Society v Wilkinson* [2005] UKHL 44, [2005] 4 All ER 97, [2005] 1 WLR 2303) so that, but for any acknowledgment of the debt within the terms of s 29(5) of the 1980 Act, time would have expired before the issue of these proceedings on 17 June 2003.

[50] The trial at first instance took place before Deputy District Judge Heaton in the Bradford County Court. He held that although the final letter of 4 October 2001 was written without prejudice and therefore inadmissible, the earlier letter of 26 September 2001 was not and, since it was a valid acknowledgment of the debt, the claim was not statute barred. Accordingly, by order dated 26 May 2004, he gave judgment for Bradford & Bingley in the sum of £22,127·86 inclusive of interest. Mr Rashid was given leave to appeal.

[51] On 14 December 2004 Judge Hawkesworth allowed Mr Rashid's appeal, holding that both of the advice centre's letters were written without prejudice and were thus inadmissible as acknowledgments. Bradford & Bingley's claim was accordingly statute barred.

[52] Finally, on 22 July 2005, the Court of Appeal (Buxton and Latham LJJ and Sir Martin Nourse ([2005] EWCA Civ 1080, [2005] All ER (D) 330 (Jul)) dismissed Bradford & Bingley's appeal (without, indeed, calling on counsel for Mr Rashid). Neither Judge Hawkesworth nor the Court of Appeal reached any conclusion upon whether either or both of the letters of 26 September 2001 and 4 October 2001 constituted an acknowledgment; it was sufficient for their decisions that they found these letters in any event to be inadmissible in evidence under the without prejudice rule.

[53] I find it convenient to address first the issue whether either or both of the advice centre's letters constitute an acknowledgment. So far as relevant ss 29(5) and 30 of the 1980 Act provide:

> '29(5) . . . where any right of action has accrued to recover—(a) any debt or other liquidated pecuniary claim; or (b) . . . and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of acknowledgment or payment . . .

> 30(1) To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.
> (2) For the purposes of section 29, any acknowledgment or payment—(a) may be made by the agent of the person by whom it is required to be made under that section; and (b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.'

[54] Although, as stated, Judge Hawkesworth and the Court of Appeal reached no decision as to whether the letters constituted an acknowledgment of Bradford & Bingley's claimed debt, it is noteworthy that Sir Martin Nourse, giving the only reasoned judgment in the Court of Appeal, held that the letter of 26 September, no less than that of 4 October, contained 'an admission against interest' and was to be regarded as written without prejudice:

> '[25] . . . In my view, the words "the outstanding balance, owed to you" do constitute an admission that the amount of the shortfall originally specified in the letter of 14 June 1994 is owed by the defendant to Bradford & Bingley.'

That notwithstanding, Mr Nugee QC submits that in neither letter did Mr Rashid admit that the debt claimed by Bradford & Bingley was a good one, merely that he could not at present pay, or was willing to settle for £500, whatever sum was in fact due. The letter referred only to 'the outstanding balance, owed to you' (letter of 26 September) and 'the outstanding amount' (letter of 4 October), in neither case acknowledging what sum was outstanding. In particular Mr Nugee submits that unless there is an admission of a definite amount due or an amount ascertainable by mere calculation, there is no acknowledgment within the statute.

[55] In advancing this argument Mr Nugee seeks to reopen the issue as to what precisely was decided by the Court of Appeal in *Good v Parry* [1963] 2 All ER 59, [1963] 2 QB 418, an issue raised and apparently resolved by the Court of Appeal's subsequent decision in *Dungate v Dungate* [1965] 3 All ER 818, [1965] 1 WLR 1477. The relevant letter in *Good*'s case discussed first the writer's proposed purchase of the house (offering £1,350 subject to contract), and continued: 'The question of outstanding rent can be settled as a separate agreement as soon as you present your account.' It was held not to constitute an acknowledgment of the landlord's claim for rent. Lord Denning MR said that the sentence meant 'there may be some rent outstanding and it can be made the subject of an agreement as soon as you present your account' and concluded:

> 'Such being the meaning of it, I am quite satisfied there is no acknowledgment, because there is no admission of any rent of a defined amount due, or of any amount that can be ascertained by calculation. The amount is uncertain altogether. Nor can I regard it as a promise to pay whatever amount may be found due on taking an account. The tenant clearly reserves the right to examine it and not to be bound except by separate agreement.' (See [1963] 2 All ER 59 at 61–62, [1963] 2 QB 418 at 424.)

Danckwerts LJ ([1963] 2 All ER 59 at 62, [1963] 2 QB 418 at 425) regarded the letter as 'merely . . . an admission that there may be some possible justified claim, but no admission that there is such a debt in fact'. Davies LJ ([1963] 2 All ER 59 at 62,

[1963] 2 QB 418 at 425) thought that 'the letter did not acknowledge the claim; it only acknowledged that there might be a claim'. a

[56] The debtor's letter in *Dungate*'s case (a claim against the widow and administratrix of the claimant's deceased brother) read: 'Keep a check on totals and amounts I owe you and we will have account now and then . . . Sorry I cannot do you a cheque yet—terribly short at the moment.' Holding this to be an acknowledgment of the claim, Diplock LJ said ([1965] 3 All ER 818 at 820, [1965] 1 WLR 1477 at 1487) that 'an acknowledgment under the Limitation Act, 1939, need not identify the amount of the debt and may acknowledge a general indebtedness, provided that the amount of the debt can be ascertained by extraneous evidence' (as had been possible there). As for the letter in *Good*'s case Diplock LJ agreed that it— b c

> 'did not acknowledge the claim; it only acknowledged that *there might be a claim*" . . . [It] did not state that any rent was in fact outstanding.' (See [1965] 3 All ER 818 at 820–821, [1965] 1 WLR 1477 at 1488.)

Russell LJ and Sellers LJ agreed, Russell LJ stating that the Dungate letter acknowledged 'I owe you money', adding 'the quantum can be established, as it has been, by extrinsic evidence' (see [1965] 3 All ER 818 at 821, [1965] 1 WLR 1477 at 1488). d

[57] Edmund Davies J, the first instance judge in *Dungate*'s case, had said that the letter was— e

> 'a totally unqualified admission of indebtedness—the "totals and amounts I owe you"—and it is open thereafter for the plaintiff to supplement that letter by oral evidence (as he has done) to show the amounts which his brother then owed him and the present position.' (See [1965] 3 All ER 393 at 397.) f

[58] It seems to me that Mr Nugee may well be right in suggesting a distinction between on the one hand Lord Denning's (although not, I think, his colleagues') apparent view in *Good*'s case that, even had the letter there admitted that *some* rent was due, it would not have constituted an acknowledgment because the amount was 'uncertain altogether' and not able to 'be ascertained by calculation' (or, as Lord Denning had said earlier, 'a mere matter of calculation from vouchers'); and on the other hand the approach taken in *Dungate*'s case, that any uncertainties as to the quantum of the admitted liability can be determined by 'extraneous evidence', including if necessary oral evidence to resolve any dispute. Assume, for example, that a creditor seeks to recover an outstanding debt of £1,000 and the debtor, asserting that he has made a number of unreceipted cash payments in partial repayment, admits that he owes something but not as much as £1,000. It may be doubted whether Lord Denning would have regarded that as an acknowledgment, the precise sum owed being capable of ascertainment 'by calculation', and without 'separate agreement' of the parties. *Dungate*'s case, however, appears to me clear authority for holding that it *would be* an acknowledgment (although, had the debtor in fact admitted liability only for £500 rather than some unspecified sum short of £1,000, that, in my opinion, would constitute an acknowledgment of the claim only to the extent of £500—see Kerr J's judgment in *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 2 All ER 481, [1977] 1 WLR 565). g h j

[59] How, then, should one approach the letters of 26 September and 4 October in the present case? Neither letter, as Mr Nugee is bound to accept, in fact suggested any basis whatever for disputing Mr Rashid's liability for the whole of the shortfall specified in Bradford & Bingley's original letter of 14 June 1994. Indeed, as the statement of facts and issues before the House records:

> 'There is not and never has been any dispute as to the quantum of the debt or the appellant's entitlement to obtain a judgment in respect thereof, subject to the question of limitation.'

Mr Nugee nevertheless submits that the letters cannot realistically be read as admitting the entirety of the claim: it would, for example, have been open to Mr Rashid thereafter to have sought to challenge the sufficiency of the sum realised by Bradford & Bingley on the sale of the property in 1991. No doubt it would. But in my opinion each of the letters of 26 September and 4 October constituted a clear acknowledgment for the purposes of the 1980 Act.

[60] *Dungate*'s case was to my mind rightly decided. Acknowledgments are not confined to admissions of debts which are indisputable as to quantum as well as liability. That to my mind would be a retrograde step in the law, not least given the Law Commission's conclusion in their 2001 report on *Limitation of Actions* (Law Com No 270), following an extensive consultation process, that the present distinction made by s 29(5) between claims for specific amounts and claims for unspecific amounts is 'anomalous' (p 86 (para 3.149)), and their recommendation that a written acknowledgment or a part payment 'irrespective of the nature of the claim, should restart the running of time' (p 88 (para 3.155(1)).

[61] I turn therefore to the application here of the without prejudice rule, noting that this is the first occasion upon which the House has had to consider the interrelationship between this rule and the operation of s 29(5) of the 1980 Act.

[62] The principles upon which the without prejudice rule operates are well-established and conveniently found summarised in Lord Griffiths' speech in *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737 at 739–740, [1989] AC 1280 at 1299:

> 'The "without prejudice" rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v Head* [1984] 1 All ER 597 at 605–606, [1984] Ch 290 at 306:
>
> > "That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged fully and frankly to put their cards on the table . . . The public policy

justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission.'

[63] In both *Cutts v Head* and the *Rush & Tompkins* case itself the communications in question had been expressly made 'without prejudice' and, generally speaking, such communications will attract the privilege even without the public policy justification of encouraging parties to negotiate and settle their disputes out of court. As Hoffmann LJ pointed out in *Muller v Linsley & Mortimer (a firm)* [1996] PNLR 74 at 77, that indeed was the position in *Cutts v Head*: the only justification there for excluding reference to the without prejudice offer on costs was an implied agreement based on customary usage and understanding. But even in cases where communications are expressly made without prejudice there are occasions when the rule will not prevent their admission into evidence—the main instances (including those under the heading 'unambiguous impropriety') are listed and described in Robert Walker LJ's judgment in *Unilever plc v Procter & Gamble Co* [2001] 1 All ER 783 at 791–793, [2000] 1 WLR 2436 at 2444–2445.

[64] In the present case, of course, as already observed, the exchanges in question were *not* marked without prejudice, so there can be no question of any implied agreement here. Rather the critical question here is whether (in Lord Griffiths' words in the *Rush & Tompkins* case) 'it is clear from the surrounding circumstances that the parties were seeking to compromise the action'—whether, as Sir Robert Megarry VC put it in the *Chocoladefabriken* case [1978] RPC 287 at 288, 'there is an attempt to compromise actual or impending litigation'.

[65] The mere fact, of course, that the communications in question constituted acknowledgments does not mean that they necessarily fall outside the protection of the without prejudice rule. There appeared to be some suggestion in Bradford & Bingley's written case that clear and unequivocal admissions, even if made explicitly without prejudice, are admissible in evidence, not least as acknowledgments to defeat a limitation defence (and certainly this seems to be so in Scotland—see particularly *Watson-Towers Ltd v McPhail* 1986 SLT 617, *Daks Simpson Group plc v Kuiper* 1994 SLT 689). This, however, is not how I understand the position in this jurisdiction. Rix LJ in the Court of Appeal in *Savings and Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630, [2004] 1 All ER 1125, [2004] 1 WLR 667 reviewing recently the many authorities on the 'unambiguous impropriety' exception, concluded (at [57]):

'It is not the mere inconsistency between an admission and a pleaded case or a stated position, with the mere possibility that such a case or position, if persisted in, may lead to perjury, that loses the admitting party the protection

a of the privilege . . . It is the fact that the privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances.'

b

[66] If without prejudice admissions of liability are not admissible at trial as evidence of their truth, no more in my opinion can they be admitted as acknowledgments for the purpose of setting time running afresh under the 1980 Act. I do not see the position here as analogous to that arising in *Muller's* case c [1996] PNLR 74 where the Court of Appeal ordered disclosure to the defendants of without prejudice negotiations which had led to the settlement of an earlier action brought by the plaintiffs against other parties. The plaintiffs were asserting that their conduct in settling the earlier claim had been a reasonable attempt to mitigate their loss; the defendants denied this. Lord Hoffmann said (at 80):

d 'The without prejudice correspondence forms part of that conduct and its relevance lies in the light it may throw on whether the Mullers acted reasonably in concluding the ultimate settlement and not in its admissibility to establish the truth of any express or implied admissions it may contain. On the contrary, any use which the defendants may wish to make of such e admissions is likely to take the form of asserting that they were not true and that it was therefore unreasonable to make them.'

[67] Earlier (at 79) he had said:

f 'The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, i.e. independently of the truth of the facts alleged to have been admitted.'

In acknowledgment cases, by contrast, the statements *are* sought to be adduced in g evidence as admissions. Indeed, it is only as admissions that they are relevant as acknowledgments.

[68] It need hardly be pointed out, moreover, that the wider the category of admissions to be regarded as capable of constituting statutory acknowledgments (and, as explained above, *Dungate's* case to my mind establishes that any clear h acceptance of a liquidated liability suffices, even if the quantum of that liability is disputed), the more inappropriate would it be to deny to such admissions the protection of the without prejudice rule assuming that it would otherwise apply.

[69] I return, therefore to the key question on this appeal: were the exchanges between the parties in September and October 2001 properly to be regarded as an j attempt to compromise actual or impending litigation?

[70] Sir Martin Nourse, in his admirably clear and concise judgment below, said this (at [25]):

'It is true that in the letter of 26 September the defendant was saying that he was not in a position to pay anything and might well not be able to pay anything until the year 2003/2004. But that emphasises rather than detracts

from the negotiating nature of the letter. Put more broadly, the "difference" between Bradford & Bingley and the defendant was that Bradford & Bingley were seeking payment under the threat of proceedings, at any rate of something, and the defendant was seeking to avoid payment of anything over a period of two years or more.'

[71] A little later (at [28]) he quoted Judge Hawkesworth's judgment in the court below:

'The letter of 26 September cannot be looked at in isolation. It was part of an attempt to negotiate on behalf of the defendant to avoid him being saddled with a large judgment debt. It seems to me that the public policy foundation for the without prejudice rule is made out both in respect of the opening letter and all subsequent letters . . . What was in issue was enforcement, and it seems to me there is equally a public policy issue in encouraging the parties to reach agreement as to the repayment of a debt as there is in encouraging them to agree as to the existence of a debt. The letter of 26 September was indeed a letter in which the defendant was "laying his cards upon the table" preparatory to negotiations.'

Sir Martin Nourse agreed—

'in particular that there is equally a public policy issue in encouraging the parties to reach agreement as to the repayment of a debt as there is in encouraging them to agree as to the existence of a debt.'

Finally Sir Martin Nourse expressed his belief that the case would not serve as a precedent for other cases and would not result in virtually all acknowledgments being held to be privileged.

[72] I would respectfully disagree with these conclusions. If the without prejudice rule is to apply not merely to attempts to resolve a dispute over the existence or extent of a liability but also to discussions as to how an admitted liability is to be paid, that would seem to me a very substantial enlargement of its scope. Save for a single case in the Bristol Mercantile Court—*Cadle Co v Hearley* [2002] 1 Lloyd's Rep 143, a first instance decision of Judge Havelock-Allan QC, not in fact referred to by the Court of Appeal in the present case—there appears to be no previous authority for such an approach. On the contrary, one is struck by its apparent novelty. It never, for example, appears to have occurred to anyone in *Dungate*'s case [1965] 3 All ER 818 (nor indeed, in *Good*'s case [1963] 2 All ER 59, [1963] 2 QB 418) that, acknowledgment or not, the letter in question was in any event inadmissible under the without prejudice rule.

[73] In my opinion the without prejudice rule has no application to apparently open communications, such as those here, designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability. I find it impossible to regard the correspondence here as constituting 'negotiations genuinely aimed at settlement' (Lord Griffiths in the *Rush & Tompkins* case) or 'an attempt to compromise actual or impending litigation' (Sir Robert Megarry VC in the *Lindt* case). Nor does the underlying public policy justification for the rule appear to have any application in circumstances such as these. That justification, as Oliver LJ observed in *Cutts v Head* (see [62], above)

'essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability'. No 'statements or offers' were made here with a view to settling a dispute. Since the debt was admitted, there *was* no dispute. As Mr Fenwick QC aptly put it in argument, Mr Rashid was simply asking for a concession; he was not giving one.

[74] I cannot, moreover, agree with the court below (see [29]) that—

> 'there is equally a public policy issue in encouraging the parties to reach agreement as to the repayment of a debt as there is in encouraging them to agree as to the existence of a debt.'

That seems to me too simplistic an approach. The position as to acknowledgments is more complicated than that. Acknowledgments, if effective for the purposes of the 1980 Act, tend, like negotiated settlements, to keep the parties out of court. By prolonging the limitation period they enable the creditor to give the debtor time to pay; he is not driven to resort to litigation to recover the debt. If open acknowledgments, merely because accompanied by a proposal to pay by instalments or with a discount, or at some unspecified future date, are to attract without prejudice privilege, then creditors will have no option but to issue proceedings and thereby add to the debtor's ultimate liability. But that is not to say that all acknowledgments should therefore be excluded from the without prejudice rule.

[75] As I have explained, acknowledgments may well leave issues of quantum outstanding and negotiations designed to resolve these to my mind *should* qualify for without prejudice protection. In these cases the policy underlying the without prejudice rule seems to me to outweigh the countervailing policy reason for lengthening the period in which the creditor must issue proceedings. There are, after all, sound policy reasons for having limitation periods in the first place: disputes, if eventually they need to be litigated, should be litigated before they become too stale.

[76] In short, therefore, some acknowledgments will indeed attract without privilege protection. But these will be cases where the extent of the liability is genuinely in dispute and the parties are attempting to settle that difference. Had Mr Rashid, for example, in fact been seeking to question the sufficiency of the sum obtained from the mortgagee's sale of the property and had the correspondence been devoted to resolving that particular issue, without prejudice protection might well have applied. But that simply was not the case. The correspondence treated the debt as an undisputed liability and dealt only with whether, when and to what extent Mr Rashid could meet that liability. The question before your Lordships is whether in those circumstances the without prejudice rule should be extended at the expense of the statutory provision for acknowledgments. For the reasons given I would hold not.

[77] I would accordingly allow Bradford & Bingley's appeal, set aside the orders of the Court of Appeal and Judge Hawkesworth, and restore the order of the deputy district judge giving judgment for Bradford & Bingley in the sum of £22,127·86.

LORD MANCE.

[78] My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Hoffmann, Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood.

[79] The first issue is whether either or both of the advice centre's letters of 26 September and 4 October 2001, if admissible in evidence, constituted an acknowledgement of the appellant bank's claim for the purposes of ss 29(5) and 30 of the Limitation Act 1980. On this issue, I agree with Lord Brown's reasoning and conclusions at [53]–[60], above. The letters acknowledged the existence of 'the outstanding balance, owed to you' or 'the outstanding amount'. The appellant bank is entitled to prove the unstated quantum of that admitted balance or amount by any admissible means, including oral evidence, in accordance with the Court of Appeal's decision in *Dungate v Dungate* [1965] 3 All ER 818, [1965] 1 WLR 1477. By the first letter, written in response to the appellant bank's insistence on proposals for repayment, Mr Rashid was simply requesting time to 'start to repay' the outstanding balance. By the second letter, written in response to the bank's reiteration of its insistence and its indication that it would consider writing off a substantial sum if Mr Rashid raised a lump sum payment 'in full and final settlement', Mr Rashid was simply offering 'approximately £500 towards the outstanding amount as a final settlement'. In each case, he was clearly acknowledging the outstanding debt without question.

[80] The second issue thus arises whether these letters are, as Judge Hawkesworth and the Court of Appeal ([2005] EWCA Civ 1080, [2005] All ER (D) 330 (Jul)) have held, inadmissible as having been written impliedly without prejudice. I agree that there is a short answer to this issue. The letters were not without prejudice, because they were not written in the context of any dispute regarding the debt, or of any attempt to compromise any such dispute. Indeed, the agreed statement of facts before the House admits that there has never been any dispute about the quantum of the debt or the appellant bank's entitlement to a judgment in respect of it (apart from the dispute about limitation which was not and could not have been in existence at the date of either letter in 2001, or indeed until after 3 January 2003, 12 years from the date of Mr Rashid's last payment).

[81] The existence of a dispute and of an attempt to compromise it are at the heart of the rule whereby evidence may be excluded (or disclosure of material precluded) as 'without prejudice'. This is clear from the passage which Lord Brown has at [62], above, cited in full from Lord Griffiths' speech in *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737 at 739–740, [1989] AC 1280 at 1299, commencing:

> 'The "without prejudice" rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish.'

As to disclosure, Lord Griffiths concluded ([1988] 3 All ER 737 at 744, [1989] AC 1280 at 1305) that—

> 'the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties.'

The rule does not of course depend upon disputants already being engaged in litigation. But there must as a matter of law be a real dispute capable of settlement in the sense of compromise (rather than in the sense of simple payment or satisfaction).

[82] Thus, in *Turner v Railton* (1796) 2 Esp 474, 170 ER 424 evidence was admitted that the defendant's former attorney had admitted the debt claimed and made an offer on the defendant's behalf to pay a certain sum on account, and Lord Kenyon said ((1796) 2 Esp 474 at 475, 170 ER 424 at 425):

> 'Concessions made for the purpose of settling the business for which the action is brought, cannot be given in evidence; but facts admitted I have always received.'

Likewise, in *Thomson v Austen* (1823) LJOSKB 99, where evidence of an admitted cross-debt was in part excluded, the court is reported as saying:

> 'We also think that the evidence which was refused was not indicative of any intention to make a compromise, for if it had been so, he would have offered some concession, some sacrifice for the sake of peace; but he simply wishes the matter ended, and then makes an unqualified admission.'

(A similar though not identical passage is attributed to Bayley J in another report at (1823) 2 Dow & Ry KB 358.)

[83] Here, the respondent, Mr Rashid, was not offering any concession. On the contrary, he was *seeking* one in respect of an undisputed debt. Neither an offer of payment nor actual payment of a smaller sum in purported discharge of a larger admitted indebtedness has the effect in law of discharging that indebtedness: cf *Foakes v Beer* (1884) 9 App Cas 605, [1881–5] All ER Rep 106; *D & C Builders Ltd v Rees* [1965] 3 All ER 837, [1966] 2 QB 617 (authorities which we were not in any way asked to reconsider). But, even if Mr Rashid had been offering a lesser sum on a basis which could, if accepted, have precluded the appellant bank from pursuing the admitted larger debt (as might have been the case under Scots law, which has no doctrine of consideration, or which might have been the case under English law, if Mr Rashid had been offering a composition to all his creditors), there would have still have been no relevant dispute about his indebtedness, and the 'without prejudice' rule would still have had no application.

[84] That is sufficient to allow this appeal. But I wish to say a few words on the situation where (unlike in this case) words such as 'without prejudice' are expressly used. If they are used in the context of an attempt to compromise a dispute, then the 'without prejudice' rule, which I have already described, applies. Indeed, in an article of great learning and continuing value, '"Without Prejudice" Communications—Their Admissibility and Effect' (1974) U Br Col LR 85 (on which Robert Walker LJ also drew in *Unilever plc v Procter & Gamble Co* [2001] 1 All ER 783, [2000] 1 WLR 2436), Mr David Vaver (now Reuters Professor of Intellectual Property Law at Oxford) concludes (p 90) that the express use of the term 'without prejudice' was developed by the legal profession by about 1830 as a result of the distinction drawn by previous court decisions (to two of which I have referred) between admissions of liability and offers of compromise. Even where there is a dispute, not every offer of compromise is necessarily intended to be without prejudice, and the express use of the phrase not only puts the matter

beyond doubt in a situation where there is an offer to compromise an existing dispute, but is also capable of throwing some light on the answer to the objective question whether such a situation existed. But its use is by no means conclusive. Neither a dispute nor a concession or offer to compromise can be conjured out of mere words.

[85] Mr Vaver submits (p 134), and I agree with him, that the 'without prejudice' rule of admissibility should be 'strictly confined' to 'the area of its legitimate utility . . . in the facilitation of disputes'. In that area, concerning admissibility in court or disclosure, the court is, as Lord Griffiths stated in the *Rush & Tompkins* case, giving effect to a rule of public policy. But there are, as Mr Vaver recognises, other contexts in which the phrase 'without prejudice' may be deployed by one or more parties, in a way which can have some effect on their legal relations (rather than on admissibility or disclosure). When Mr Guppy in Dickens' *Bleak House* (Ch IX) insisted after the event that his unsuccessful move 'to file a declaration–to make an offer' of marriage to Miss Esther Summerson had been 'without prejudice', he was not suggesting that the offer had been made to compromise some dispute between them, merely that he did not want to be embarrassed by later reference to it, and Miss Summerson was fully entitled therefore to qualify her response: 'I will never mention it', said she, 'unless you should give me future occasion to do so'.

[86] The use and potential significance of the phrase 'without prejudice' in contexts where there is no dispute or attempt to compromise is considered in Mr Vaver's article (pp 132 and 164–169). He identifies (p 132) two relevant questions, the one what effect (if any) may have been intended, the other whether the court ought to give effect to that intention. He points out (at pp 164–169) that the intention is likely to have been to deprive a communication or act of all or a particular legal consequence which it would otherwise have or to reserve or preserve a course of action which might otherwise be prejudiced. He cites as examples *Oliver v Nautilus Steam Shipping Co Ltd* [1903] 2 KB 639 and *Unsworth v Elder Dempster Lines Ltd* [1940] 1 All ER 362, [1940] 1 KB 658, and, in the context of limitation, *Cory v Bretton* (1830) 4 C & P 462, 172 ER 783, where the provision in a letter that it was 'not to be used in prejudice of my rights . . .' was read as meaning that an apparent acknowledgement of indebtedness in the same letter was 'clearly a conditional statement', as well as *Re River Steamer Co, Mitchell's Claim* (1871) 6 Ch App 822 at 831–832, [1861–73] All ER Rep Ext 1272 at 1278, where the phrase 'without prejudice' meant that the debtor could not be regarded as having entered into the new contract—an acknowledgement being at the date of these last two cases only capable of restarting the limitation period if read as implying a fresh promise to meet the old debt. In any such case, it is a matter of construction and substantive law (rather than admissibility or privilege) whether effect will be given to the intention. But, as Mr Vaver points out, the phrase may also be used unthinkingly or superfluously, in which case it falls simply to be ignored: cf also *Nicholson v Southern Star Fire Insurance Co Ltd* (1927) 28 SRNSW 124, *Re Brisbane City Council and White* (1981) 50 LGRA 225, where the phrase was 'futile' in the context of an originating process, and the *Unilever* case [2001] 1 All ER 783 at 795, [2000] 1 WLR 2436 at 2448, where Robert Walker LJ referred to—

> 'the uncontroversial point that "without prejudice" is not a label which can be used indiscriminately so as to immunise an act from its normal legal consequences, where there is no genuine dispute or negotiation.'

In his *Treatise on the Anglo-American system of evidence in trials at common law* (2nd edn, 1923) (para 1061), Wigmore echoed Dickens in noting the confusion resulting from the unthinking use of the phrase as a 'shibboleth', and the Law Reform Committee made the same point with judicious understatement in its *Sixteenth Report on Privilege in Civil Proceedings* (Cmnd 3472; December 1967) (para 23).

[87] In the light of this analysis, it is wrong to assimilate the express use or effect of the phrase 'without prejudice' in a context where there is no dispute or attempt to compromise a dispute with the significance of the 'without prejudice' rule which applies, or of the 'privilege' which exists, where there is an attempt to compromise a dispute. I am unable therefore to agree with my noble and learned friend Lord Brown's statement at [63], above, that 'generally speaking' communications marked 'without prejudice' will 'attract the privilege even without the public policy justification of encouraging parties to negotiate and settle their disputes out of court'. It is not open to a party or parties to extend at will the reach of the 'without prejudice' rule or of the 'privilege' it affords as regards admissibility or disclosure. Nor is this conclusion in any way affected if one takes the view (which Hoffmann LJ, as my noble and learned friend then was, did in *Muller v Linsley & Mortimer (a firm)* [1996] PNLR 74 at 77, 79) that convention, rather than a questionable view of public policy, was the basis of the prohibition which (unless otherwise stipulated: cf *Cutts v Head* [1984] 1 All ER 597, [1984] Ch 290) precludes the use of without prejudice communications on questions of costs. Indeed, Hoffmann LJ (at 79) identified the conventional position regarding costs as 'the only case' where the use of without prejudice communications otherwise than as admissions was precluded.

[88] Had there been a dispute and an attempt at its compromise, the further issue would have arisen whether the use of Mr Rashid's acknowledgment of his indebtedness to satisfy ss 29(5) and 30 of the Limitation Act 1980 fell within one of the qualifications or exceptions to the 'without prejudice' rule, variously addressed by Mr Vaver ((1974) U Br Col LR 85, pp 143–164), by Lord Griffiths in the *Rush & Tompkins* case [1988] 3 All ER 737 at 740–741, [1989] AC 1280 at 1300–1301, by Hoffmann LJ in *Muller*'s case (at 79) and by Robert Walker LJ (as my noble and learned friend then was) in the *Unilever* case [2001] 1 All ER 783 at 791–793, [2000] 1 WLR 2436 at 2444–2446

[89] Two possibilities may be suggested. One, the broader, is that an unequivocal admission made during without prejudice communications regarding the possible compromise of a dispute may be isolated from the remainder of the communications and so used against the party making it, whether on the issue of liability or to restart the limitation period. This appears to be the view taken at first instance in Scotland: cf *Watson-Towers Ltd v McPhail* 1986 SLT 617 and *Daks Simpson Group plc v Kuiper* 1994 SLT 689 (use as admissions on liability of statements in the course of without prejudice communications which were, in the first case (at 618), 'not . . . a hypothetical admission or concession for the purpose of securing a settlement but . . . a statement of fact' and, in the second case (at 682), not 'offers, suggestions, concessions or whatever' but 'a clear and unequivocal admission or statement of fact'); and cf *Richardson v Quercus Ltd* 1999 SC 278 (adoption of the same approach to restart the running of limitation).

[90] I agree with Lord Brown that English law has viewed the matter in different terms. Lord Griffiths in the *Rush & Tompkins* case [1988] 3 All ER 737 at 740, [1989] AC 1280 at 1300 put the position as follows:

> 'There is also authority for the proposition that the admission of an "independent fact" in no way connected with the merits of the cause is

admissible even if made in the course of negotiations for a settlement. Thus an admission that a document was in the handwriting of one of the parties was received in evidence in *Waldridge v Kennison* (1794) 1 Esp 142, 170 ER 306. I regard this as an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence.'

[91] In the *Unilever* case [2001] 1 All ER 783 at 796, [2000] 1 WLR 2436 at 2448–2449, Robert Walker LJ said that the authorities showed that the protection of admissions was 'the most important practical effect' of the without prejudice rule, and that—

'to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737 at 740, [1989] AC 1280 at 1300: "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.'

[92] At present, therefore, I see the first instance Scots authorities as taking an approach differing from the English appellate approach. A limited review suggests that other Commonwealth jurisdictions also adopt an approach which is generally similar to the English, rather than the Scots: see e g (a) as regards Canada, *Evidence in Canada* Sopinka, Lederman and Bryant (2nd edn, 1999) (para 14.204) and Supplement 2004 (para 14.204.1), explaining that the theory 'that all admissions in the course of negotiations towards settlement are protected by a privilege based on public policy' is 'now universally accepted in Canada', following the British Columbia Court of Appeal decision in *Middlekamp v Fraser Valley Real Estate Board* (1992) 96 DLR (4th) 227 (although one can find earlier authority adopting Wigmore's different theory in *Kirschbaum v Our Voices Publishing Co* [1972] 1 OR 737, to which Lord Sutherland referred in *Daks Simpson Group plc v Kuiper* 1994 SLT 689); (b) as regards Australia, *Cross on Evidence* (Australian edn) JD Heydon (2004) paras 25350 and 25375, where the exception is explained as limited to statements of fact that have 'no reference at all to the dispute' or are not 'reasonably incidental to [the] negotiations'; and McNicol *Law of Privilege* (1992) pp 477–478, submitting that 'future courts should be careful not to restrict without prejudice privilege too much' under this test, and concurring with Lord Griffiths' comments concerning *Waldridge*'s case (1794) 1 Esp 142, 170 ER 306; and (c) as regards South Africa, *The South African Law of Evidence* formerly Hoffmann and Zeffertt, now Zeffertt, Paizes and Skeen p 617, where the exception is said to be even more narrowly limited to 'admissions that are quite unconnected with or irrelevant to the settlement'. In *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (4) SA 722 (mainly reported in Afrikaans, but summarised in *Zeffertt, Paizes and Skeen* (p 617)), Viljoen R was able to distinguish a clear admission by a motor insurer as to liability

in respect of a motor accident from the without prejudice negotiations which followed on that basis regarding quantum, and so to treat the admission as restarting the limitation period. I can understand that line of reasoning. But the Scots cases appear on their facts to me to go considerably further. However, I think it preferable to say no more about the scope of any exception, until a case arises where it falls squarely for determination on the facts.

[93] The other, more limited half-way possibility, supported by my noble and learned friend Lord Hoffmann, invokes and seeks to build on his observations in *Muller v Linsley & Mortimer (a firm)* [1996] PNLR 74 at 79–80 to the effect that (with the one possible conventional qualification relating to costs, to which I have referred) the rationale of the without prejudice rule is directed solely to circumstances where a statement made without prejudice is proposed to be used as an admission in relation to the subject-matter of dispute. The possibility involves distinguishing between the use of Mr Rashid's admission as an acknowledgment to avoid any limitation problem and its use as an admission to prove liability on the merits at trial. In *Belanger v Gilbert* (1984) 14 DLR (4th) 428 at 430, (British Columbia Court of Appeal) (cited in *Evidence in Canada* (para 14.226)), one of the three members of the court, Lambert JA, supported this distinction, saying:

> 'In my opinion it is possible for a letter to be considered as a "without prejudice" letter and inadmissible in evidence in relation to its contents about the flow of settlement negotiations either on liability or quantum, but at the same time for the same letter to be admissible in evidence for the exclusive purpose of s.5 of the Limitation Act. It is not necessary to decide that question on the facts of this case, and I explicitly do not do so.'

In support of this distinction, the argument is no doubt that a debtor who makes an unqualified admission in the course of without prejudice negotiations for the compromise of a dispute is, in effect, encouraging the creditor not to commence proceedings, so that, while it would be wrong to treat the admission as prejudicing the debtor on the merits, it would be equally wrong to allow him to take the benefit of time gained in negotiations when it came to a limitation issue. On the other hand, it may be said that the public policy in allowing parties to negotiate freely would be undermined if, during any negotiations, they had to keep an eye open for the possible impact on limitation of any admissions they were without prejudice prepared to make. The argument that a creditor may in such a context be encouraged not to commence proceedings may also be said to have a certain circularity, on the basis that a creditor engaging in without prejudice negotiations should always keep an eye on the limitation position for the very reason that the negotiations are without prejudice. However, since the suggested distinction between the different effects (on the merits and on limitation) of one and the same admission were not explored in any detail before us, perhaps for good reason, I think it again best to say no more on the point.

[94] For the reasons I have given, I agree that this appeal should be allowed.

Appeal allowed.

Celia Fox Barrister.

R (on the application of Munjaz) v Mersey Care NHS Trust

[2005] UKHL 58

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOPE OF CRAIGHEAD, LORD SCOTT OF FOSCOTE AND LORD BROWN OF EATON-UNDER-HEYWOOD

27–30 JUNE, 13 OCTOBER 2005

Mental health – Patient – Seclusion – Prohibition of inhuman or degrading treatment – Right to respect for private and family life – Code of practice issued by Secretary of State in relation to admission and medical treatment of patients suffering from mental disorder – Code of practice requiring hospitals to have written guidelines on use of seclusion – High security hospital's policy set out in guidelines differing from code of practice – Whether policy unlawful – Whether policy breaching prohibition of inhuman or degrading treatment – Whether policy breaching right to respect for private and family life – Mental Health Act 1983, s 118(1) – Human Rights Act 1998, Sch 1, Pt I, arts 3, 8.

The claimant had been transferred from prison to a high security hospital managed by the defendant NHS Trust, one of three hospitals which provided high security hospital accommodation and services for persons liable to be detained under the Mental Health Act 1983. Since then he had been secluded on a number of occasions for the protection of others. Section 118(1)[a] of the 1983 Act provided that the Secretary of State for Health should prepare, and from time to time revise, a code of practice for the guidance of, inter alia, medical practitioners, managers and staff of hospitals and mental nursing homes in relation to the admission and medical treatment of patients suffering from mental disorder. Before preparing or altering the code of practice, the Secretary of State was required to consult such bodies as appeared to him to be concerned, to lay the code before Parliament and to publish the code. The Secretary of State promulgated a code of practice in March 1999 which, in Ch 19, addressed seclusion, which was defined to mean 'the supervised confinement of a patient in a room, which may be locked to protect others from significant harm'. Chapter 19 provided, inter alia, that hospitals should have clear written guidelines on the use of seclusion, and covered the procedure for seclusion and the frequency of medical reviews. The trust drew up a policy on seclusion which repeated parts of the code of practice but differed from it in that it provided for less frequent medical reviews, particularly after the seventh day of seclusion. It did, however, provide, inter alia, for frequent monitoring; for notification to the Mental Health Act Commission of any seclusion for more than seven days; for appeals to the medical director or his deputy; and for judicial review. The claimant sought judicial review, challenging the general lawfulness of the policy of the trust with respect to medical reviews of seclusion and its application to patients at the hospital, either because it was inconsistent with domestic law or because it failed to comply with, inter alia, the prohibition of inhuman and degrading treatment and the right to respect for private and family life contained

a Section 118, so far as material, is set out at [5], below

in arts 3[b] and 8[c] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The judge held the policy to be lawful in both respects. However, the Court of Appeal declared the policy to be unlawful, concluding that the code should be observed by all hospitals unless they had a good reason for departing from it in relation to an individual patient. The trust appealed. It submitted that the code did not fall within s 118(1) since it related neither to 'admission' nor 'medical treatment'; that if it did, it was guidance rather than instruction; that it was directed to the generality of mental hospitals and did not address the specific problems of high security hospitals; and that the policy was compatible with the convention.

Held – (1) 'Admission' could not sensibly be read as referring only to the process of admission to the exclusion of all that followed. Similarly 'medical treatment' was an expression wide enough to cover nursing and caring for a patient in seclusion, even though seclusion could not properly form part of a treatment programme. Accordingly, the code had been issued under s 118(1) (see [19], [44], [66], [67], [107], below).

(2) (Lord Steyn dissenting) In calling for hospitals to have clear written guidelines on the use of seclusion, the code acknowledged that hospitals were not bound simply to reproduce the terms of the code. It was plain that it did not have the binding effect of a statutory provision or a statutory instrument. It was what it purported to be: guidance, not instruction; but it was guidance which any hospital should consider with great care, and from which it should only depart if it had cogent reasons for doing so. It was clear that the trust had considered the code very carefully. In considering the frequency of medical review after day seven the trust had been entitled to take account of, particularly, that the code did not address the special problems of high security hospitals, containing as they inevitably did the most potentially dangerous patients in the country; that it did not recognise the special position of patients whom it was necessary to seclude for more than a very few days; and that the statutory scheme, while providing for guidance by the Secretary of State, had deliberately left to those bearing the legal and practical responsibility for the detention, treatment, nursing and care of patients the power and responsibility of final decision. If a practice was supported by cogent reasoned justification, the court was not entitled to condemn it as unlawful (see [20]–[24], [69], [70], [109], [110], below).

(3) (Lord Steyn dissenting) The policy, considered as a whole and properly operated, would be sufficient to prevent any possible breach of the rights guaranteed by art 3 of the convention of a patient secluded for more than seven days. It could not be said that a policy containing the safeguards which the trust's policy contained exposed such a patient to any material risk of treatment prohibited by art 3 (see [29], [81], [82], [114]–[116], below).

(4) (Lord Steyn and Lord Brown of Eaton-under-Heywood dissenting) It was difficult to see how seclusion could be said to show lack of respect for the patient's rights under art 8(1) if it was used as the only means of protecting others from violence or intimidation and for the shortest period necessary to that end. If, however, it did involve such an interference, it was plainly justified under art 8(2)

b Article 3 provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

c Article 8, so far as material, is set out at [7], [117], below

as being necessary for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Properly used, the seclusion would not be disproportionate because it would match the necessity giving rise to it. The procedure adopted by the trust did not permit arbitrary or random decision-making and thus accorded with law. Accordingly, the appeal would be allowed (see [32]–[34], [89], [90], [92], [94], [100], [103], [104], below).

Notes

For the care and treatment of patients generally, see 30 *Halsbury's Laws* (4th edn reissue) para 436, for the prohibition of torture; inhuman or degrading treatment or punishment and for the right to respect for private life, see 8(2) *Halsbury's Laws* (4th edn reissue), paras 124, 150.

For the Mental Health Act 1983, s 118, see 28 *Halsbury's Statutes* (4th edn) (2001 reissue) 983.

For the Human Rights Act 1998, Sch 1, Pt I, arts 3, 8 see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 705, 707.

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Herczegfalvy v Austria (1993) 15 EHRR 437, [1992] ECHR 10533/83, ECt HR.

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R v Broadmoor Special Hospital Authority, ex p S, H and D [1998] CA Transcript 143.

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Raninen v Finland (1998) 26 EHRR 563, [1997] ECHR 20972/92, ECt HR.
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Appeal

The defendant, Mersey Care National Health Service Trust, appealed with permission of the Appeal Committee from the decision of the Court of Appeal (Lord Phillips of Worth Matravers MR, Hale and Latham LJJ) on 21 July 2003 ([2003] EWCA Civ 1036, [2004] QB 395, [2003] 3 WLR 1505) allowing the appeal of the claimant, Colonel Munjaz, from the decision of Sullivan J on 5 July 2002 ([2002] EWHC 1521 (Admin)) dismissing his application for judicial review, by which he challenged the general lawfulness of the policy of the trust with respect to medical reviews of seclusion and its application to patients at Ashworth Hospital. MIND and the Secretary of State for Health appeared as interested parties. The Mental Health Act Commission made written submissions. The facts are set out in the opinion of Lord Bingham of Cornhill.

John Howell QC and *Phillippa Kaufmann* (instructed by *Capsticks*) for the trust.
Nigel Pleming QC and *Fenella Morris* (instructed by *Hogans*) for Mr Munjaz.
Richard Gordon QC and *Paul Bowen* (instructed by *MIND Legal Unit*) for MIND.
Clive Lewis and *Ben Hooper* (instructed by the *Solicitor to the Department of Health*) for the Secretary of State.

Their Lordships took time for consideration.

13 October 2005. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, in December 2002 the appellant, the Mersey Care National Health Service Trust (the trust), as managers of Ashworth Hospital, implemented a written policy governing the seclusion of patients detained at the hospital. The issue in this appeal is whether that policy is unlawful, either because it is inconsistent with the domestic law of England and Wales or because it fails to comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Sullivan J at first instance held the policy to be lawful in both respects ([2002] EWHC 1521 (Admin)). For reasons given in a judgment of the court delivered by Hale LJ, the Court of Appeal (also including Lord Phillips of Worth Matravers MR and Latham LJ) declared the policy to be unlawful ([2003] EWCA Civ 1036, [2004] QB 395, [2003] 3 WLR 1505). In this appeal the trust challenges that decision. Its legal submissions are supported by the Secretary of State for Health as an interested party. Mr Colonel Munjaz seeks to uphold the Court of Appeal decision. His submissions are supported and elaborated by the National Association for Mental Health (MIND). The Mental Health Act Commission makes written submissions in support of Mr Munjaz.

[2] Ashworth Hospital is one of three hospitals (the others are Broadmoor and Rampton) which provide high security hospital accommodation and services for persons liable to be detained under the Mental Health Act 1983. The Secretary of State is bound by ss 1 and 4(1) of the National Health Service Act 1977 to provide

such accommodation for persons who 'in his opinion require treatment under conditions of high security on account of their dangerous, violent or criminal propensities'. It is not in doubt that among those detained at Ashworth there are patients who, for differing periods and in differing degrees, but sometimes to an extreme degree, exhibit such propensities. The trust became the managers responsible for Ashworth with effect from 1 April 2002.

[3] Mr Munjaz is a man now in his late 50s. After a number of spells in prison and hospital he was admitted to Ashworth from prison under ss 47 and 49 of the 1983 Act on 19 July 1984. He remained an in-patient until March 1992, when he was discharged by a mental health review tribunal. About a year later he was arrested and charged with a number of offences and was admitted, from prison, to a medium secure unit in August 1993. In that unit he became increasingly psychotic, aggressive and violent. He was placed in seclusion and transferred to Ashworth on 1 March 1994. Since then he has been secluded on a number of occasions for the protection of others. In these proceedings he originally complained of four periods of seclusion in the years 2001–2002, the longest of these lasting for 18 days and the shortest for four. But, as will be seen, these complaints are not pursued. His claim now relates solely to the general lawfulness of the policy of the trust with respect to medical reviews of seclusion and its application to patients at Ashworth.

THE LEGISLATIVE BACKGROUND

[4] The admission, detention and treatment in NHS hospitals of those suffering from mental disorder are largely governed by the 1983 Act. Part II of the Act governs compulsory admission to hospital and guardianship. Patients are ordinarily detained in hospital by the managers of the hospital acting on the authority of medical recommendations. At common law those who have custody of or treat or look after patients owe them a duty of care, but this duty is fortified by s 127 of the 1983 Act which makes it a criminal offence punishable by imprisonment to ill-treat or wilfully neglect a hospital in-patient.

[5] Section 118(1) of the 1983 Act is central to this appeal and, as amended in 1995, provides:

> 'The Secretary of State shall prepare, and from time to time revise, a code of practice—(a) for the guidance of registered medical practitioners, managers and staff of hospitals and mental nursing homes and approved social workers in relation to the admission of patients to hospitals and mental nursing homes under this Act and to guardianship and after-care under supervision under this Act; and (b) for the guidance of registered medical practitioners and members of other professions in relation to the medical treatment of patients suffering from mental disorder.'

This is followed by sub-s (2) which makes more particular provision for the code to address forms of treatment not falling within s 57(1)(a) or specified by the Secretary of State in regulations made by him for purposes of s 57(1)(b) but nonetheless calling for special care in ensuring that the patient consents. Subsection (2) provides:

> 'The code shall, in particular, specify forms of medical treatment in addition to any specified by regulations made for the purposes of section 57 above which in the opinion of the Secretary of State give rise to special concern and which should accordingly not be given by a registered medical practitioner unless the patient has consented to the treatment (or to a plan of

a treatment including that treatment) and a certificate in writing as to the matters mentioned in subsection (2)(a) and (b) of that section has been given by another registered medical practitioner, being a practitioner appointed for the purposes of this section by the Secretary of State.'

Before preparing or altering the code of practice the Secretary of State is required b to consult such bodies as appear to him to be concerned (sub-s (3)). The code and any revised code must be laid before Parliament, and either House may within a specified period require its alternation or withdrawal (sub-ss (4), (5)). The code must be published (sub-s (6)).

[6] By s 120(1) of the 1983 Act the Secretary of State is required to keep under review the exercise of the powers and the discharge of the duties conferred or c imposed by the Act so far as they relate to the detention of patients under the Act, and is further required to make arrangements for persons authorised by him in that behalf to visit and interview privately patients detained in hospital under the Act and to investigate complaints made by persons who are or have been detained under the Act. By s 121(2) the Secretary of State must direct that these d functions shall be performed by the Mental Health Act Commission, an authoritative professional body established under s 11 of the 1977 Act and continued by s 121(1) of the 1983 Act.

[7] As is now well known, s 6(1) of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with a convention right. It is not in doubt that the trust is a public authority. The victim of an act made unlawful e by s 6(1) may bring proceedings under s 7(1) and obtain redress under s 8. The main convention rights here in issue are those provided in art 3, which prohibits the subjection of any person to torture or inhuman or degrading treatment or punishment, and art 8, which guarantees to everyone the right to respect for his private and family life, his home and his correspondence. This guarantee in f art 8(1) is supplemented and qualified by para (2):

> 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of . . . the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and g freedoms of others.'

Reference should also be made to art 5. This guarantees to everyone the right to liberty and security of person, and provides that no one shall be deprived of his liberty save in specified cases and in accordance with a procedure prescribed by law. The relevant case for present purposes is '(e) the lawful detention . . . of h persons of unsound mind'. Article 5(4) provides:

> 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not j lawful.'

[8] If in any proceedings one of the higher courts determines that any provision of primary legislation is incompatible with a convention right, the court may so declare: see s 4(1), (2) of the 1998 Act. But the courts are subject to an unusual interpretative duty designed to obviate the need for such a declaration save exceptionally. Section 3(1) of the Act provides:

'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

THE SECRETARY OF STATE'S CODE OF PRACTICE

[9] Pursuant to his duty under s 118(1) of the 1983 Act, following long and detailed consultation with appropriate bodies including the Mental Health Act Commission, and in accordance with the procedure prescribed by statute, the Secretary of State promulgated in March 1999 the code of practice relevant to this appeal. It was prefaced by a statement of guiding principles to guide interpretation of the code. These included principles that people to whom the 1983 Act applies should 'receive recognition of their basic human rights under the European Convention', should 'have their needs taken fully into account, though it is recognised that, within available resources, it may not always be practicable to meet them in full', and should 'be given any necessary treatment or care in the least controlled and segregated facilities compatible with ensuring their own health or safety or the safety of other people'.

[10] The code covers a wide field, and most of its contents are irrelevant to this appeal. Chapter 19 covers 'Patients presenting particular management problems'. Part of this section is addressed to seclusion, defined in para 19.16 to mean 'the supervised confinement of a patient in a room, which may be locked to protect others from significant harm'. Its sole aim is to contain severely disturbed behaviour which is likely to cause harm to others. Thus seclusion should be used as a last resort and for the shortest possible time and should not be used as a punishment or threat, as part of a treatment programme, because of shortage of staff or where there is any risk of suicide or self-harm.

[11] Paragraph 19.17 provides:

'Hospitals should have clear written guidelines on the use of seclusion which:

ensure the safety and well being of the patient;

ensure the patient receives the care and support rendered necessary by his or her seclusion both during and after it has taken place;

distinguish between seclusion and "time-out" (see paras 18.9–18.10);

specify a suitable environment taking account of patient's dignity and physical well being;

set out the roles and responsibilities of staff;

set requirements for recording, monitoring, reviewing the use of seclusion and any follow-up action.'

[12] Succeeding paragraphs cover the procedure for seclusion and the frequency of medical reviews. They are in these terms:

'19.18 The decision to use seclusion can be made in the first instance by a doctor or the nurse in charge. Where the decision is taken by someone other than a doctor, the rmo or duty doctor should be notified at once and should attend immediately unless the seclusion is only for a very brief period (no more than five minutes).

19.19 A nurse should be readily available within sight and sound of the seclusion room at all times throughout the period of the patient's seclusion, and present at all times with a patient who has been sedated.

19.20 The aim of observation is to monitor the condition and behaviour of the patient and to identify the time at which seclusion can be terminated. The level should be decided on an individual basis and the patient should be observed continuously. A documented report must be made at least every 15 minutes.

19.21 The need to continue seclusion should be reviewed

every 2 hours by 2 nurses (1 of whom was not involved in the decision to seclude), and

every 4 hours by a doctor.'

There follow paragraphs in which the code addresses the conditions in which patients are to be secluded, the keeping of records and other matters.

THE ASHWORTH POLICY

[13] In response to para 19.17 of the code (see [11], above), and in the light of an earlier judgment of Jackson J on 28 September 2000 ([2000] MHLR 183), the trust drew up the policy on seclusion which is challenged in these proceedings. The introduction to the policy draws attention to the special problems presented by patients at Ashworth. In para 2.4 it states:

'The Code of Practice provides guidance on how registered mental health practitioners, managers and staff of hospitals should proceed when undertaking duties under the Act. The Code of Practice revised in March 1999 was written to encompass a wide range of mental health services and does not specifically consider the special situation of a high security hospital.'

The aims of the policy are set out in para 3 in terms which almost reproduce para 19.17 of the code, quoted in [11], above.

[14] The policy repeats verbatim the definition of seclusion in the code (para 4.1: see [10], above). It repeats the code's statements on when seclusion should be used and that it should not be used as a punishment or threat or as part of a patient's treatment (paras 4.2–4.3). It addresses the risk of self-harm (para 4.4). The aim of the policy is to protect the public, staff, visitors and patients within the hospital (para 4.5). It deals in detail with the conditions of seclusion (paras 5.1–5.6).

[15] Paragraph 6 of the policy addresses the decision to seclude and provides:

'. . . 6.3 The decision to use seclusion will be made usually in the first instance by the nurse in charge of the ward. It must be clear which individual made the decision. The RMO or deputy and the Ward Manager or deputy should be informed immediately.

6.4 The doctor and Ward Manager or deputy will attend the ward as soon as possible within the hour to assess the situation and review with the nurse in charge whether or not seclusion is required to continue and assess alternative responses. The doctor will record in the notes any agreed level of observation or intervention in excess of the standard seclusion observation . . .'

A nurse is to be readily available within sight and sound of a room in which a person is secluded at all times, and a paper recording of direct visual observation of the patient is to be made at least every 15 minutes (para 7.1). Paragraph 8 provides for the keeping of detailed records and for a detailed plan for

management of the ending of seclusion to ensure its ending at the earliest possible time. a

[16] Because of their importance in this appeal, paras 9–11 of the policy must be quoted in full:

'9 Review

9.1 The RMO is responsible for the use of seclusion. Regular reviews must take place involving the RMO or deputy and Ward Manager or deputy. The details of these are given below. b

9.2 If a doctor was not present at the time of seclusion, he must initiate a review on arrival within one hour and then at:

9.2.1 First day—medical review at 4, 8, 12 and 24 hours; c

9.2.2 Day 2 to day 7—twice per day;

9.2.3 Day 8 onwards:—

[i] daily review by Ward Manager or Site Manager from different ward;

[ii] three medical reviews every 7 days [one being by the RMO];

[iii] weekly review by multi-disciplinary patient care team to include RMO; d

[iv] review by Seclusion Monitoring Group as per paragraph 10 below;

9.3 If at any review at 8 hours or subsequently the doctor is not a consultant psychiatrist the doctor doing the review must consult with the patient's responsible medical officer or the duty consultant and this should be fully documented. e

9.4 The senior manager/nurse will conduct a review on arrival on the ward within one hour of the decision to seclude and then in accordance with the agreed review schedule.

9.5 The nurse in charge will ensure that the patient's Consultant Psychiatrist, or their deputy is informed at the earliest opportunity. Others involved in the patient's care should also be informed. f

9.6 Two qualified nursing staff will carry out a review of the seclusion every two hours. They will record the outcome in the observation record and they will both sign the entry.

9.7 Where practicable one of the nursing staff who carries out a review of seclusion should not have been involved in the original decision to seclude. g

9.8 A Consultant Psychiatrist [who will be the RMO if available or their designated deputy, eg out of hours or during absence from hospital] must see the patient within 72 hours or on the first working day. If waiting until the first working day causes a delay, the duty Registrar must discuss the patient's care with the duty Consultant or RMO and seek agreement to the delay. h

9.9 If the patient remains in seclusion for more than 8 hours continuously or for 12 hours intermittently within a period of 48 hours, an independent review of the need to continue seclusion will take place for this purpose. This should involve, where practicable, one or more clinicians who were not directly involved in the decision to seclude the patient as well as members of the Patient Care Team. However, at least one clinician taking part in the review must not have been involved in the decision to seclude the patient. j

9.10 There is an appeal process available to all secluded patients, separate from and additional to the procedures set out within this paragraph. This process is set out at paragraph 16.

10 Monitoring arrangements

10.1 All seclusion used within the hospital is reviewed by a multi-disciplinary group known as the Seclusion Monitoring Group (SMG).

10.2 The functions of the group are as follows:

* to monitor the implementation and adherence to the policy and procedure for the use of seclusion

* to monitor and review the use of seclusion throughout the hospital

* to monitor and review patients secluded under conditions of paragraph 8 of the seclusion procedure

* to receive and analyse data relating to seclusion and to monitor overall trends in the use of seclusion

* to review documentation for the collection of information about the use of seclusion and alternative management strategies

* to examine training and educational needs to support staff mechanisms and make recommendations to the Hospital Authority Board

* to prepare and submit reports to Clinical Teams, Executive Directors, Authority Board

* to consider any other matters relating to seclusion that occur

* to share and disseminate good practice, hospital wide.

10.3 The Seclusion Monitoring Group is chaired by the Medical Director and reports to the Clinical Governance Committee.

11 The use of seclusion for patients posing management problems

11.1 Any patient for whom the clinical team has to institute seclusion in excess of seven days, will be individually brought to the attention of the Medical Director or in their absence the Executive Nurse Director, by the chairperson of the patient's clinical team, with a resume of the reasons for the continuing use of seclusion, the care and treatment which the patient will be receiving and what is hoped will be achieved.

11.2 The Medical Director will inform the Chief Executive and request a formal case presentation to the next planned meeting of the SMG.

11.3 The Medical Director and Executive Nurse Director, or two representatives of the Seclusion Monitoring Group acting on their behalf, must see the patient whether or not they are familiar with the case.

11.4 Following the case presentation at 10.2, monitoring arrangements will be agreed between the SMG and the patient's clinical team . . .

11.7 Each patient's case will be reviewed weekly by the clinical team and a written report sent monthly to the Seclusion Monitoring Group. At the initial review meeting, and with the patient's consent, consideration will be given by the team to notifying the patient's key relative(s).

11.8 After six months, the Medical Director and Executive Nurse Director will participate in a clinical team review. The case will then be discussed at the Executive Team Meeting.

11.9 The Mental Health Act Commission will be informed if seclusion continues beyond 7 days and will receive progress reports on a regular basis.'

An appendix to the policy provides more detailed guidance on the conduct of the eight-hour review.

[17] Paragraph 12 lays down a further requirement of record keeping. Paragraph 13 authorises the nurse in charge of the ward to terminate seclusion at any time. Paragraph 14.2.1 provides that visiting relatives should, whenever

possible, be allowed to visit a secluded patient. Paragraphs 15 and 16 are to this effect:

> '**15 Monitoring of Seclusion in Ashworth Hospital Authority**
>
> 15.1 Regular performance management information on the use of seclusion will be reviewed daily by the Site Managers, regularly by Service Managers and monthly by Service Management Teams. Information will be reviewed by Executive Team and Ashworth Hospital Authority Board monthly. Review of Seclusion Policy and overall auditing will be the responsibility of the Clinical Governance Committee through the Clinical Audit and Effectiveness Committee. The Executive Nurse will provide regular reports to the Clinical Governance Committee.
>
> **16 Appeal**
>
> 16.1 If a patient or patient's representative want to make any representations they can do so. These representations should be made to the Medical Director, or the Medical Director's nominated deputy, who will conduct a formal review, taking into account all representations as well as all the circumstances before making a decision.
>
> 16.2 The procedure is separate from and additional to the review procedure set out at paragraph 9 above, although any representations made by the patient or the patient's representative will be taken into account as part of the procedures set out under paragraph 9. This appeal procedure is to provide a further opportunity for representations to be made.'

IS THE ASHWORTH POLICY UNLAWFUL IN DOMESTIC LAW?

[18] Mr Munjaz contends that the Ashworth policy is unlawful under the domestic law of England and Wales because it provides for less frequent medical review of seclusion, particularly after day 7, than is laid down in the code. If para 9.2.3 of the policy is compared with para 19.21 of the code it is indeed evident that the frequency of medical reviews is significantly less under the policy than under the code.

[19] The first question for consideration is whether the code issued by the Secretary of State falls within s 118(1) of the 1983 Act. The trust suggests that it does not, since it does not relate to 'admission', the subject matter of (a), and does not relate to 'medical treatment', the subject matter of (b). The judge held that the code fell within (1)(b) but not (1)(a): see para [73] of his judgment. The Court of Appeal ([2004] QB 395 at [72]) held that guidance on the use of seclusion can be issued under (1)(a) and (1)(b). I prefer the Court of Appeal's conclusion. 'Admission' cannot sensibly be read as referring only to the process of admission, to the exclusion of all that follows. Similarly, 'medical treatment' as defined in s 145(1) of the 1983 Act, a definition very similar to that considered and explained by my noble and learned friend Lord Hope of Craighead in *Reid v Secretary of State for Scotland* [1999] 1 All ER 481 at 494–496, [1999] 2 AC 512 at 529–531, is in my opinion an expression wide enough to cover the nursing and caring for a patient in seclusion, even though seclusion cannot properly form part of a treatment programme.

[20] If, then, the code is issued under s 118(1), what is its legal effect in relation to those to whom it is addressed? The trust insists that it is guidance. That is what s 118 requires. The code itself states in its introduction:

'The Act does not impose a legal duty to comply with the Code but as it is a statutory document, failure to follow it could be referred to in evidence in legal proceedings.'

It describes itself as guidance. There is a categorical difference between guidance and instruction. In calling (para 19.17) for hospitals to have clear written guidelines on the use of seclusion, the code acknowledges that hospitals are not bound simply to reproduce the terms of the code. The Secretary of State has a power to give binding directions to hospital authorities (see s 17 of the 1977 Act, in any of its recent amended forms) but that was not the power he was exercising when he issued the code. No express obligation was placed on hospitals to follow the guidance, an omission which contrasts with other provisions, discussed in the authorities, where such an obligation is found. In response, Mr Munjaz lays emphasis on the consultation which must (and certainly did) precede the drawing up of the code, on the Parliamentary sanction which it received, on the issue of the code by the Secretary of State as the public officer responsible for the National Health Service and on the high importance of protecting detained mental patients, a vulnerable and defenceless sector of society, from any risk of abuse. These considerations, it is said, show that the code was intended to be very much more than advice which hospital authorities might choose to follow or not to follow.

[21] It is in my view plain that the code does not have the binding effect which a statutory provision or a statutory instrument would have. It is what it purports to be, guidance and not instruction. But the matters relied on by Mr Munjaz show that the guidance should be given great weight. It is not instruction, but it is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so. Where, which is not this case, the guidance addresses a matter covered by s 118(2), any departure would call for even stronger reasons. In reviewing any challenge to a departure from the code, the court should scrutinise the reasons given by the hospital for departure with the intensity which the importance and sensitivity of the subject matter requires.

[22] The extensive evidence adduced by the trust makes clear that the code was very carefully considered. This is indeed evident from the policy itself, which reproduces important parts of the code and contains cross-references to it. But the policy did depart from the code in providing for less frequent medical review after day 7. As the judge observed (at [36]), the trust 'has explained the justification for the policy in very considerable detail'. Witness statements were made by Dr Collins, who was Mr Munjaz's responsible medical officer, Dr James, a consultant psychiatrist and the medical director of the trust, Dr Finnegan, a consultant psychiatrist and the lead consultant for mental health services at Ashworth, Dr Davenport, consultant psychiatrist and the lead consultant for the women's service at Ashworth, Mr Barwood, the trust's executive director of nursing, and Mr Eley, the deputy director of nursing.

[23] In considering the frequency of medical review after day seven the trust were in my opinion entitled to take account of three matters in particular. First, as pointed out in the introduction to the policy, the code was directed to the generality of mental hospitals and did not address the special problems of high security hospitals, containing as they inevitably do the most potentially dangerous patients in the country. Secondly, the code did not recognise the

special position of patients whom it was necessary to seclude for longer than a very few days. It has been the experience of the trust that the condition of those secluded for more than a week does not change rapidly, and that it is in any event unsafe to rely on an apparent improvement without allowing enough time to pass to give grounds for confidence that the improvement will endure. Thirdly, the statutory scheme, while providing for the Secretary of State to give guidance, deliberately left the power and responsibility of final decision to those who bear the legal and practical responsibility for detaining, treating, nursing and caring for the patients.

[24] The witness statements submitted by the trust are very strongly challenged in statements and evidence on behalf of Mr Munjaz, MIND and the Mental Health Act Commission. This is a highly controversial subject, on which professional opinions differ. The seven-day divide between short-term and long-term secluded patients is criticised. So is the practice, adopted at Ashworth, of allowing secluded patients to spend periods of time, sometimes lengthy periods, in closely supervised association with other patients. There are differences of practice, not all of them fully explained, between Ashworth, Broadmoor and Rampton. It is not, however, for the courts to resolve debatable issues of professional practice, but to rule on issues of law. If a practice is supported by cogent reasoned justification, the court is not entitled to condemn it as unlawful. In the present case, even with the intense scrutiny called for, I cannot regard the long and detailed statements submitted by the trust as failing to show good reasons for adopting the policy it has adopted, even though there are many eminent professional experts who take a different view.

IS THE ASHWORTH POLICY INCOMPATIBLE WITH THE CONVENTION?

[25] Mr Munjaz does not contend that it was inappropriate to seclude him on any of the four occasions when he was secluded. He does not contend that he was secluded for longer periods than his mental condition justified or that his periods in seclusion were longer than they would have been had his condition been the subject of medical review at the frequency indicated in the code rather than that in the Ashworth policy. He does not contend that the periods for which he was secluded, or the reduced frequency of medical review as compared with the code, had a deleterious effect on his mental or physical condition. The evidence of Dr Sophie Davison, a consultant forensic psychiatrist, which Mr Munjaz adduced in the Court of Appeal, precludes any of these contentions. Thus it is necessary to consider the compatibility with the convention of the policy as a policy. For this purpose the code is irrelevant: if the policy is incompatible, consistency with the code will not save it; if it is compatible, it requires no support from the code.

[26] It is furthermore to be assumed for purposes of this discussion that the Ashworth policy is followed in the hospital, or at least that it is followed with that degree of regularity to be expected in a well-ordered and suitably staffed institution. This is a matter of some importance. For seclusion is universally recognised to be an unwelcome necessity of last resort, never a preferred option. It is justified only when used to protect others, and then for the shortest period necessary for that purpose. These restrictions are insisted upon because the potential injury which seclusion can cause to the psychological and physical health and well-being of a patient is, again, universally recognised. It is quite plain that, improperly used or continued, seclusion can violate a patient's convention rights, found claims under ss 6 and 7 of the 1998 Act, and give rise to common law

claims in tort. The focus of this appeal, however, is not on acts or omissions said to give rise to violations of convention rights but on the compatibility of the policy with the convention.

1. *Article 3*

[27] As a party to the convention the United Kingdom is bound in international law, by art 1 of the convention, to secure to everyone within its jurisdiction the rights and freedoms with which this appeal is concerned. As a contracting party it is answerable for any failure to do so. But the internal distribution of powers within member states is not regulated by the convention. It is for them to resolve, through the democratic process, what power shall be exercised and by whom to secure the observance of convention rights. If, therefore, as in this case, Parliament chooses to establish a framework of binding statutory provisions, and to supplement those provisions by a code which will guide but not bind local managers and healthcare professionals, leaving the final decision to them, there is nothing in the convention which invalidates that decision. The evidence makes plain that there are those who would favour binding central direction on the use of seclusion, but that is not the choice which Parliament has made and not a course the Secretary of State supports. It is for the trust to secure observance of art 3 at Ashworth.

[28] The trust must not subject patients at Ashworth to treatment prohibited by art 3. There is no evidence, and it is not suggested, that it has done so.

[29] The trust must not adopt a policy which exposes patients to a significant risk of treatment prohibited by art 3. Despite much learned argument addressed to the House, I do not find it necessary to discuss the extent or probability of the risk or the extent to which it must be foreseen. For I agree with the judge (at [57]–[58]) that the policy must be considered as a whole, that the policy, properly operated, will be sufficient to prevent any possible breach of the art 3 rights of a patient secluded for more than seven days and that there is no evidence to support the proposition that the frequency of medical review provided in the policy risks any breach of those rights. The patient must be the subject of recorded observation by a nurse at least every 15 minutes and of recorded review by two qualified nurses every two hours, one of them (where practicable) not involved in the decision to seclude. In the ordinary course of things it is the nurses who know the patient best, and the nurse in charge of the ward can terminate seclusion at any time. There must be a daily review by a ward manager or site manager of a different ward: these, as the evidence shows, are senior and experienced people. There must be three medical reviews each week, one of them involving the patient's responsible medical officer. There must in addition be a weekly review by a multi-disciplinary patient care team, including the patient's RMO. The seclusion of the patient must be monitored by the hospital's Seclusion Monitoring Group, which includes the medical director, the hospital director, the head of psychology, the senior nurse, the head of social care, two nurses, the ward manager and a non-executive director of the trust, some of whom must have seen the patient. It reports to the hospital's Clinical Governance Committee. The Mental Health Act Commission must be informed once a patient has been secluded for seven days and must thereafter receive regular progress reports: as already noted, it has statutory power to visit and investigate any complaint. The patient may, wherever possible, be visited by a relative. The patient or his representative may appeal to the medical director or his deputy, who must review the case and take account of any representations

made. The patient may seek judicial review of the decision to seclude him or continue to seclude him, or to challenge the conditions in which he is secluded. It cannot in my opinion be said, bearing in mind that the standard set must obtain in all member states of the Council of Europe, that a policy containing these safeguards exposes a patient secluded for more than seven days to any material risk of treatment prohibited by art 3.

2. *Article 5*

[30] It does not appear that the potential applicability of art 5 was canvassed before the judge, but it was raised in the Court of Appeal. That court concluded ([2004] QB 395 at [69]) that while art 5 may avail a person detained in an institution of an inappropriate type (as in *Bouamar v Belgium* (1989) 11 EHRR 1 and *Aerts v Belgium* (1998) 5 BHRC 382) it cannot found a complaint directed to the category of institution within an appropriate system (as in *Ashingdane v UK* (1985) 7 EHRR 528). The approach to residual liberty which appears to have prevailed in Canada (see *Miller v R* (1985) 24 DLR (4th) 9) does not, as I understand, reflect the jurisprudence of the European Court. I do not for my part regret this conclusion since, as the Court of Appeal pointed out (at [70]), improper use of seclusion may found complaints under art 3 or art 8, and art 5(4) provides that a successful challenge should result in an order that the detainee be released, not in an order that the conditions of his detention be varied. I would not, for example, understand art 5(4) as enabling a prisoner, lawfully detained, to challenge his prison category. In any event, the Ashworth policy, properly applied as one must assume, does not permit a patient to be deprived of any residual liberty to which he is properly entitled: seclusion must be for as short a period and in conditions as benign as will afford reasonable protection to others who have a right to be protected.

3. *Article 8*

[31] Mr Munjaz placed no reliance on art 8 before the judge, but Mr Gordon QC representing MIND as an interested party addressed argument on it to the Court of Appeal. He repeats that argument to the House, and Mr Pleming QC for Mr Munjaz adopts it.

[32] It is obvious that seclusion, improperly used, may violate a patient's art 8 right in a serious and damaging way and may found a claim for relief. This appeal, however, is directed to the compatibility of the Ashworth policy with the convention, assuming it to be followed. I have, for my part, some difficulty in appreciating how seclusion can be said to show any lack of respect for a patient's private and family life, home or correspondence, if it is used as the only means of protecting others from violence or intimidation and for the shortest period necessary to that end. A detained patient, when in his right mind or during lucid intervals, would not wish to be free to act in such a way and would recognise that his best interests were served by his being prevented from doing so.

[33] If, however, it is accepted that seclusion, properly used in accordance with the policy, involves an interference by a public authority with the exercise of the patient's right under art 8(1), it is necessary to consider justification under art 8(2). Seclusion under the policy is plainly necessary for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Properly used, the seclusion will not be disproportionate because it will match the necessity giving rise to it.

[34] Mr Gordon, on behalf of MIND, submits that the interference is not 'in accordance with the law' because not prescribed by a binding general law. I cannot for my part accept this. The requirement that any interference with the right guaranteed by art 8(1) be in accordance with the law is important and salutary, but it is directed to substance and not form. It is intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied. This could of course have been achieved by binding statutory provisions or binding ministerial regulations. But that was not the model Parliament adopted. It preferred to require the Secretary of State to give guidance and (in relation to seclusion) to call on hospitals to have clear written guidelines. Given the broad range of institutions in which patients may be treated for mental disorder, a matter on which Mr Gordon places special emphasis, it is readily understandable why a single set of rules, binding on all, was thought to be undesirable and perhaps impracticable. It is common ground that the power to seclude a patient within the hospital is implied from the power to detain as a 'necessary ingredient flowing from a power of detention for treatment': see *R v Broadmoor Special Hospital Authority, ex p S, H and D* [1998] CA Transcript 143 per Auld LJ and the Court of Appeal judgment in the present case (at [40]). The procedure adopted by the trust does not permit arbitrary or random decision-making. The rules are accessible, foreseeable and predictable. It cannot be said, in my opinion, that they are not in accordance with or prescribed by law.

[35] Since the trust's policy does not in my view violate any of the convention articles under consideration, there is no warrant for resorting to s 3 of the 1998 Act to give s 118 of the 1983 Act a meaning and effect other than that which Parliament gave to it.

[36] The Court of Appeal gave the code a stronger effect than is in my view permissible. It said (at [76]):

> 'Hence we conclude that the Code should be observed by all hospitals unless they have a good reason for departing from it in relation to an individual patient. They may identify good reasons for particular departures in relation to groups of patients who share particular well-defined characteristics, so that if the patient falls within that category there will be a good reason for departing from the Code in his case. But they cannot depart from it as a matter of policy and in relation to an arbitrary dividing line which is not properly related to the Code's definition of seclusion and its requirements.'

The considered judgment of a strong and experienced Court of Appeal naturally commands great respect. But this conclusion gives the code a weight which Parliament did not give it, which the Secretary of State does not support and which the convention context does not require. It deprives local managers of the judgmental authority they were given and intended to exercise, and so has a strong (and in my opinion impermissible) centralising effect. It elevates the authority of the code in a way for which there is no warrant in the statute or the code.

[37] I would allow the appeal and, for reasons which are in large measure those given by the judge, dismiss Mr Munjaz's application for judicial review.

LORD STEYN.

[38] My Lords, the advance in the treatment and care of mentally disordered individuals since Victorian times has been great. On the other hand, mental health law has not entirely marched in step with the changing attitudes of society towards treating and caring for mentally disordered patients justly. The Mental Health Act 1983, the controlling statute, is out of date in its approach. Unfortunately, its modernisation in a comprehensive new statute, in conformity with evolving standards, has not yet been accomplished. In respect of the treatment of persons detained in high security mental hospitals, such as Ashworth Hospital, it has been left to so-called soft law, in the form of a code of practice issued by the Secretary of State, to fill in part the gap. The current code was published in March 1999. It addresses, to some extent, the problem of seclusion. It may not be much in terms of modern health law but at least the code is an attempt to set some modern standards. It is the best we have at present. But the present appeal raises the question of the status of the code.

[39] The appeal concerns the use of seclusion in hospitals where mentally disordered patients are detained. The hospital involved is Ashworth Hospital. It decided not to adhere to the current code but instead to follow its own different policy statement. From the perspective of the individual patient it is probably right to say that Ashworth's policy statement represents a somewhat lesser order of protection of mentally disordered patients than was contained in the code. That is the reason for the present case.

[40] In my view the real issues on this appeal are: (1) What is the status of the code of practice (in so far as it covers seclusion) issued under s 118 of the 1983 Act as a matter of domestic and European Convention for the Protection of Human Rights and Fundamental Freedoms (as set out in Sch 1 to the Human Rights Act 1998) law? (2) Upon what basis, as a matter of domestic and convention law, is the seclusion of a patient, already detained under the 1983 Act, lawful?

[41] The judgment of the Court of Appeal in this case has been reported: see *R (Munjaz) v Mersey Care NHS Trust, R (S) v Airedale NHS Trust* [2003] EWCA Civ 1036, [2004] QB 395, [2003] 3 WLR 1505. It is a judgment which demonstrates a thorough understanding of this sensitive and difficult branch of mental health law. I would respectfully pay tribute to it. Having had the advantage of testing the reasoning of the Court of Appeal in the light of detailed adversarial argument, I find myself in agreement with the Court of Appeal on essential points and in particular in respect of arts 3 and 8 of the convention the status of the code, and the conclusion reached (at [76]) that the hospitals may not depart from the code as a matter of policy. The minor error involved in the incorrect reference to s 7 of the Local Authority Social Services Act 1970 (at [73]) does not affect the central reasoning of the judgment.

[42] The only part of the judgment of the Court of Appeal on which I would not adopt the reasoning and conclusion is in respect of seclusion and the applicability of art 5 of the convention. I will explain the point briefly. Under English law a convicted prisoner, sentenced to imprisonment, retains all his civil rights which are not taken away expressly or by necessary implication: see *Raymond v Honey* [1982] 1 All ER 756 at 759, [1983] 1 AC 1 at 10 per Lord Wilberforce. To that extent the prisoner has a residual liberty. The concept of residual liberty is a logical and useful one as demonstrated by the decision of the Canadian Supreme Court in *Miller v R* (1985) 24 DLR (4th) 9. The reasoning in *Miller v R* shows that in a case of a prisoner where solitary confinement is unlawfully and unjustly superimposed upon his prison sentence the added

solitary confinement can amount to 'prison within a prison': it is capable of constituting a material deprivation of residual liberty. It is true that in *Hague v Deputy Governor of Parkhurst Prison, Weldon v Home Office* [1991] 3 All ER 733, [1992] 1 AC 58 the House of Lords ruled out this concept. Lord Jauncey of Tullichettle summed up the reasoning of the House ([1991] 3 All ER 733 at 755, [1992] 1 AC 58 at 176):

> '[The prisoner] is lawfully committed to a prison and while there is subject to the Prison Act 1952 and the Prison Rules 1964. His whole life is regulated by the regime. He has no freedom to do what he wants, when he wants. His liberty to do anything is governed by the prison regime. Placing Weldon in a strip cell and segregating Hague altered the conditions under which they were detained but did not deprive them of any liberty which they had not already lost when initially confined.'

Hague's case predates the 1998 Act. It is cast in the lexicon of the old law. It excluded a remedy for intolerable prison conditions on the basis of false imprisonment and breach of statutory duty. Lord Bridge of Harwich ([1991] 3 All ER 733 at 746, [1992] 1 AC 58 at 165–166) suggested a possible remedy in negligence. But as Feldman *Civil Liberties and Human Rights in England and Wales* (2nd edn, 2002) p 440, has pointed out:

> 'the remedies depend so heavily on the supply of resources from government that it is hard to imagine that a duty of care in tort would ever be adequate to provide a remedy for those who are condemned to live in [inhuman and degrading] conditions.'

In *Hague*'s case Lord Bridge observed ([1991] 3 All ER 733 at 746, [1992] 1 AC 58 at 166): 'In practice the problem is perhaps not very likely to arise'. It is not to be assumed that in 2005 such conditions do not sometimes occur in our prisons. Under domestic law *Hague*'s case effectively denies prisoners any effective remedy for a breach of their residual liberty. Even in respect of convicted prisoners *Hague*'s case should no longer be treated as authoritative. A fortiori *Hague*'s case should not be applied to the relationship between a detained patient and the managers of the hospital. After all, unlike prisoners who committed crimes of their own volition, mentally disordered patients are not guilty of any legal or moral culpability.

[43] It would also be wrong to assume that under the jurisprudence of the convention residual liberty is not protected. There is relevant European authority not placed before the Court of Appeal. In *Bollan v UK* App No 42117/98 (4 May 2000, unreported), the European Court of Human Rights, albeit in an admissibility decision, considered the point. The complaint was a comparatively weak one: the prisoner had been confined to her cell, unlawfully it was said, for some two hours. The evidence was that she was a heroin addict who objected to that restriction on her residual liberty. In European terms the case simply did not reach the necessary threshold of severity. The European Court dealt with the legal principles arising under the convention as follows:

> 'It is undisputed in the present case that Angela Bollan was lawfully detained in Corton Vale prison pursuant to a court order remanding her in custody pending sentence for a criminal offence. Nor is it disputed that the prison was an appropriate establishment for that type of detention or that there was anything inappropriate concerning her place of detention within

the prison. The principal issue is whether the decision of the prison officers to leave Angela Bollan in her cell until lunchtime—a period of less than two hours—in itself disclosed an unjustified and unlawful deprivation of her liberty within that prison. *The court does not exclude that measures adopted within a prison may disclose interferences with the right to liberty in exceptional circumstances.* Generally however, disciplinary steps, imposed formally or informally, which have effects on conditions of detention within a prison, cannot be considered as constituting deprivation of liberty. Such measures must be regarded in normal circumstances as modifications of the conditions of lawful detention and therefore fall outside the scope of art 5(1) of the convention (see *X v Switzerland* (1977) 11 DR 216). In appropriate cases, issues may arise however under arts 3 and 8 of the convention.' (My emphasis.)

Plainly, the European Court has not ruled out as a matter of principle the concept of residual liberty. On the contrary, it accepts that there is scope for such a doctrine. It will be noted also that the European Court observed that in such cases 'in appropriate cases, issues may arise however under arts 3 and 8 of the convention'. To that it must be added that, if substantial and unjust seclusion of a mentally disordered patient cannot in our domestic law be protected effectively under arts 3 and 8, the case for protection under art 5 becomes ever stronger. It follows that a substantial period of unnecessary seclusion of a mentally disordered patient, involving total deprivation of any residual liberty that the patient may have within the hospital, is capable of amounting to an unjustified deprivation of liberty.

[44] In relation to the status of the code, I am in full agreement with the reasoning of the Court of Appeal. The code was plainly issued under s 118(1)(a) and (b) of the 1983 Act. It is a very special type of soft law. It derives its status from the legislative context and the extreme vulnerability of the patients which it serves to protect. In the context of the code the Court of Appeal explained (at [11]), and I accept, that the concern about seclusion lies 'in the combination of the potentially harmful or degrading effects of seclusion upon the patient and its potential for misuse by those looking after him'. This is the contextual scene of s 118(1). It is wrong to focus exclusively or even primarily on the dictionary meaning of 'guidance'. In a careful analysis Mr Pleming QC relied in addition to the reasons given by the Court of Appeal on the fact that s 118(2) provides that 'the code shall, in particular, specify forms of medical treatment' which 'should accordingly not be given by a registered medical practitioner unless the patient has consented to the treatment'. He pointed out that the preceding White Paper of November 1981 observed that the code 'might include references to treatments such as electro-convulsive therapy when used in particular circumstances, long acting drugs, and behaviour therapies': see *Reform of the Mental Health Legislation* (para 39). These examples reveal that in s 118(1) Parliament had authorised a code with some minimum safeguards and a modicum of centralised protection for vulnerable patients. This is inconsistent with a free-for-all in which hospitals are at liberty to depart from the published code as they consider right. Indeed, it seems unlikely that Parliament would have authorised a regime in which hospitals may as a matter of policy depart from the code. After all that would result in mentally disordered patients being treated about seclusion in a discriminatory manner, depending on the policy adopted by the managers and clinicians in particular hospitals.

[45] Another internal aid to the interpretation of s 118 mentioned by Mr Pleming is s 121 which deals with the Mental Health Act Commission. Section 121(4) provides:

> 'The Secretary of State may, at the request of or after consultation with the Commission and after consulting such other bodies as appear to him to be concerned, direct the Commission to keep under review the care and treatment, or any aspect of the care and treatment, in hospitals and mental nursing homes of patients who are not liable to be detained under this Act.'

This provision is in line with the idea of centralised minimum safeguards. It throws light on the dynamic role that a code issued under s 118 was intended to play.

[46] The Court of Appeal applied the dictum of Sedley J in *R v Islington London BC, ex p Rixon* (1996) 32 BMLR 136 at 140, that local authorities may only depart from the Secretary of State's guidance for good reason. The Court of Appeal observed that there is a considerable difference between the *Wednesbury* approach (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) and the *Ex p Rixon* approach. Counsel for the Secretary of State and the trust challenged this approach. They were mistaken. In the present case fundamental rights are at stake and even before the 1998 Act an intense review on principles of proportionality was appropriate: see *R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539, [1994] QB 198, which was affirmed in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400, [2000] 2 AC 115 and in *R v Secretary of State for the Home Dept, ex p Daly* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532. The concrete differences between the *Wednesbury* and proportionality approaches was concretely described in *Daly*'s case. In a speech made with the approval of the House I observed (at [27]):

> '. . . First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations . . .'

The application of these established principles, wholly appropriate to the context of fundamental rights, reinforces the conclusion of the Court of Appeal. That conclusion was stated with precision (at [76]) as follows:

> 'Hence we conclude that the Code should be observed by all hospitals unless they have a good reason for departing from it in relation to an individual patient. They may identify good reasons for particular departures in relation to groups of patients who share particular well-defined characteristics, so that if the patient falls within that category there will be a good reason for departing from the Code in his case. But they cannot depart from it as a matter of policy and in relation to an arbitrary dividing line which is not properly related to the Code's definition of seclusion and its requirements.'

Given the manifest dangers inherent in seclusion, and the extreme vulnerability of the patients, I regard this conclusion as sound. It is a corner of mental health

law in which a dilution of minimum centrally imposed safeguards, by pragmatic policy decisions from hospital to hospital, is not appropriate.

[47] In para 40 of the printed case of Mr Munjaz the resultant picture and implications are graphically illustrated:

> '. . . Ashworth, and any detaining hospital, can now substitute 3 (or 4) medical reviews for the 42 required by the Code of Practice during days 8 to 14. [Mr Munjaz's] complaint is not that he can be secluded for one or two more hours without a Code of Practice medical review, but that he could be secluded for 72 hours without such a review. If such wholesale departures from the Code can be made on the basis of the views of the hospital managers, there is no logical reason why Ashworth should not reduce its medical reviews yet further, depending only on its rational view of its needs and its resources. Why not a medical review every week, every month? Certainly, Ashworth cites approvingly [in para 95 of its printed case] in support of its position, cases where monthly review of segregated prisoners has been held to be lawful. A national Code of Practice provides the necessary checks and balances for this otherwise unregulated activity.'

This is a disturbing picture.

[48] If Ashworth Hospital is permitted in its discretion to reject the code, lock, stock, and barrel, regarding seclusion, it will be open to other hospitals to do so too. The code would then be seriously undermined. For my part the endorsement of the code by the Secretary of State makes his virtual disowning of the code in these proceedings difficult to understand. Compared to the judgment of the Court of Appeal the judgment of the majority of the House permits a lowering of the protection offered by the law to mentally disordered patients. If that is the law, so be it. How society treats mentally disordered people detained in high security hospitals is, however, a measure of how far we have come since the dreadful ways in which such persons were treated in earlier times. For my part, the decision today is a set-back for a modern and just mental health law.

[49] I would dismiss the appeal of the trust.

LORD HOPE OF CRAIGHEAD.

[50] My Lords, at the heart of this case there lies a dispute about the proper use and regulation of seclusion as a means of controlling seriously disturbed behaviour on the part of mental patients detained in psychiatric hospitals. There is general agreement that the sole aim of this procedure is to control such behaviour where it is likely to cause harm to others. There is general agreement also as to the nature of the procedure. It consists of the supervised confinement of the patient in a room which may be locked to protect others from significant harm. But opinions differ sharply as to the length of time for which it may be proper to resort to it. This in turn affects the degree to which seclusion in practice interferes with the patient's personal autonomy, the extent to which it is possible for the state by means of a uniform code to regulate this and the way in which the patient's interests are to be safeguarded.

[51] Section 118(1) of the Mental Health Act 1983, as amended by s 1(2) of and para 16 of Sch 1 to the Mental Health (Patients in the Community) Act 1995 and s 116 of and para 9 of Sch 4 to the Care Standards Act 2000, directs the Secretary of State to prepare, and from time to time revise, a code of practice (a) for the guidance of registered medical practitioners, managers and staff of hospitals and approved social workers in relation to 'the admission of patients' to hospitals and

to guardianship and after-care under supervision under the Act, and (b) for the guidance of registered medical practitioners and members of other professions in relation to 'the medical treatment of patients suffering from mental disorder'. Section 118(2) provides that the code shall in particular specify forms of medical treatment which give rise to special concern and which should accordingly not be given by a registered medical practitioner unless the patient has consented to the treatment. Seclusion is not a form of treatment that falls within the scope of that subsection, but its provisions have a bearing on the status that should be accorded to the code by the legal system within which it is to operate.

[52] The code of practice which is currently in issue (the code) was published in March 1999. It contains detailed guidance on various matters of practice, including the admission of mental patients and their treatment and care in hospital. Chapter 19 deals with patients presenting particular management problems who behave in a way that disturbs others or whose behaviour may present a risk to themselves or others around them or those charged with their care. Among the topics covered in this section are general preventative measures, restraint, methods of restraining behaviour and the use of medication, locked wards and secure areas. It has not been suggested that the ways these topics are dealt with has given rise to difficulty. The dispute which has given rise to this litigation relates to the way the code deals with seclusion. This topic is dealt with in paras 19.16–19.23.

[53] Paragraph 19.16 defines seclusion in these terms:

> 'Seclusion is the supervised confinement of a patient in a room, which may be locked to protect others from significant harm. Its sole aim is to contain severely disturbed behaviour which is likely to cause harm to others.'

It also contains guidance as when this procedure should and should not be used. Paragraph 19.17 provides that hospitals should have clear written guidelines on the use of seclusion which should, among other things, set requirements for recording, monitoring, reviewing the use of seclusion and any follow-up action. But the code was not content to leave these matters entirely to the discretion of each hospital. Detailed guidance is provided in the paragraphs that follow as to the procedure that should be adopted, including the frequency of reviews of the need to continue the procedure, as to the conditions of seclusion and as to record keeping.

[54] The code applies to the management of all patients admitted to mental hospitals in England and Wales. They include so-called informal patents who are admitted without any application, order or direction as well as those who are liable to be detained in a hospital under s 3 of the 1983 Act. The Secretary of State was obliged by s 118(3) before preparing or altering it to consult with such bodies as appeared to him to be concerned. It had also to be laid before Parliament, where it was subject to the negative resolution procedure of either House, and it had to be published: see s 118(4)–(6). It has the support of the Royal College of Psychiatrists and of the Mental Health Act Commission, among whose functions is to make proposals to the Secretary of State as to what it should contain. The majority of mental patients are informal, and the majority of the institutions in which they are detained are independent of the National Health Service. One of the virtues of the code is that it is able to provide clear standards and practical norms that are capable of being applied by all hospitals and all healthcare facilities.

[55] Ashworth is one of three hospitals (the others being Rampton and Broadmoor), formerly known as 'special hospitals', that were established to treat only those mental patients who require treatment under conditions of high security on account of their dangerous, violent or criminal propensities. In February 1999 the Ashworth Special Hospital Authority (Ashworth) issued its own Seclusion Procedure which made provision for the frequency of reviews of the need to continue the procedure which departed in several respects from that set out in the version of the Secretary of State's code that was then in issue. This statement of the procedure to be used at Ashworth was the subject of proceedings for judicial view by the respondent, Mr Colonel Munjaz, in 1999. Following a judgment given by Jackson J on 28 September 2000 ([2000] MHLR 183), who held that the provisions for review which it contained were not ones which a reasonable authority could adopt, a review of Ashworth's seclusion policy was conducted and a new policy was formulated. It was ratified by the Regional Board of the National Health Service on 6 November 2002 and it was put into effect from 6 December 2002 by the appellant, Mersey Care National Health Service Trust, which had assumed responsibility for Ashworth. This is the policy (the policy) which is said in this case to be unlawful.

[56] In the introduction to the policy it is noted that Ashworth Hospital admits patients with mental disorder who are considered to present a grave and immediate risk to the public and who present a risk to other patients, staff, visitors or the general public which cannot be managed in conditions of lesser security including medium security. Reference is made to particular reasons for referral which include the fashioning of weapons from items in common use such as furniture and cutlery, the taking of hostages, the possession of skills which could lead to serious injury and the use of techniques to plan and commit assaults which involve other patients and general subversion of day to day routines and practices. It is expected that patients will only be referred to Ashworth when conditions of lesser security have exhausted all appropriate management interventions. For such patients it is often the case that all other usual interventions such as psychological interventions and alterations in drug treatment have been tried, and the increased relational procedure and the perimeter security at Ashworth is considered necessary to add to the individual patient's treatment plan.

[57] It is in the light of this background that the introduction to the policy then explains why it was decided that it was necessary to devise a policy which was specially designed to address the use of seclusion at Ashworth:

> 'Seclusion in this policy is as defined in the Code of Practice [19.6] (sic). Seclusion is the supervised confinement of a patient in a room, which may be locked to protect others from significant harm. Its sole aim is to contain severely disturbed behaviour which is likely to cause harm to others. This is an intervention which good clinical and professional practices dictate should only be used when other less restrictive interventions are inadequate. Special considerations need to be applied to the use of seclusion in a high secure hospital given that patients have been referred to the hospital because the usual range of interventions available within Mental Health Services have failed to protect others from harm. The policy on seclusion in Ashworth Hospital needs to reflect this.'

The same point is made in para 2.4 of the policy, which states:

'. . . The Code of Practice revised in March 1999 was written to encompass a wide range of mental health services and does not specifically consider the special situation of a high security hospital.'

[58] The policy deals with a variety of matters, many of which are not the subject of criticism. Paragraph 3 sets out its aims, which are taken word for word from the list of items in para 19.17 of the code about which hospitals are told they should have clear written guidance. Paragraph 4 contains a policy statement about the use of seclusion. Here too the guidance in the code is followed word for word. In para 5, which deals with the environment for seclusion and the maintenance of dignity and care and support, the guidance in para 19.22 of the code is adopted and elaborated upon. Paragraph 6 deals with the decision to seclude. In substance it repeats the guidance in para 19.18 of the code, but here too it is elaborated upon. Paragraph 6.2, for example, states that if a member of staff has been threatened or attacked by a patient they should so far as possible not be involved in the decision to seclude—a point not dealt with in the code, which does not mention incidents of this character or offer any advice as to how to deal with them. Details are set out in para 7 of how patients who are in seclusion are to be observed and cared for and in para 8 of the way records are to be kept. Here again the advice given in paras 19.19 and 19.20 of the code is followed and elaborated upon. One such elaboration is the requirement in para 8.4 of the policy that a detailed management plan for management of the ending of seclusion should be prepared in all cases to ensure the earliest possible ending of seclusion. There is an indication here that it was not envisaged that seclusion would be used at Ashworth for a brief period, such as one of no more than five minutes as para 19.18 of the code envisages.

[59] The point of departure from the code is in para 9 where the policy deals with regular reviews of the use of seclusion. The system of review described in para 19.18 of the code is modified from the first day up to day seven. Thereafter the frequency of regular reviews is reduced very considerably. Paragraph 9.2.3 provides that from day eight onwards there are to be (i) a daily review by the ward manager or a site manager from a different ward, (ii) three medical reviews every seven days (one being by the patient's responsible medical officer (RMO), (iii) a weekly review by a multi-disciplinary patient care team which is to include the RMO and (iv) a review by a multi-disciplinary group known as the Seclusion Monitoring Group whose functions are set out in para 10. Paragraph 11.1 provides that the case of any patient for whom the clinical team has to institute seclusion in excess of seven days will be brought to the attention of the medical director or in their absence the executive nurse director by the chairperson of the patient's clinical team, with a resume of the reasons for the continuing use of seclusion, the care and treatment which the patient will be receiving and what it is to be hoped will be achieved. Monitoring arrangements are to be agreed between the Seclusion Monitoring Group and the patient's clinical team, the patient's case is to be reviewed weekly by the clinical team and a report sent monthly to the Seclusion Monitoring Group and after six months the medical director and the executive nurse director are to participate in a clinical team review: paras 11.4–11.8. Paragraph 11.9 provides that the Mental Health Act Commission will be informed if seclusion continues beyond seven days and that it will receive progress reports on a regular basis.

[60] It is important to appreciate that much of what is in the policy complies with and elaborates upon the guidance which the code offers. The departure from that guidance is explained by Ashworth's perception of what is needed for the

management of the patients detained there whose behaviour falls outside the normal pattern of that exhibited by mental patients generally in terms both of the risk it offers and its duration. There is a genuine and respectable difference of view among those who are responsible for the formation of policy in this difficult and highly specialised field as to the parameters within which seclusion may properly be resorted to, including the length of time for which it may continue before it is terminated.

[61] In a letter to Ashworth's solicitors dated 27 March 2002 the Mental Health Act Commission said that it was perhaps true that the code was written on the assumption that seclusion as a last resort response to dangerous behaviour should not normally still be in place after three days, no matter how disturbed the patient might be at the time of the seclusion. The Commission's view was that in that event other methods of management should be resorted to:

> 'It is arguable, for instance, that, by the time a patient has been secluded for three days, arrangements should have been considered for alternative management of the patient, such as a trial period of one to one (or more intensive) nursing, etc. The Commission takes the view that, where seclusion as defined by the Code of Practice does continue past 72 hours, the need for rigorous monitoring and review of its continuance is a pressing need.'

In para 12.26 of its Tenth Biennial Report 2001–2003 the Commission repeated these observations, adding that it would wish to see such alternatives implemented. Ashworth has however made it clear that it wishes to adhere to the system of monitoring and review set out in its policy.

[62] This dispute is not something on which judges are competent to adjudicate. But the law is not blind to the importance of the issue in the wider context, as it is in the interests of all mental patients that the use of this highly intrusive procedure should be properly regulated.

THE ISSUES

[63] The first question then is whether it is lawful under domestic law for Ashworth, for the reasons indicated by these passages in the introduction to the policy, to depart from the code and devise and apply its own seclusion policy. The status that is to be accorded to the code lies at the heart of this question. This is an important issue of general public importance. The second question is whether, assuming that it was otherwise lawful in domestic law, the relevant parts of the policy are incompatible with the respondent's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

DOMESTIC LAW

[64] The question for resolution under domestic law is whether it was unlawful for Ashworth's policy to depart from the provisions in the code of practice about the frequency of medical reviews where seclusion is resorted to. Section 118(1) of the 1983 Act provides that the code is to be prepared 'for the guidance' of those to whom it is addressed. The code itself states in para 1 of the introduction that, while the Act does not impose a legal duty to comply with it, as it is a statutory document failure to follow it could be referred to in evidence in legal proceedings. As Mr Lewis for the Secretary of State pointed out in his written case, s 118(1) does not impose an express obligation on anyone to 'have regard' to the code. But he said that it is implicit in the subsection that those to whom it is addressed are under an

obligation to have regard to it in reaching any decisions on matters which fall within its scope.

[65] This interpretation of its effect, which is subscribed to also by Ashworth, is to be contrasted with the view of its status that the Court of Appeal expressed in its judgment ([2003] EWCA Civ 1036 at [76], [2004] QB 395 at [76], [2003] 3 WLR 1505):

> 'Hence we conclude that the Code should be observed by all hospitals unless they have a good reason for departing from it in relation to an individual patient. They may identify good reasons for particular departures in relation to groups of patients who share particular well-defined characteristics, so that if the patient falls within that category there will be a good reason for departing from the Code in his case. But they cannot depart from it as a matter of policy and in relation to an arbitrary dividing line which is not properly related to the Code's definition of seclusion and its requirements.'

[66] The first point that has to be considered is whether there is a statutory base for the guidance that the code gives on seclusion. Does it fall within the scope of s 118(1) of the 1983 Act? Section 118(1)(a) provides for the giving of guidance 'in relation to the admission of patients to hospitals'. Section 118(1)(b) provides for the giving of guidance 'in relation to the medical treatment of patients suffering from mental disorder'. A narrow reading of these two phrases might suggest that seclusion falls outside the scope of the matters which are to be dealt with by means of a code of practice prepared by the Secretary of State under this subsection. But the purpose of the statute requires a broader view to be taken. I agree with the Court of Appeal that the words 'the admission of patients to hospitals' cannot in this context be limited to the actual admission process so as not to include anything that happens thereafter while the patient is detained in hospital: see [2004] QB 395 at [72]. The expression 'medical treatment' is defined in s 145(1) of the 1983 Act as including, as well as nursing, care, habilitation and rehabilitation under medical supervision. In my opinion it includes all manner of treatment under medical supervision of those suffering from mental disorders from cure to containment. It includes treatment under medical supervision which is designed to alleviate or prevent a deterioration of the patient's condition, even if it will have no effect on the disorder itself. As para 15.4 of the code puts it, it covers the broad range of activities aimed at alleviating, or preventing a deterioration of, the patient's mental disorder.

[67] Seclusion is not part of the patient's treatment. Paragraph 19.16 of the code states that it is not to be used as part of a treatment programme. But it aims to contain severely disturbed behaviour, the decision to resort to it is made by a nurse or a doctor and it is supervised by medical staff in the hospital. So it falls well within the scope of the phrase 'the medical treatment of patients suffering from mental disorder' on which the Secretary of State is directed by s 118(1)(b) to give guidance. The fact that the guidance on seclusion appears under the general heading 'Treatment and Care in Hospital' and in a section dealing in particular with patients presenting particular management problems suggests that those who wrote the code had this paragraph of s 118(1) in mind when they were framing it rather than the paragraph that refers to the admission of patients to hospitals. I would hold that the statutory base for its guidance on seclusion is to be found in s 118(1)(b) of the 1983 Act.

[68] Then there is the question of the code's status. What does 'guidance' mean in this context? There is no statutory obligation to comply with it. But it cannot be

divorced from its statutory background, from the process of consultation and from the parliamentary procedure that must be gone through before it is published under s 118(6) as 'the code as for the time being in force'. Statutory guidance of this kind is less than a direction. But it is more than something to which those to whom it is addressed must 'have regard to'.

[69] The Court of Appeal said (at [76]) that the code is something that those to whom it is addressed are expected to follow unless they have good reason for not doing so: see *R v Islington London BC, ex p Rixon* (1996) 32 BMLR 136 at 140 per Sedley J. Like my noble and learned friend Lord Bingham of Cornhill I would go further. They must give cogent reasons if in any respect they decide not to follow it. These reasons must be spelled out clearly, logically and convincingly. I would emphatically reject any suggestion that they have a discretion to depart from the code as they see fit. Parliament by enacting s 118(1) has made it clear that it expects that the persons to whom the code is addressed will follow it, unless they can demonstrate that they have a cogent reasons for not doing so. This expectation extends to the code as a whole, from its statement of the guiding principles to all the detail that it gives with regard to admission and to treatment and care in hospital, except for those parts of it which specify forms of medical treatment requiring consent falling within s 118(2) where the treatment may not be given at all unless the conditions which it sets out are satisfied.

[70] If good reasons are required for departing from the system that the code sets out for the monitoring and review of the use of seclusion, there are ample grounds for thinking that they have been well demonstrated at Ashworth. There is no doubt that the situation there differs from that in the generality of institutions in which mental patients who are severely disturbed may find themselves. As the introduction to Ashworth's policy states, special considerations need to be applied to the use of seclusion in a high security hospital, bearing in mind that the very reason why patients are there is because they cannot be dealt with by mental health services elsewhere in a way that will protect others from harm. The code does not address this problem. Nor is it designed to do so, as s 118(1) does not provide for this. The subsection envisages a single code of practice, not a series of codes designed for different types of hospital. The care with which the problem at Ashworth was addressed is evident from the witness statements of those who were responsible for evolving and applying the policy. It is evident too from the policy itself, which sets out a series of additional safeguards that must be applied if seclusion extends beyond seven days. A balance is struck between the need for frequent medical reviews in the early stages and the process of group monitoring in the longer term at less frequent intervals, bearing in mind that some patients at Ashworth suffer from mental conditions that make them dangerous not just for short bursts but also for long periods, and bearing in mind too the need to make the most efficient use of the medical resources at the hospital.

[71] The point does not end there however. There are further questions that must be addressed. How is the court to judge whether good reason to depart from the code has been demonstrated? Must the code be given a greater status in order to make it compatible with mental patients' convention rights? Was Ashworth free to depart from the code by adopting its own policy for the use of this procedure, or was it free to do so if at all only in regard to individual patients or groups of patients? These were the points to which, while endorsing the *Ex p Rixon* approach, the Court of Appeal directed its attention (at [74]):

> '. . . Where there is a risk that agents of the state will treat its patients in a way which contravenes article 3, the state should take steps to avoid this through

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> the publication of a Code of Practice which its agents are obliged to follow unless they have good reason to depart from it. Where there is an interference with the rights protected by article 8, the requirement of legality is met through adherence to a Code of Practice again unless there is good reason to depart from it. The same will apply where the Code deals with the deprivation of liberty within the meaning of article 5.'

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It was in the light of these observations that the Court of Appeal held (at [76]) that hospitals could depart from the code only in the case of individual patients or groups of patients and that they could not do so as a matter of policy.

[72] The respondent does not suggest that the code itself fails to respect the patients' convention rights. The Secretary of State is not said to have failed in her c duty under s 118(1). She is not a party to these proceedings. His argument is that, given the state's obligation under art 3 of the convention to avoid ill-treatment of patients detained by or on its authority, the code must be given a weight and status which is consistent with that obligation. The same point is made with reference to the state's obligations under arts 5 and 8 of the convention. He submits that it is for d the court to achieve this, in its assessment of the weight and status that is to be given to the code.

[73] There is no doubt that, as it is a public authority, the court has a responsibility in domestic law to do what it can to ensure that legislation is applied compatibly with convention rights: see s 6 of the 1998 Act. It is subject also to the interpretative obligation which s 3(1) of that Act sets out. These provisions reflect e the way the obligations of the state in these matters are seen by the court in Strasbourg. In *Storck v Germany* [2005] ECHR 61603/00 (para 93) the European Court of Human Rights said:

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> 'The court recalls that it is not its function to deal with errors of fact or law allegedly committed by the national courts and that it is in the first place for the national authorities, notably the courts, to interpret the national law. However, the court is called to examine whether the effects of such an interpretation are compatible with the convention (see, inter alia, *Platakou v Greece* App No 38460/97 (11 January 2001, unreported) at para 37). In securing the rights protected by the convention, the contracting states, notably their g courts, are obliged to apply the provisions of national law in the spirit of those rights. Failure to do so can amount to a violation of the convention article in question, which is imputable to the state.'

[74] It is plain that the intensity of review must vary according to the context. The proposition that it is the responsibility of the court to give the code the weight h and status that it needs in order to secure the patients' convention rights is undoubtedly sound in principle. It follows that in this context the reasons for any departure from the code which puts the patients' convention rights at risk must be subjected to particularly careful and intense scrutiny. But the complaint which the respondent makes is directed not at an isolated act or series of acts of departure j from the code in violation of his convention rights but to the fact that Ashworth has developed its own policy for the seclusion of patients in its hospital. The argument that the code must be given an enhanced status is a sterile one in this context unless it can be demonstrated that the policy is in itself incompatible with the patients' convention rights. Unless this can be done, the conclusion must be that there are no grounds for declaring that the policy is unlawful in order to ensure that there is compatibility.

THE CONVENTION RIGHTS

[75] The crucial question then, to which I now turn, is whether the relevant parts of the policy are incompatible with the respondent's convention rights. The rights that have been put in issue are those which are guaranteed by arts 3, 5 and 8 of the convention.

[76] It must be stressed at the outset that no complaint is made about the way the policy has been implemented by Ashworth. It is not suggested that the staff in the hospital have been anything other than rigorous in their observance of it. Nor is it suggested that it was applied to the respondent on any of the occasions when he was secluded in a way that has caused harm to him. In a summary of her conclusions at the end of a report which she prepared following an interview with him, having had access to his full medical records, Dr Sophie Davison, a consultant forensic psychiatrist, said that the Ashworth policy of fewer reviews than recommended in the code of practice increased the risks associated with seclusion, particularly after seven days. But she also said that the initial decision was appropriate on each of the four occasions of seclusion in his case that she had investigated, that there was no evidence that he had suffered as a result of medical reviews being less frequent than recommended in the code and that there was no evidence that more frequent reviews would have reduced the overall time that he had spent in seclusion. There is no evidence that any other patient has suffered as a result of the way Ashworth's policy on seclusion has been implemented.

a. *Article 3*

[77] Article 3 guarantees that no one shall be subjected to torture or to inhuman and degrading treatment or punishment. No one suggests that seclusion is a form of torture or that it is being used as punishment. Paragraph 4.3 of the policy states in terms that seclusion is not used as a punishment. So the parts of this guarantee that are relevant to this case are those that prohibit inhuman or degrading treatment. But, as Dr Davison's report makes clear, it is not suggested in this case that Ashworth has done anything that is directly prohibited by this article. The argument has concentrated instead on its positive effects—what must be done to ensure that patients do not suffer treatment of the kind that is prohibited.

[78] The European Court has repeatedly said that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the expression 'inhuman or degrading treatment': see *A v UK* (1998) 5 BHRC 137 at 141 (para 20). This standard is to be judged in the light of the circumstances, as the court has held that in order for an arrest or detention in connection with court proceedings to be degrading within the meaning of the article it must be of a special level and it must in any event be different from the usual degree of humiliation that is inherent in arrest or detention: see *Öcalan v Turkey* (2005) 18 BHRC 293 at 345 (para 181). It has also made clear that, while the absolute prohibition is not capable of modification on grounds of proportionality, issues of proportionality will arise where a positive obligation is implied as where positive obligations arise they are not absolute. In *Osman v UK* (1998) 5 BHRC 293 at 321 (para 116) the court recognised that such obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Nevertheless, as the court said in *Z v UK* (2002) 34 EHRR 97 at 131 (para 73), states must take measures to provide effective protection of vulnerable persons, and these must include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

[79] Further guidance is to be found in *Van der Ven v Netherlands* [2003] ECHR 50901/99. The applicant's complaint was that the detention regime to which he was subjected in a maximum security prison constituted inhuman and/or degrading treatment and infringed his right to respect for his private and family life. The court held that routine strip searches to which he was subjected together with other security measures amounted to inhuman or degrading treatment in violation of art 3. But it made it clear that detention in a high security prison facility could not be said in itself to raise an issue under the article (para 50). The removal from association with other prisoners for security, disciplinary or protective reasons did not in itself amount to inhuman or degrading treatment or punishment (para 51); see also *Koskinen v Finland* App No 20560/92 (30 August 1994, unreported). In assessing whether a measure may fall within the ambit of art 3 in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned: para 51; see also, for a case where the same test was applied to the conditions of detention in solitary confinement in a mental institution, the European Commission of Human Rights's opinion in *Dhoest v Belgium* (1987) 55 DR 5 at 21 (para 118).

[80] I would approach this issue therefore by asking myself whether Ashworth's policy gives rise to a significant risk of ill-treatment of the kind that falls within the scope of the article, and if there is any such risk whether it would impose a disproportionate burden on Ashworth for it to be forced to abandon its policy so as to eliminate it.

[81] The risk which must be considered is whether a patient might suffer ill-treatment of the required level of severity as a result of being kept in seclusion under Ashworth's policy for longer than would have been the case under the code. As Dr Davison makes clear in her report, seclusion does give rise to risks which are both physical and psychological. That is why regular medical reviews are necessary to ensure that the patient's mental and physical health does not deteriorate. Her conclusion is that Ashworth's policy of fewer reviews after seven days increases the risks. But the evidence falls well short of demonstrating that the policy, when read as a whole and if proper weight is given to all its additional safeguards, gives rise to a serious risk of ill-treatment of the required level of severity. The absence of any evidence that any patient has suffered as a result of Ashworth's policy is highly significant. So too is the absence of any evidence that seclusion is being used at Ashworth for reasons that are unacceptable. On the contrary, Dr Davison's opinion is that the initial decision to seclude the respondent was appropriate on each occasion and that there was no evidence that more frequent reviews would have made any difference in his case. The Mental Health Act Commission's suggestion that arrangements should have been considered for the alternative management of such patients has not, so far as the evidence shows, been followed up by any detailed explanation of the alternative options that are available.

[82] The conclusion must be that the risk of ill-treatment is very low if full effect is given to the policy, and that in view of the safeguards which it contains and the special circumstances that obtain in its hospital it would be disproportionate for Ashworth to be compelled to abandon the policy in favour of the code to eliminate that risk. In my opinion the policy is not incompatible with art 3.

b. *Article 5*

[83] Article 5 addresses the right to liberty and security. It provides that no one shall be deprived of his liberty save in the cases that it describes and in accordance with a procedure prescribed by law. The cases that it describes include the lawful

detention of persons of unsound mind: see art 5(1)(e). Everyone who is deprived of his liberty is entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if it is unlawful: see art 5(4).

[84] The issue in this case however is not directed to the fact that the respondent is being detained as a mental patient at Ashworth. The criteria for the detention of a patient which were laid down in *Winterwerp v Netherlands* (1979) 2 EHRR 387 at 403 (para 39), are not in issue in this case. Nor is it suggested that Ashworth is an inappropriate institution for the respondent's detention while he is of unsound mind. Seclusion is, of course, a further form of detention. It involves the patient's supervised confinement in a room, which may be locked to protect others from significant harm. But it is not suggested that the use of seclusion engages art 5 in every case where the use of this procedure is appropriate. The respondent's argument is directed instead to Ashworth's policy for dealing with it.

[85] A person who is of unsound mind must be detained in a place which is appropriate for that purpose: see *Aerts v Belgium* (1998) 5 BHRC 382. Beyond that, as Baroness Hale of Richmond pointed out in *R (on the application of B) v Ashworth Hospital Authority* [2005] UKHL 20 at [34], [2005] 2 All ER 289 at [34], [2005] 2 AC 278, art 5(1)(e) is not concerned with the patient's treatment or the conditions of his detention: see *Ashingdane v UK* (1985) 7 EHRR 528 at 543 (para 44). The question whether the way these matters are dealt with involves a violation of the patient's convention rights must be dealt with under arts 3 and 8. Moreover, it is to be noted that, following para 19.16 of the code, para 4.2 of the policy states that seclusion should be used as a last resort and for the shortest possible time. Paragraph 8.4 states that a detailed management plan for management of the ending of seclusion should be prepared in all cases to ensure the earliest possible ending of seclusion. In *Bollan v UK* App No 42117/98 (4 May 2000, unreported), the court said that disciplinary steps imposed formally or informally on prisoners which have an effect on conditions of detention within a prison cannot be considered a deprivation of liberty, but must be regarded in normal circumstances as modifications of the conditions of detention and therefore outside the scope of art 5(1).

[86] In my opinion the seclusion of a patient who is lawfully detained at Ashworth under the conditions laid down in the policy does not amount to a separate deprivation of liberty which engages art 5.

c. *Article 8*

[87] Article 8(1) provides that everyone has the right to respect for his private and family life, his home and his correspondence. An interference with these rights may be justified under art 8(2), but only if it is in accordance with the law and is necessary in a democratic society for, among other things, the prevention of disorder or crime. The argument that the policy is incompatible with this article was introduced in the Court of Appeal by the mental health charity MIND, which was permitted to intervene in these proceedings and whose arguments the respondent now adopts.

[88] The European jurisprudence tells us that not all interferences with respect for private and family life during lawful detention will engage art 8. What it describes as normal restrictions and limitations consequent on prison life and discipline in these circumstances will not constitute in principle a violation of this article: see *Nowicka v Poland* [2003] 2 FCR 25 at 35 (para 71). So long as it does not amount to ill-treatment in violation of art 3, seclusion will not as a general rule result in an interference with the patient's rights under art 8(1): see *Herczegfalvy v*

Austria (1993) 15 EHRR 437 at 484, 485 (paras 82–84, 86), *Raninen v Finland* (1998) 26 EHRR 563 at 588–590 (paras 56–59, 64). Recommendation Rec (2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder, adopted by the Committee of Ministers under the terms of art 15.b of the Statute of the Council of Europe on 22 September 2004, recognises that seclusion may be resorted to in appropriate circumstances. Article 27 provides the following guidelines:

> '1. Seclusion or restraint should only be used in appropriate facilities, and in compliance with the principle of least restriction, to prevent imminent harm to the person concerned or others, and in proportion to the risks entailed.
>
> 2. Such measures should only be used under medical supervision, and should be appropriately documented.
>
> 3. In addition:
>
> i. the person subject to seclusion or restraint should be regularly monitored;
>
> ii. the reason for, and duration of, such measures should be recorded in the person's medical records and in a register.
>
> 4. This article does not apply to momentary restraint.'

[89] Clearly, there is a risk of a violation if this form of intervention is resorted to improperly or for longer periods than the patient's mental condition justifies. But there is no evidence that this is what has been happening at Ashworth. The whole purpose of the policy, which is written down and published within the hospital, is to define the standards that must be followed and prevent abuse and arbitrariness. It is designed to minimise the risk of a violation. It is hard to see why, in these circumstances, the policy should itself be thought to be incompatible with art 8(1).

[90] Assuming nevertheless that the policy requires to be justified under art 8(2), I would conclude that it satisfies these tests. The aim of seclusion is to prevent disorder or crime, as it is resorted to only as a last resort to protect others from significant harm. The purpose of the policy is to address the special considerations that need to be applied to its use in a high security hospital, whose patients are considered to present a grave and immediate risk to the public and may do so also to other patients, staff and visitors: see the introduction to the policy. It shares the aims of the code in this respect, and its aim is a legitimate one. It also aims to ensure that the procedure is resorted to in a way that is proportionate, as it is designed to avoid harm to the patient and to ensure that, even in long-term cases, it is brought to an end as early as possible.

[91] The main thrust of MIND's argument that the conditions of art 8(2) are not satisfied is directed to the requirement that an interference with the art 8(1) rights cannot be justified unless it is 'in accordance with the law.' This phrase has the same meaning as the expression 'prescribed by law' in arts 9, 10 and 11: see *Silver v UK* (1983) 5 EHRR 347 at 371 (para 85). The interference in question must have some basis in domestic law and be in conformity with it: *Silver v UK* (at 372 (para 86)). 'Law' in this context is not limited to statutory enactment or to measures, such as the code, that have their base in a statute. It includes the common law: see *Sunday Times v UK* (1979) 2 EHRR 245 at 270 (para 47). But the measure must be formulated with sufficient precision and be sufficiently accessible to satisfy the criterion of foreseeability: see *Sunday Times v UK* (at 271 (para 49)); *Silver v UK* (at 372 (para 87)).

[92] In my opinion the policy satisfies the requirements of precision and accessibility. The procedures which it lays down are spelled out with the same

clarity and attention to detail as those in the code. They have been reduced to writing, of course, and the policy is published within the hospital so that it is available to all who need to see them. Uniformity of practice is ensured by this process, so the way this form of intervention is being managed at Ashworth is entirely foreseeable. Patients are protected against random or arbitrary interferences with their art 8(1) rights by the fact that the policy sets out standards in the light of which under domestic law judicial review of such interferences is available. The protections that are available to patients under the civil and the criminal law are reinforced by them. I would conclude that the purposes for which the requirement that the interference must be in accordance with the law is set out in art 8(2) are satisfied.

[93] MIND accepts that the convention does not require an express statutory provision for the use of this procedure. But it argues that the code of practice would not have the force of law if it was open to Ashworth to depart from it in formulating its own policy. The concern is that, if this is so, the patient will not be able to foresee to a degree that is reasonable the circumstances in and the conditions on which this form of intervention may be exercised. If the circumstances in which the code may be departed from cannot be predicted it will fail the tests of foreseeability and certainty.

[94] I do not accept this argument. The requirement which the law lays down that those to whom the code is addressed are expected to follow it unless they can give a good reason for not doing so provides a sufficient assurance of certainty and predictability to satisfy the requirements of art 8(2). But the argument misses the point in any event, because the issue in this case is not whether the code is incompatible or is at risk of being held to be incompatible. It is directed to the lawfulness of Ashworth's policy. The question for inquiry is not whether the code is compatible with this article but whether the requirement of compatibility is satisfied by the policy.

CONCLUSION

[95] In my opinion it has not been shown that Ashworth's policy is incompatible with the respondent's convention rights. It is not necessary therefore to subject it to enhanced scrutiny in order to ensure its compatibility. This has an important bearing on the question whether, bearing in mind that it was expected to follow the code unless it had good reason for not doing so, it was open to Ashworth to depart from the guidance which the code gives on seclusion and to formulate its own policy.

[96] The Court of Appeal said (at [76]) that Ashworth could not depart from the code as a matter of policy and in relation to an arbitrary dividing line that was not properly related to the code's definition of seclusion and its requirements. As I accept—and indeed would strengthen—the test which they were applying, this is the key point of difference between us. In my opinion there is nothing that is arbitrary about the way in which Ashworth has departed from the code in the framing of its policy. A careful reading of it shows that it is based very substantially on the code's guidance, and that where it departs from it—with regard to the frequency of reviews in particular—it does so because of its perception of the way seclusion needs to be used in the special circumstances that obtain at Ashworth. The system that it lays down has been carefully designed to deal with its use for much longer periods than the code's guidance was designed for. Its purpose is to ensure that its use for these longer periods is not resorted to at random or arbitrarily. Following the code's example, that is the whole purpose of the policy.

[97] As for the question whether Ashworth was free to depart from the code as a matter of policy, and not just in relation to individual patients or groups of patients, I do not see why this should be so, provided of course that it can demonstrate that it had a good reason for doing so. The distinction which the Court of Appeal made between a departure in the case of individual patients or groups of patients and a departure which takes the form of a written policy for dealing with a particular form of intervention is elusive, and I do not think that it can be regarded as acceptable. There is an obvious danger that, if the code could be departed from in the case of individual patients or groups of patients where no written guidance was available, decisions to do this would be open to attack as being arbitrary because their consequences were unregulated and unpredictable. That, precisely, is what Ashworth's policy seeks to avoid. Good clinical and medical practice dictates that seclusion should only be used in particular situations to protect others and subject to particular conditions to ensure that the patient is not harmed or secluded for any longer than is necessary. The purpose of the policy is to ensure that the conditions under which it is to be resorted to are clearly understood and carefully observed so that decisions that are taken about the management of this procedure are consistent and not arbitrary.

[98] I am in full agreement with all that my noble and learned friend Lord Brown of Eaton-under-Heywood has said about this case except with regard to the issues raised by art 8(2) of the convention, as to which I have the misfortune to disagree with him. The point that divides us is whether the practice of seclusion carried out at Ashworth in accordance with the policy is 'in accordance with the law'. As his quotation from the court's judgment in *Hewitt v UK* (1992) 14 EHRR 657 at 665 (para 39) reminds us, it is the quality of the law that matters rather than the form it takes. The touchstones by which its quality is measured are, as Lord Brown says, its transparency, its accessibility, its predictability and its consistency. Where these qualities are present the measure protects against the abuse of power and against conduct which is arbitrary. There is no doubt that the code satisfied these tests, notwithstanding the fact that there is no statutory obligation to comply with it. In my opinion Ashworth's policy, which is careful in all these respects to follow the code's example, does so too. It is, of course, true that Ashworth could alter its policy. But if it did so every departure from the code would have to be justified in the same way as the policy itself has had to be justified. I do not think that the fact that Ashworth has its own policy opens the door to further departures from the code that could be described as arbitrary.

[99] Assuming, of course, that Ashworth has shown—as it has—clearly, logically and convincingly that it had cogent reasons for departing from the code in these particular respects in favour of its own policy, I would hold that its decision cannot be said to have been unlawful. Concerns that a departure from the code in this instance will lead to widespread variations in practice and undermine its status generally or that your Lordships' judgment lowers the protection offered by the law to mentally disordered patients are misplaced, in my opinion. The requirement that cogent reasons must be shown for any departure from it sets a high standard which is not easily satisfied. The protection which the law provides to ensure that any departures are compatible with convention rights is an additional safeguard. This has been amply demonstrated in practice since the code was promulgated. Ashworth is the only place where a hospital has departed from what the code says about seclusion in favour of its own policy. While I would respectfully endorse everything that Lord Brown says in the last paragraph of his speech, I believe that it would be wrong to see this judgment as opening the door to substantial

departures from the code on the part of individual hospitals. The decision of the majority should not be seen as an invitation to other hospitals to do this and resort to their own policies. The status of the code remains unchanged, and so does the need to show cogent reasons if in any respect it is departed from.

[100] For these reasons and those given by my noble and learned friend Lord Bingham of Cornhill, whose speech I have had the opportunity of reading in draft, I would allow the appeal and dismiss the respondent's application.

LORD SCOTT OF FOSCOTE.

[101] My Lords, I have had the advantage of reading in advance the opinions of my noble and learned friends and find myself in complete agreement with the reasons for allowing this appeal given by Lord Bingham of Cornhill and Lord Hope of Craighead. I can add nothing useful to those reasons. I am in respectful agreement, also, with everything that my noble and learned friend Lord Brown of Eaton-under-Heywood has written save in relation to art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). I want to add a few words to explain why I disagree with my noble and learned friend's conclusion that the Ashworth policy on seclusion cannot be described as being 'in accordance with the law' for art 8 purposes.

[102] Lord Brown (at [117], below) poses the question whether the placing of a mental hospital patient in seclusion engages art 8. He answers the question (at [118]): 'It is unthinkable that a mental patient can be subjected to seclusion, particularly on a long-term basis as is often the case at Ashworth, without good reason and . . . without such interference with his rights being "in accordance with the law".' I respectfully agree. But my noble and learned friend then examines whether the Ashworth policy on seclusion can be described as being 'in accordance with the law' and concludes that, because of the significant respects in which the provisions of the Ashworth policy are different from the provisions of the Secretary of State's code of practice, the Ashworth policy cannot be so described. Lord Brown (at [127], below) comments that the practices relating to seclusion adopted by any individual hospital, rational and reasonable though those practices might be, would not have 'the necessary legal quality to render them compatible with the rule of law'.

[103] My Lords, this surely cannot be right. 'The law', for art 8 purposes, does not consist only of statutes, directives, statutory codes and the like. It must include, also, the variety of duties and rights arising out of the circumstances in which individuals and institutions find themselves and their relationship with one another that are imposed by the common law. It cannot be doubted that Ashworth owes a legal duty to each of the inmates of the hospital to take reasonable steps to protect him or her from physical injury by other inmates. Ashworth cannot choose its patients. They are sent to Ashworth by others and Ashworth has to accept them, to detain them and to look after them. All of them suffer from some degree of mental disturbance—otherwise they would not be there. Some of them from time to time present a physical danger to other inmates. Where the danger appears particularly acute Ashworth's legal duty to the other inmates may well require Ashworth to place the dangerous inmate in seclusion. It is accepted that the only legitimate purpose of placing an inmate in seclusion is the protection of others. Seclusion cannot be used as a punishment nor can it constitute medical treatment, at least in the narrow sense of that expression. And the placing of a patient in seclusion where the apprehended danger that the patient in question may inflict

harm on other inmates is sufficiently acute would, in my opinion, constitute a step that Ashworth's legal duty to the other inmates would require it to take. So the proposition that for Ashworth to do so would not be 'in accordance with the law' for art 8 purposes because of some perceived defect in the written formulation of Ashworth's policy on seclusion must, in my opinion, be rejected. A dangerous patient's art 8 rights could not justifiably be pitched at a level that required the hospital to leave other inmates in unacceptable danger of physical harm. Once it is accepted that Ashworth has no statutory obligation to have a seclusion policy that conforms in every respect to the statutory code and that Ashworth's seclusion policy is rational and reasonable in itself despite its divergences from the code, there can be no room for any suggestion that the implementation of Ashworth's seclusion policy for the safety of other inmates is otherwise than in accordance with the law.

[104] I would, for the reasons given by Lord Bingham and Lord Hope, allow this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[105] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead and gratefully adopt their exposition of the facts, the legislation, the Secretary of State's code of practice (the code), and Ashworth's own policy (Ashworth's policy). In what follows I take all that as read.

[106] This appeal concerns a very sensitive question: the seclusion of mental health patients. Such patients, it need hardly be said, whether detained under s 3 of the Mental Health Act 1983 or admitted to mental hospitals informally (as the great majority are), form a particularly vulnerable group within society. And, of course, seclusion, forcible supervised solitary confinement, is one of the most extreme methods of controlling them.

[107] The central question raised by the appeal is what status must be given to the code (properly issued, as I understand all your Lordships to agree, pursuant to s 118 of the 1983 Act) with regard to the use of seclusion in mental hospitals. I use the word status because that was the word used during argument and in heading (g) to the Court of Appeal's conclusions ([2003] EWCA Civ 1036 at [71]–[76], [2004] QB 395 at [71]–[76], [2003] 3 WLR 1505). It is important, however, to understand precisely what is at issue. The Court of Appeal (at [92]) ultimately made a declaration that:

> 'In relation to the use of seclusion, the code of practice issued under section 118 of the [1983 Act] may only be departed from if there is good reason for such departure either in the case of an individual or a group of individuals sharing the same characteristics.'

I understand a majority of your Lordships to conclude that that declaration should be set aside: the code is to be regarded as guidance rather than instruction, albeit guidance which 'should be given great weight' and departed from 'only if [the hospital] has cogent reasons for doing so' (see [21], above).

[108] The difference between these two positions is not immediately obvious. 'Cogent reasons' for departing from guidance might well be thought to amount equally to 'good reason'. Yet the Court of Appeal ruled in the light of its declaration that Ashworth's policy—a policy described at [80] as 'departing from the Code of Practice on a wholesale basis'—is unlawful, whereas the majority of your Lordships would find it lawful. The critical difference must surely therefore be this: in a case

where two (or more) views as to the appropriate policy to adopt towards seclusion could each be regarded as reasonable and where the code embodies one view and an individual hospital takes another, whereas the Court of Appeal would require the hospital to follow the code, the majority of your Lordships would not; rather they would hold it lawful for the hospital to adopt and apply its own preferred policy.

[109] This is in many ways an odd appeal. It is not now suggested that Mr Munjaz was subject to seclusion when he should not have been, nor that he was secluded for longer than he should have been. Nor, I think, is it suggested that Ashworth's policy, assuming always, as one must, that it was properly applied, itself gives rise to any direct violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), let alone to any breach of domestic law. Rather what is suggested is that Ashworth is simply not permitted to have its own different policy towards seclusion (being entitled to depart from the code's policy only if in some individual case or group of cases such departure is justified—notably in those cases where it would make no sense to apply the code).

[110] I agree with the majority of your Lordships that this argument cannot be advanced on domestic law grounds: on any conventional approach to the construction and application of s 118 of the 1983 Act, the code would clearly permit Ashworth to adopt its own differing policy on seclusion. But what of the arguments centred on the Strasbourg jurisprudence? The real case advanced by those who challenge Ashworth's policy I understand to proceed in three stages: it is said first, that the United Kingdom would be in breach of its obligations under the convention if Ashworth were permitted to adopt a policy of its own; second, to ensure compatibility with convention rights, s 118 must accordingly be construed pursuant to s 3 of the 1998 Act to give greater weight to the code; third, once the code is given this additional weight, Ashworth becomes disentitled to adopt a different policy of its own.

[111] The articles of the convention on which the arguments have focused are arts 3, 5 and 8. The Court of Appeal accepted the appellant's case (supported as it was by MIND) with regard to arts 3 and 8 but not as to art 5. As to art 5 the court held that provided only that the person concerned is detained in a type of institution appropriate to meet the art 5(1) purpose of his detention, that article is not concerned with the conditions of that detention, only with its justifiability. I agree with the Court of Appeal's decision on this part of the case as expressed in paras [69] and [70].

[112] As to art 3, the argument which I understand the Court of Appeal to have accepted was essentially this. Unnecessary or unnecessarily prolonged seclusion can, in extreme circumstances, constitute inhuman or degrading treatment such as to amount to a violation of art 3. The state is under an implied positive obligation to take steps to guard against such breaches. The code of practice, if given the enhanced status contended for by the appellants, satisfies this positive obligation. Otherwise it is breached.

[113] For my part I find this argument unconvincing. In the extended part of its judgment refusing permission to appeal, the Court of Appeal said (at [91]):

> 'We did not lay down a general principle that where there is a risk that a public authority may act incompatibly with a Convention right there must be a Code of Practice promulgated by the state.'

I confess to some difficulty in reconciling this with a number of earlier passages in the judgment. Take this (at [60]):

> 'The argument before us is that the court should afford a status and weight to the Code of Practice which is consistent with the state's obligation to avoid ill-treatment of patients detained by or on the authority of the state. We accept that argument . . .'

And this (at [74]):

> '. . . Where there is a risk that agents of the state will treat its patients in a way which contravenes article 3, the state should take steps to avoid this through the publication of a Code of Practice which its agents are obliged to follow unless they have good reason to depart from it . . .'

[114] Reconcilable or not, however, the Court of Appeal's final thoughts on the issue must surely be right: there can be no principle that the state is obliged to promulgate a code whenever the risk arises of a public authority acting incompatibly with a convention right. The Strasbourg jurisprudence goes nowhere near supporting such a principle. Even in an art 2 case the positive obligation arises only in cases where the state knows or ought to know of a real and immediate risk to life. There is no evidence in the present case that the approach to seclusion being taken up and down the country (let alone by Ashworth itself) creates so plain a risk of art 3 violations that the Secretary of State is bound to take corrective measures.

[115] There is, moreover, to my mind a further ground for rejecting the art 3 argument here. As I observed in my judgment in the Court of Appeal in *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 735 at [36], [2002] 1 WLR 2515 at [36]:

> '. . . the Secretary of State's obligation under section 6 of the Human Rights Act 1998 is not himself to act incompatibly with a Convention right; he is not obliged to ensure that other public authorities themselves act compatibly . . .'

True it is, as observed by the court below (at [59]), that this was said in the context of an argument that the Secretary of State should have called in a planning application so as to avoid the risk of the local planning authority acting incompatibly with art 6. I see no reason, however, why that same principle should not apply equally in the present context. The Secretary of State is entitled to place the responsibility for acting compatibly with art 3 upon another public authority, here the hospital trust.

[116] On these issues, therefore, I am in full agreement with the majority of your Lordships. The remaining issue, however, that revolving around art 8, I confess to having found altogether more difficult.

[117] The first question to arise under art 8 is, of course, whether seclusion pursuant to Ashworth's policy engages art 8 at all—whether, that is, it falls within the scope of art 8(1): 'Everyone has the right to respect for his private and family life, his home and his correspondence.' In placing a patient in seclusion, is Ashworth interfering with the exercise of the patient's private life so as to require, pursuant to art 8(2), both a substantial factual justification for seclusion and, additionally, a sound legal basis for it?

[118] There can surely be only one answer to this question. It is unthinkable that a mental patient can be subjected to seclusion, particularly on a long-term basis as is often the case at Ashworth, without good reason and, in the language of

art 8(2), without such interference with his rights being 'in accordance with the law'. It is unnecessary to go so far as Mr Gordon QC appears to have submitted below on behalf of MIND, that seclusion is *always* an interference with the patient's right to private life, to conclude that as a practice it will inevitably sometimes engage art 8: there are bound to be occasions when the patient's 'personal autonomy' or 'moral integrity' (art 8 concepts well recognised and enshrined in the Strasbourg case law) are undermined, occasions when his 'human dignity' (and, indeed, important elements also of his residual 'human freedom') are compromised. The Court of Appeal's analysis (at [61] and [62]) on this part of the art 8 argument is in my opinion correct.

[119] To my mind therefore, the case turns on art 8(2), and above all on the requirement that any interference with private life involved in the practice of seclusion be effected 'in accordance with the law'. Nobody could dispute that seclusion as a practice is necessary. It can, indeed, be justified under several of the specified grounds provided for by art 8(2): 'in the interests of . . . public safety', 'for the prevention of disorder or crime', 'for the protection of health', and 'for the protection of the rights and freedoms of others'.

[120] But that is not a sufficient answer to the complaint of interference with art 8 rights. This is illustrated by in *Malone v UK* (1985) 7 EHRR 14, a complaint about telephone-tapping. Nobody doubted the justification of the practice but it was held to be contrary to art 8 for not being 'in accordance with the law'—a deficiency in the legislation cured by the Interception of Communications Act 1985.

[121] *Hewitt v UK* (1992) 14 EHRR 657 provides another illustration of the principle in the context of secret surveillance activities carried out by the Security Service. These activities, an undoubted interference with the applicants' private lives, were based on a non-binding and unpublished directive from the Home Secretary to the Director General of the Security Service. The directive did not have the force of the law, nor did its contents constitute legally enforceable rules governing the operation of the Security Service. In those circumstances the European Commission of Human Rights concluded that the directive did not provide a framework indicating with the requisite degree of certainty the scope and manner of the exercise of discretion by the authorities in the carrying out of their activities. This want of legal support for the practice in turn had to be cured by further legislation, the Security Service Act 1989.

[122] What is clear from these and other Strasbourg authorities is that more is required by way of legal justification for an interference with private rights merely than that there exists a sufficient basis for the practice in domestic law. In its judgment in *Hewitt v UK* (at 665 (para 39)) the Commission referred back to the court's judgment in *Malone v UK* as having 'elucidated the concept of foreseeability and highlighted its importance as a safeguard against the arbitrary application of measures of secret surveillance', quoting from the court's judgment in *Malone v UK* (at 40 (para 67)):

> 'The Court would reiterate its opinion that the phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law . . .'

'The quality of the law' there referred to encompasses notions of transparency, accessibility, predictability and consistency, features of a legal regime designed to guard against the arbitrary use of power and to afford sufficient legal protection to those at risk of its abuse.

[123] It was just such considerations which recently led the European Court of Human Rights in *HL v UK* (2004) 17 BHRC 418 (the complaint to Strasbourg which followed on from your Lordships' decision in *R v Bournewood Community and Mental Health NHS Trust, ex p L (Secretary of State for Health intervening)* [1998] 3 All ER 289, [1999] AC 458) to hold that the absence of procedural safeguards to protect informal mental patients against the arbitrary deprivation of liberty on grounds of necessity violates art 5(1): the court was struck by the lack of any fixed procedural rules governing the admission and detention of compliant incapacitated persons, contrasting this dearth of regulation with the extensive network of safeguards applicable to psychiatric committals under the 1983 Act.

[124] What view then should be taken of the seclusion of mental patients? Is this a form of control where regulation can satisfactorily be left to the individual hospitals who practise it or must it be subject to more constraining central direction? In short, for the practice to be compliant with the convention, must the Secretary of State's code have something akin to the force of law? Must it therefore be given the status for which the appellants contend, a status disentitling individual hospitals to depart from it on policy grounds (rather than on the ground that it would be unreasonable to apply the code to particular patients or groups of patients)?

[125] Not without some considerable hesitation I have reached the conclusion that the code must indeed be given this higher status. Without such a code the legal position would be this. The only authority for seclusion would be, in the case of patients detained under the 1983 Act, the implied power of control over those lawfully detained; in the case of informal patients, the common law doctrines of necessity and self-defence. The actual use of seclusion in individual cases would not be regulated save in so far as each hospital practising it would be required to adopt, publish and practise a rational policy of its own. That, of course, is precisely what Ashworth does. But by the same token that Ashworth is permitted to adopt its own policy, so too may other hospitals. Much of the factual focus of the appeal was upon those of Ashworth's patients who are detained for over seven days. But Ashworth's policy departs from the code much earlier than this: only for the first 12 hours does Ashworth conduct medical reviews at four-hourly intervals as specified by the code; from then until the end of the seventh day such reviews occur twice (rather than six times) a day. Other hospitals too may think it unnecessary to conduct reviews as frequently as provided for by the code. And of course there is nothing to stop Ashworth altering its policy whenever it thinks it right to do so. The policy of an individual hospital can be changed with infinitely greater ease than the code itself.

[126] Under Ashworth's approach, moreover, seclusion as a concept loses something of its clarity. Although Ashworth ostensibly adopts the code's definition of seclusion—'the supervised confinement of a patient in a room, which may be locked to provide others from significant harm'—Dr Finnegan's evidence (para 58) is that 'at most times about 75% of the long term secluded patients are being nursed in extended association, despite being defined as "secluded"'. These patients are said to be 'up in the public areas of the ward interacting with staff and patients'. Small wonder that this different attitude to the very concept of seclusion results in what seem to be widely differing approaches to the practice. A startling example of this appears from the written intervention helpfully submitted to the House by the Mental Health Act Commission. In October 2002 one particular patient was transferred from Ashworth to Rampton having been in seclusion at Ashworth for the best part of nine years. At Rampton his long-term seclusion ceased and

although from time to time since he has been subject to seclusion this has never been for as long as eight hours (or a total of 12 hours within any 48-hour period) such as to trigger Rampton's independent review process (the process provided for by para 19.21 of the code).

[127] The Secretary of State's foreword to the 1999 issue of the code stated that: 'the Code should be followed' until necessary new legislation came into force. It ended:

> 'The Code provides essential referenced guidance for those who apply the Act. Patients and their carers are entitled to expect professionals to use it.'

Under the ruling proposed by the majority of your Lordships, patients and their carers must be reconciled instead to substantial departures from the code on the part of individual hospitals who may prefer to follow a different policy of their own. It is my reluctant conclusion that not only will these patients and carers be disappointed in their expectations but that the practices in the event adopted by any such hospital (rational though I acknowledge they must certainly be) will not have the necessary legal quality to render them compatible with the rule of law. Unless it is to the code that one can look for regulation carrying the force of law it is not in my opinion to be found elsewhere. Hospital policies themselves provide too insubstantial a foundation for a practice so potentially harmful and open to abuse as the seclusion of vulnerable mental patients.

[128] On this limited basis I for my part would uphold the judgment of the Court of Appeal and declare Ashworth's policy to be unlawful.

[129] I add only this. The discordance of view revealed in this case between on the one hand the hospital trust and the Secretary of State, and on the other hand the Mental Health Act Commission (the statutory body charged with keeping under review the exercise of the powers and duties contained in the 1983 Act) and MIND (the leading mental health charity in this country), seems to me both striking and unfortunate. It is noteworthy too that, as recently as December 2004, the Joint Parliamentary Select Committee on Human Rights expressed itself concerned about 'the low level of compliance with guidelines on the use of seclusion' as attested to by the Mental Health Act Commission (see para 242 of its report). The new Mental Health Bill, just as the 1983 Act, makes provision for a code of practice. The present code, I readily accept, appears on its face to be altogether more obviously directed to short-term than to comparatively long-term periods of seclusion. I would express the hope that with a proper degree of co-operation on the part of all those concerned in this sensitive area of public administration, it may prove possible to lay down a comprehensive and compulsory scheme for the regulation of seclusion and its periodic review such as properly reflects not merely best practice generally but also such special problems as Ashworth (although apparently not the other high security hospitals) experiences. Sooner or later, consensus must be reached upon the proper place of seclusion within our mental hospitals. This issue has been a running sore for far too long.

Appeal allowed.

Kate O'Hanlon Barrister.

Martin-Dye v Martin-Dye

[2006] EWCA Civ 681

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS CJ, THORPE AND DYSON LJJ

15 FEBRUARY, 27 MARCH, 25 MAY 2006

Divorce – Financial provision – Pension sharing order – Pensions in payment – Other financial resources – Approach to pensions in payment in clean break cases – Matrimonial Causes Act 1973, s 25(2)(a).

The parties commenced divorce proceedings and both applied for ancillary relief. Section 25(2)(a)[a] of the Matrimonial Causes Act 1973 required the court in particular to have regard to the income, earning capacity, property and other financial resources which each of the parties to the marriage had. At the time of the hearing they had an estate worth approximately £6·3m. That included, for each of them, pensions in payment. The husband's pension was approximately ten times more valuable than the wife's pension. If included as part of his assets, the value of his pension represented approximately 35% of his assets; the value of the wife's pension, if included as part of her assets, represented approximately 3%. Before the district judge, both parties sought a clean break. The judge concluded that a fair split would be 57:43 in favour of the wife, each party's share to include their pension. The husband appealed, challenging, inter alia, the way in which the district judge had treated the pension assets. The appeal was dismissed and the husband appealed. The court considered the proper approach to the division of pensions in payment. No challenge was made as such to the apportionment of 57:43.

Held – There was no rule of law which prohibited the aggregation of the value of pensions in payment with all the other assets of the parties and a distribution of the resultant value that was fair in all the circumstances. Pensions in payment were to be characterised as 'other financial resources' within s 25(2)(a) of the 1973 Act as they did not sit comfortably in the category of 'property' since they were unrealisable and non-transferable or in the category of 'income' because their income stream did not derive from future endeavour but from past employment or contribution which would generally have been effected during the years of marriage. The aggregation approach might be appropriate where the parties had pensions in payment which were of approximately equal value and/or the value of the pensions was small in comparison with that of the other assets. In the circumstances of the instant case, however, the failure to treat the pensions as different in kind from the other assets, without making a significant adjustment to reflect the difference was bound to lead to unfairness. The proportion of the husband's assets that would vanish on his death was far greater than the proportion of the wife's assets that would vanish on hers. Furthermore, not only were the other assets transferable, but they also had the potential to increase in value over time, whereas the income stream represented by the pensions would remain constant, with a nominal fixed value which was likely over time to become less valuable by reason of inflation. Accordingly, a pension

a Section 25, so far as material, is set out at [59], below

sharing order would be made in the ratio 57:43. The remaining property should be shared in the same ratio, which would require a substantial balancing payment to be made by the wife to the husband (see [61], [65]–[67], [83], [85], [86], [88], [89], [93], [94], below).

Per Thorpe LJ. Rule 118(F) of the Family Proceedings (Amendment) No (5) Rules 2005, SI 2005/2922, introduces Form P which should be used in every case where a pension is significant and where a pension sharing order might be made. It can be used on a voluntary basis if the scheme member signs to give his authority or it can be ordered to be completed by the court, probably at the first direction appointment. Form P is available for use in any case where a Form A was filed after 5 December 2005. The virtue of Form P is that it directs the attention of the professions to the information which is required for the just disposal of the claim, whether by consent or by order of the court. That information includes the value of the pension and the valuation to be used. Where proportionate the court should be ready to direct the instruction of an expert in a case that requires a bespoke valuation. In such cases it will usually be appropriate to direct valuation by a single joint expert. Any completed Form P should be in the court bundle prepared for a first direction appointment hearing and for any subsequent trial. In any case where there has been a bespoke valuation both the letter of instruction and the report should be included in the court bundle (see [68]–[71], below).

Notes

For pension sharing orders, see 29(3) *Halsbury's Laws* (4th edn reissue) paras 825–831.

For the Matrimonial Causes Act 1973, s 25, see 27 *Halsbury's Statutes* (4th edn) (2000 reissue) 972.

Cases referred to in judgments

Brooks v Brooks [1995] 3 All ER 257, [1996] AC 375, [1995] 3 WLR 141, HL.

Cowan v Cowan [2001] EWCA Civ 679, [2001] 2 FCR 331, [2002] Fam 97, [2001] 3 WLR 684.

Duxbury v Duxbury [1990] 2 All ER 77, [1992] Fam 62, [1991] 3 WLR 639, CA.

F v F (clean break: balance of fairness) [2003] 1 FLR 847.

G v G (financial provision: equal division) [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143.

GW v RW [2003] EWHC 611 (Fam), [2003] 2 FCR 289.

Maskell v Maskell [2001] EWCA Civ 858, [2001] 3 FCR 296.

Norris v Norris [2002] EWHC 2996 (Fam), [2003] 2 FCR 245.

V v V (child maintenance) [2001] 2 FLR 799.

White v White [2001] 1 All ER 1, [2001] 1 AC 596, [2000] 3 WLR 1571, HL.

Appeal

The petitioner, Philip Martin-Dye (the husband), appealed with permission given on 17 November 2005 from the decision of Judge Horowitz QC on 25 July 2005 dismissing his appeal from the decision of District Judge Green in the Principal Registry of the Family Division in proceedings for ancillary relief in divorce proceedings between the husband and the respondent, Heather Lynn Martin-Dye (the wife), ordering a division of assets as to 57% to the wife and as to 43% as to the husband and refusing to make a pension sharing order. The facts are set out in the judgment of Thorpe LJ.

Nicholas Francis QC and *Alexis Campbell* (instructed by *Brookman Solicitors*) for the husband.

Martin Pointer QC, Valentine Le Grice QC and *Simon Webster* (instructed by *Gordon Dadds*) for the wife.

Cur adv vult

25 May 2006. The following judgments were delivered.

THORPE LJ (giving the first judgment at the invitation of Lord Phillips of Worth Matravers CJ).

THE PRINCIPAL ISSUE

[1] This appeal raises the question of how following a decree of divorce or nullity the court assessing the fair division of available assets in order to achieve a clean break between the parties should treat pensions in payment.

[2] In modern times pensions have come to be an increasingly important ingredient within the range of financial investments made by prosperous families. Where one or both of the spouses have been high earners over a sustained period the pension entitlement may form a very substantial part of their overall financial security. The powers of the courts have had to be specifically enlarged in line with this economic development.

LEGISLATIVE DEVELOPMENTS

[3] The case of *Brooks v Brooks* [1995] 3 All ER 257, [1996] AC 375 provided a partial solution to the problem. The court used its power under s 24(1)(c) of the Matrimonial Causes Act 1973 to deal with a pension. This section gave the court the power to vary any ante-nuptial or post-nuptial settlements made on the parties to the marriage for the benefit of the parties and/or any children of the family. *Brooks v Brooks* laid down that in some circumstances a pension scheme fell within the definition of a nuptial settlement and that accordingly the court could vary the terms of the settlement.

[4] The pension scheme in *Brooks v Brooks* was an unusual one and Lord Nicholls of Birkenhead observed ([1995] 3 All ER 257 at 267, [1996] AC 375 at 396) that:

> 'This decision should not be seen as a solution to the overall pensions problem. Not every pension scheme constitutes a marriage settlement . . . If the court is to be able to split pension rights on divorce in the more usual case of a multi-member scheme where the wife has no earnings of her own from the same employer, or to direct the taking out of life insurance, legislation will still be needed.'

[5] Consequently after *Brooks v Brooks* the powers of the courts to deal with pensions were increased by successive legislative enactments. Several new powers became available to the courts as methods of dealing with pensions in matrimonial proceedings.

[6] Section 166 of the Pensions Act 1995 amended the Matrimonial Causes Act 1973 by inserting new sections (ss 25B, 25C and 25D). The powers under these provisions were known as pension earmarking. The provisions were amended by the Welfare Reform and Pensions Act 1999 and they were renamed pension attachment orders.

[7] The 1999 Act also introduced a new financial order into the 1973 Act by ss 21A, 24B, 24C and 24D. These sections enable the court to order that a spouse's pension be shared (or split) so as to provide a proportion of that pension to the other spouse. The recipient of a share then has a pension fund that is personal to him or her.

[8] The 1999 Act also abolished the remedy created by *Brooks v Brooks*, for proceedings begun after 1 December 2000, by excluding a marriage settlement in the form of a pension arrangement from the categories of settlement which are variable.

[9] These statutory developments raised the question of how pensions were to be valued, especially where the court intended to set off the value of a pension against some other asset the value of which was either transparent or established by expert evidence. As Judge Horowitz QC said in the judgment giving rise to this appeal:

> 'The problem of difference in the quality of assets distributed to or left with the parties becomes highlighted in the post-[*White v White* [2001] 1 All ER 1, [2001] 1 AC 596] era where mathematical equality receives a higher emphasis than before. Unless the parties receive the same amount of cash or equal acreage the exercise will always involve measuring and equating different assets mediated through a money valuation. Money value thus performs its essential function as a medium of exchange.'

[10] The development of a convenient and fair method of valuation of pensions concerned not only the family justice system and its practitioners but also the pensions industry. Accordingly the question was investigated and considered by a select committee of the House of Commons, the Social Security Committee. In their report of October 1998 (Fifth Report of Session 1997–98, *Pensions on Divorce*) (HC Paper 869) they recommended (para 47) that: 'the courts should be given a limited discretion to cater for circumstances where serious anomalies would arise from the rigid use of a standard cash equivalent transfer valuation (CETV) of pension rights.'

[11] Section 25D(2)(e) of the 1973 Act provides for regulations to be made for the value of any benefits under any pension scheme to be valued and verified for the purposes of financial provision orders.

[12] The first regulations made under this section were the Divorce etc (Pensions) Regulations 1996, SI 1996/1676. We are not concerned with those regulations since in due course they were replaced by the Divorce etc (Pensions) Regulations 2000, SI 2000/1123 and the Pensions on Divorce etc (Provision of Information) Regulations 2000, SI 2000/1048 (the Information Regulations). The 2000 regulations came into force on 1 December 2000 and revoked the 1996 regulations.

[13] Regulation 3 of the Divorce etc (Pensions) Regulations 2000 provides that:

> 'For the purposes of the court's functions in connection with the exercise of any of its powers under Part II of the Matrimonial Causes Act 1973, benefits under a pension arrangement shall be calculated and verified in the manner set out in regulation 3 of the Pensions on Divorce etc (Provision of Information) Regulations 2000 . . .'

[14] Regulation 3 of the Information Regulations provides the methodology for valuation, distinguishing between deferred members of an occupational

pension scheme, active members of an occupational pension scheme and pensions in payment. For the purposes of the present appeal reg 3 is the crux and accordingly I set out the parts of the regulation relevant to pensions in payment:

> '(1) Where an application for financial relief under any of the provisions referred to in section 23(a)(i), (ia), (iii) or (iv) of the 1999 Act (supply of pension information in connection with domestic and overseas divorce etc in England and Wales and corresponding Northern Ireland powers) has been made or is in contemplation, the valuation of benefits under a pension arrangement shall be calculated and verified for the purposes of regulation 2 of these Regulations in accordance with . . .(d) paragraphs (7) to (9), if—(i) the pension of the person with pension rights is in payment . . .
>
> (7) Except in a case to which, or to the extent to which, paragraph (9) applies, the cash equivalent of benefits in respect of a person referred to in paragraph (1)(d) shall be calculated and verified in such manner as may be approved in a particular case by—(a) a Fellow of the Institute of Actuaries; (b) a Fellow of the Faculty of Actuaries; or (c) a person with other actuarial qualifications who is approved by the Secretary of State, at the request of the person responsible for the pension arrangement in question, as being a proper person to act for the purposes of this regulation in connection with the arrangement.
>
> (8) Except in a case to which paragraph (9) applies, cash equivalents are to be calculated and verified by adopting methods and making assumptions which—(a) if not determined by the person responsible for the pension arrangement in question, are notified to him by an actuary referred to in paragraph (7); and (b) are certified by the actuary to the person responsible for the pension arrangement in question as being consistent with "Retirement Benefit Schemes—Transfer Values (GN 11)" published by the Institute of Actuaries and the Faculty of Actuaries and current at the date on which the request for the valuation is received.'

[15] With that introduction I turn to a brief statement of the background.

FACTUAL AND PROCEDURAL BACKGROUND

[16] The parties were married on 5 December 1987. The wife had been married before and had a child from the previous marriage, Isadora (date of birth 20 December 1985), who was adopted by Mr Martin-Dye subsequent to the marriage.

[17] The wife and her first husband had purchased a property called Green Lane Farm in October 1984. The parties lived there and improved the property during the course of the marriage.

[18] The parties had a child together, Frederick born on 26 November 1988.

[19] The husband petitioned for divorce on 24 April 2003 and decree nisi was pronounced on 20 August 2003.

[20] At the time of the hearing Isadora was awaiting her A level results and holding an offer from Exeter University. Frederick was attending Cranleigh public school. He was a keen go-kart racer. Frederick's motor racing activities were paid for by sponsorship provided by the husband's company Offspec Kitchens.

[21] The wife applied for ancillary relief on 30 May 2005 and the husband cross-applied on 2 June 2005.

[22] The husband was a commercial pilot working with British Airways (BA). He took early retirement in 1998 on the grounds of ill health. The husband had a pension with BA which was already in payment at the date of the hearing of the applications.

[23] The parties' assets can be summarised as follows:

(i) Green Lane Farm, 41 acre property comprising the former matrimonial home, two cottages, various stables and outbuildings from which the wife runs a livery business.

(ii) Leander, a property in the husband's name.

(iii) Eton Design Ltd, a property holding company formed by the parties. The parties were equal shareholders in the company.

(iv) Offspec Kitchens, a new business venture started by the husband, with a partner in January 2001.

(v) Cars and chattels.

(vi) A policy held by the husband with the Prudential.

(vii) Various small investments.

(viii) Pensions: the husband's BA pension in payment, and the wife's pension with Friends Provident, also in payment.

[24] In the preparation of the ancillary relief applications the wife understandably emphasised that at the date of the marriage she was richer than the husband and had accordingly brought in greater assets. In countering that case the husband relied on inter alia the cash equivalent transfer value (CETV) value of the BA pension at the date of marriage. That was appropriate since at the date of marriage the BA pension was not in payment and in accordance with regulation and practice fell to be valued on the CETV basis. The actuary whom he instructed contended for a CETV valuation of about £170,000 at marriage, a figure reduced in the subsequent judgment of the district judge to £123,000. Having claimed this credit in the contribution arena the contention by Mr Francis QC for the husband that the two pensions, by then in payment, should be excluded from the court's review was clearly inconsistent. That point Mr Francis readily conceded during the course of argument in this court. Accordingly it is not surprising that Mr Pointer QC for the wife insisted that pensions in payment were brought into the courts' calculations. The end result was a letter to BA that resulted in a response offering a CETV figure of approximately £940,000 for the husband's pension. We were not shown either the letter of request or, initially, the response from BA. I was therefore not impressed by the subsequent submission of Mr Le Grice QC (who appeared before us in Mr Pointer's stead) that what BA furnished was in truth a cash equivalent benefits figure under reg 3(7) of the Information Regulations erroneously labelled a CETV figure. As Mr Le Grice conceded, in the absence of evidence the suggestion was mere speculation.

THE HEARING BEFORE DISTRICT JUDGE GREEN

[25] So when the case came for a week long trial before District Judge Green in the Principal Registry the two pensions in payment appeared in the schedule of available assets with a combined CETV worth of £1,040,807.

[26] Before the district judge both parties sought a clean break. The husband's primary case was that the assets should be split equally with all the properties being sold and each party retaining their pension. He contended that the disparity in the pre-marriage contributions had become merged in the sixteen-or seventeen-year marital history. However Mr Francis drew attention to his

fallback case, briefly stated in written submissions, providing for a pension sharing order to equalise future pension receipts.

[27] The wife sought a division of assets in the percentage of 62½:37½ in her favour and [an order pursuant to *V v V (child maintenance)* [2001] 2 FLR 799] for Freddie. She particularly sought the transfer of the husband's share in Green Lane Farm, both as the family home and as the site of her successful livery business. She accepted that Eton Design should be liquidated and the proceeds equally divided and that each party should keep their own pension. I emphasise that neither party primarily contended for a pension sharing order before the district judge and both presented the two pensions as assets together worth over £1m. The valuation exercise required by the Information Regulations was not carried out and the district judge was not referred to those regulations by any of the counsel in the case. The outcome before the district judge can be crudely summarised thus: she valued the assets at the date of the hearing at approximately £6·3m, and concluded that a fair split would be 57% to the wife and 43% to the husband. The wife's share included her pension at £100,317 and the husband's share included his pension at £940,490. In addition the district judge ordered the husband to pay education expenses for the two children of the family amounting to £23,000 pa.

THE APPEAL TO JUDGE HOROWITZ

[28] The husband filed a notice of appeal against the judgment of District Judge Green on 28 September 2004, substantially amended on 16 November 2004. The notice challenged the treatment of the pensions in payment. It also attacked the district judge's reasons for rejecting the application for a pension sharing order.

[29] The appeal was heard by Judge Horowitz over two days commencing on 14 July 2005.

[30] Judge Horowitz gave judgment on 25 July 2005. The husband's appeal was dismissed.

[31] Mr Francis referred us to his written submissions for the appeal. They demonstrate that the second of the six issues he raised was 'the proper way to treat pension assets, especially bearing in mind that they are in payment'. The issue was elaborated over fifteen of the following paragraphs of his skeleton argument. Again the district judge's rejection of the application for a pension sharing order was challenged.

[32] Judge Horowitz carefully recorded Mr Francis's oral submissions as follows:

> 'Pension
>
> [75] Mr Francis says that here the district judge fell into fundamental error of principle. The pension should not have been treated as capital. Nor should it have been worked twice. By this he means that it is stacked in the husband's capital column and then used to identify the husband's income for himself and as a source of support for Freddie. The pension, he says, should have been used as an income stream. It is, he submitted, no more a capital asset than the wife's livery business to which no-one sought to ascribe a capital value. On the other hand, the husband suffers injustice because his pension fund is treated as a CETV value as part of his 43% capital allocation, despite the fact that he cannot commute or spend it. Even if the pension is brought in, Mr Francis said, it should not be at CETV value. Mr Francis pointed out that as an ancillary relief capital asset, the husband's BA pension

fund represented a poor bargain. His £940,000 pays £30,000 net. The 2005–2006 *At a Glance: Essential Court Tables for Ancillary Relief* (Family Law Bar Association) quotes £518,000 as the *Duxbury* fund (see *Duxbury v Duxbury* [1990] 2 All ER 77, [1992] Fam 62) required to provide a level £30,000 net with the added advantage of freedom to cash in all or part of the notional portfolio at will.'

[33] Judge Horowitz answered Mr Francis's case in his judgment (at [85]–[89]) which I set out below:

'[85] I do not accept a calculation that excludes disparate pensions in payment as a valid presentation of the position of either party. The pensions, especially the husband's, represent payments referable to past salary taken as pension provision and now in a safe capital haven. Mr Francis refers me to dicta that warn against treating pension provision as equal currency to other assets. An example may be found in *Maskell v Maskell* [2001] EWCA Civ 858, [2001] 3 FCR 296 where on modest figures the husband was decades away from retirement and awarded £4,000 in capital on the basis of his future enjoyment of £32,000 CETV-worth of pension. Singer J made a similar observation in *F v F (clean break: balance of fairness)* [2003] 1 FLR 847 at [14], again a case of future pension. Neither is an apt analogy for the present facts.

[86] Mr Francis criticises the use of the CETV. He was unable in principle and by calculation to point to an alternative appropriately discounted figure. I note that a defensive suggestion made by a husband to discount the value of his pension not yet in payment by 25% was rejected by Bennett J in *Norris v Norris* [2002] EWHC 2996 (Fam), [2003] 2 FCR 245 at [69]. A discount of a pension fund not yet in payment was similarly rejected by Nicholas Mostyn QC in *GW v RW* [2003] EWHC 611 (Fam), [2003] 2 FCR 289. Of course, the theoretical basis of the discount was in both of those cases different being founded upon the fact that the fund was not yet paying. I see no compelling logic to consider a discount founded upon the fact that payment has arrived.

[87] Burying the pension off-schedule is, in my judgment, no solution. Mr Pointer says that CETV values are the prescribed currency, provided by the rules. That is a well-made point. However, I accept that there may be some degree of force in Mr Francis's critical analysis of CETV values where a pension is used without full consideration as an element in a flexible search for equality. The answer to Mr Francis may, it seems to me, be found in an observation of Coleridge J in *G v G (financial provision: equal division)* [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143 who said (at [47]):

"After a marriage of this length and with the quality of each party's respective contributions, fairness dictates, in my judgment, that as far as possible they should leave the marriage on terms of broad financial equality. But equality does not necessarily mean precisely 50% of the value of a given assets schedule on a given date. It means leaving each side in a position of broadly similar financial muscle. The wife has a greater measure of security which, given her lack of earning capacity, is sensible. The husband has the greater income, earning capacity, capital growth potential and risk. Both will share, to differing degrees, in the future risks and potential rewards. I think that is a fair balance between them."

a The principle contained in that passage is that a departure from equality may reflect the quality of the divided assets as well as the overall justice required by the circumstances of the case.

[88] This is a case where the district judge examined with care the impact of her order and departed from strict equality. She determined 57/43 in her discretion on consideration of all the factors. The wife did not succeed in b relating the award to her initial contribution or extracting a lump sum from the husband. While she succeeded in her major objective of retaining Green Farm Lane, she did so at a price nearer to paper equality.

[89] Those factors may include and in my judgment could include in this case factoring in the nature of an asset as an element in calibrating the precise percentage award. I do not consider that I should re-open consideration of c the judgment below on the basis that the district judge did not expressly address the characteristics of the pension fund Mr Francis relies upon. I am, however, clear that if I were to do so, I would arrive at the same or a very similar result in terms of the assets awarded to each party.'

d [34] Clearly Judge Horowitz was right to reject Mr Francis's submission that the pensions in payment should be excluded from account. Although his rejection of Mr Francis's criticism of the use of CETV figures must be questioned, I emphasise that no one referred him to the Information Regulations. He was hardly assisted by Mr Pointer's submission 'that CETV values are the prescribed currency, provided by the rules'.

e [35] An appellant's notice, seeking to appeal the decision of Judge Horowitz, was filed by the husband on 9 August 2005. The notice raised a sufficient point of principle to justify a second appeal and permission was granted on 17 November 2005.

SUBMISSIONS IN THE SECOND APPEAL

f [36] Mr Francis filed two skeletons, one to support his permission application and the other to support his appeal. Nowhere did he refer to the Information Regulations. Only in para 13 of his second skeleton did he cite reg 3(6) of the 1996 regulations. That was hardly helpful since those regulations had been revoked with effect from 1 December 2000.

g [37] Thus it is the remarkable and regrettable fact the parties have engaged well known specialist counsel and incurred costs of over half a million pounds on two hearings in the court below which were distorted by the failure to cite and focus on the method of valuation of pensions in payment provided by the regulation in force. When the point was raised with Mr Francis in argument he at once acknowledged the error and frankly conceded that the responsibility h was in part his. Mr Le Grice, who had prepared the respondent's skeleton for the appeal jointly with Mr Pointer and Mr Webster, was equally ready to accept some responsibility for the failure.

[38] Although I accept that to establish the procedure for and method of valuation requires a careful study of both r 2-20 of the Family Proceedings Rules j 1991 and the Information Regulations, *Rayden and Jackson on Divorce and Family Matters* (18th edn, 2005) vol 1, paras 16.193 and 16.199 gives a clear and complete statement of the required practice.

[39] In the course of his oral submissions Mr Francis informed us that his client at the date of retirement had taken 25% of the fund in cash, in sum £130,000. That went into the family pot. However since the courts below had brought his pension into the account at the CETV value of £940,490, his pension

in payment amounted to 35% of £2·7m, being his 43% share of the assets. Mr Francis's principal submission continued to be that the proper application of the district judge's percentages for the division of the assets now entitled his client to receive a balancing payment of £646,325 rather than the figure of £146,179, which would be his client's due were his appeal dismissed. Mr Francis arrived at the higher figure by excluding both pensions in payment from the result. Mr Francis did not contend for a pension sharing order, although in reply it was clear that he recognised that a pension sharing order would follow from the acceptance of his principal submission.

[40] Mr Le Grice in his oral submissions did not challenge Mr Francis's submissions on the categorisation of pensions in payment. He sought to support the outcome below by a table illustrating the net effect of the district judge's order. The table presented the husband as having a house worth £650,000 (the district judge's assessment of his housing needs), residual cash of almost £400,000, his pension at the CETV value of approximately £940,000 and Offspec together with its loan account amounting to £715,428: in all £2,701,673. The schedule represents his income as a notional £15,830 return on residual cash, pensions £37,840, Offspec £40,000 (as found by the district judge): in all £93,670 gross. The schedule shows the wife's capital worth of £3,581,288 made up of Green Lane Farm £3,104,000, residual cash £376,971 and pension £100,317. By way of income the document shows the livery business producing £73,500, £15,079 notional return on residual cash and pension £5,818: in all £94,397 gross. Mr Le Grice submitted that this schedule showed the reality and the essential fairness of the outcome, given that there was no challenge to the wife's entitlement to the greater share. Of course the flaw in this otherwise impeccable document is that it continues to introduce the pensions in payment as assets valued on the CETV basis.

FRESH EVIDENCE

[41] In first expressing my conclusions on the appeal I did not go beyond the failings recorded at [36]–[38] above. Since the courts below had not ascertained the cash equivalent of benefits (CEB) valuations as required by reg 3 of the Information Regulations but had acted on CETV valuations the resulting discretionary allocation of assets could not stand.

[42] After the circulation of the judgments in draft to counsel the respondent's solicitors approached BA and obtained a fax in the following terms:

> 'Further to your fax received earlier today we can confirm that the CETV mentioned in our letter to Brookman Solicitors dated 13 July 2004 was calculated with reference to the member's status in the scheme and therefore can technically be described as the Cash Equivalent of Benefits.'

[43] That resulted in an application by Mr Le Grice to introduce fresh evidence and to re-open the appeal. As well as the recent letter from BA cited above the respondent also produced the letter from BA of 13 July 2004 which was the source of the CETV valuations used throughout the trial. Both letters clearly bear the same signature. The court fixed an oral hearing of the application on notice to the appellant. At the oral hearing Mr Pointer returned to the case to argue the application. His simple submission was that the draft judgment could not stand since the further evidence demonstrated that in reality the judgments below were reached on the basis of CEB valuations carelessly labelled CETV valuations. Although Mr Pointer's instructing solicitors had made no inquiry of

Friends Provident, Mr Pointer suggested that the CETV valuation advanced for his client's pension was also in reality a CEB valuation.

[44] In response Mr Francis did not dispute the face value of the recent fax from BA. That may reflect the fact that his client is the pensioner and therefore better placed than the respondent to obtain evidence as to the value of his pension benefits.

[45] At the conclusion of brief submissions we admitted the fresh evidence.

[46] That evidence sheds very limited light on the process of valuation that produced the figures upon which the courts below worked. Whether strictly compliant with reg 3 of the Information Regulations, or at least consistent with reg 3 we do not know. However the fresh evidence is sufficient to establish the possibility that valuation in accordance with reg 3 would have produced equivalent figures. A mere disregard of the regulation would not in itself justify the appeal if the resulting error were only one of misdescription.

CONCLUSIONS

[47] In the light of the fresh evidence it is necessary to rule on the question of principle raised by paras 3–6 of the grounds of appeal and elaborated in paras 5–7 of the appellant's skeleton. In sum it is there submitted that the courts below erred in principle in debiting against the appellant's entitlement to 43% of the assets his pension in payment at the value supplied by BA. Pensions in payment, being different in kind to other available assets, should have been apportioned by means of a pension sharing order.

[48] The arguments in support are self-evident. A pension in payment is no more than a whole-life income stream akin to an annuity. It cannot be sold, commuted for cash or offered as security for borrowings. It has no capacity for capital appreciation. The benefit does not survive the death of the scheme member and thus cannot form part of his estate. Thus there are obvious distinctions between a technical value ascribed to a pension in payment and a market value ascribed to a realisable asset such as a freehold, a portfolio of shares or a work of art. These distinctions have been partially drawn in previous decisions of this court: see *Cowan v Cowan* [2001] EWCA Civ 679, [2001] 2 FCR 331, [2002] Fam 97 and *Maskell v Maskell* [2001] EWCA Civ 858, [2001] 3 FCR 296.

[49] Before the district judge this issue was almost submerged under a plethora of other contentions. However in his opening submissions for the husband Mr Francis wrote (para 3.5):

> 'In each case the capital value of pensions has been left out, for the simple reason that both pensions are in payment and therefore only represent a source of income. If the court wishes to bring these into account in part or at all, the proper way to deal with them is to make a pension sharing order.'

In the following paragraphs he defined the principal issues including:

> '4.7 The proper way to treat pension assets: are they simply to be added in as capital, or are they to be viewed as income producing assets (bearing in mind that they are in payment)?
>
> 4.8 Once the court has resolved all the above, what *type* of asset each should have?'

[50] In his final submissions to the district judge Mr Francis contended that there were no grounds to depart from an equal share of the assets. He continued (paras 17 (b) and (c)):

'This leads H to make a concession that goes beyond our open proposals. It seems to us that to seek to ring-fence his pension is inconsistent with these arguments. The pension is an asset that H brought to the marriage. Indeed, W expressly seeks to give it a value now (although it's in payment) and then to treat that as capital to be offset against other capital resources.

If H acknowledges that the pension is an asset of the marriage to be equitably divided, this can be achieved by a pension sharing order to equalize pensions.'

[51] In the accompanying schedule Mr Francis invited the transfer to the wife of a substantial portion of the BA pension so that the sum of the wife's existing Friends Provident policy and her portion of the BA policy would equal the remaining portion of the husband's policy.

[52] How did the district judge deal with this issue? She says this (at p 7 of her judgment):

'In the husband's closing submissions he suggested, as far as I am aware, for the very first time in the long history of this ancillary relief dispute, that there should be a pension-sharing order. This is not something the wife has ever suggested as far as I am aware. My attention was not drawn to any to any documentation to prove that the notice requirements of Rule 2.70 had not been met or to any response to such notice. Neither had I been given any written or oral evidence as to the cost of a pension-share arrangement in this case or a calculation as to the income each party might expect pursuant to any pension sharing order. In other words the husband had left this suggestion until very late in the day and supported it with no evidence as to its cost or impact.

The husband's pension has a CETV of almost £940,500; the wife's pension is considerably smaller with a CETV of £100,300. My judgment takes into account any possible loss of pension benefits as a result of divorce. Each pension is already in payment.'

[53] The only other relevant reference comes at the conclusion of her judgment when she announces the result in the following two paragraphs:

'In the course of this judgment I have worked my way through all of the disputed facts, all of the circumstances of the case and all of the s 25 factors. Weighing everything in the balance I have concluded that a fair outcome is to divide the parties' global assets of approximately £6,326,000 in the proportions 57% to the wife and 43% to the husband, giving the wife assets totalling approximately £3,600,000 to include Green Lane Farm at approximately £3,100,000 net of costs and her pension at approximately £100,000. By keeping Green Lane Farm her needs for a home and a way to be self-sufficient and support the children are met.

By keeping his British Airways pension and his company, the husband's income needs for himself are met and he can afford his support of the children. Additionally, he will have sufficient other capital to meet his housing needs. The illiquid assets he receives are not "duffs". They do, can or should produce his income.'

[54] With the advantage of hindsight I conclude that the judgment of the district judge is flawed on two grounds. First in dividing the available assets between the parties she ignored the essential differences between saleable

property and an income stream derived from an inalienable pension in payment. The district judge's perception of these differences was hindered by the way in which the husband's case was presented and by the use of CETV labels, the meaning of which was not questioned. Second, the district judge's rejection of the husband's application for a pension sharing order was insufficiently reasoned. The evidential deficits were more technical than substantial. The district judge conducts a quasi-inquisitorial trial and her duty is to consider the exercise of all the statutory powers available to the court. The option of a pension sharing order was raised in Mr Francis's opening submissions. If the district judge felt unable to consider such an order without further information she might have raised that question at the outset.

[55] On appeal to Judge Horowitz the first issue raised in the written submissions was that the district judge had secured to the wife the copper-bottomed assets and lumbered the husband with the risk-laden assets. His second issue was the treatment of pensions. Mr Francis's basic complaint was that the district judge had fallen into fundamental error by adding CETVs of vested pensions to the value of other assets. A vested pension is not the same as a capital fund.

[56] I have already recorded Mr Francis's submissions on the appeal and Judge Horowitz's response.

[57] Again with the advantage of hindsight I conclude that Judge Horowitz was wrong to reject the appeal for two reasons. First I do not share his construction of the crucial paragraphs of the judgment of the district judge (cited at [51] above) to demonstrate that she had factored in the nature of the assets as an element in calibrating the precise percentage award. As I read her judgment she first determined the percentage split by reference to contributions and other factors and then proceeded to divide the available assets between the parties in such a way as to secure the transfer of the husband's half share in Green Lane Farm in return for a comparatively small balancing payment. Even on Judge Horowitz's reading the district judge erred in failing to recognise the true nature of the assets that she was factoring in. My second criticism is that Judge Horowitz failed to deal with Mr Francis's second submission, namely that the district judge's reasons for rejecting the application for a pension sharing order could not be sustained. In my judgment those criticisms were well founded and constituted an independent ground of appeal.

[58] For the reasons stated above I conclude that the district judge misdirected herself and arrived at an erroneous conclusion. The appeal to Judge Horowitz failed to correct the errors. Before considering the consequences I express some general views, given that this appeal raises a point as to the proper treatment of pensions in payment which has not previously been considered.

[59] How then should pensions in payment be treated in clean break cases? It is helpful to return to the provisions of s 25 of the Matrimonial Causes Act 1973. Section 25(2) requires the court in particular to have regard to:

> '(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has . . .
>
> (h) . . . the value to each of the parties to the marriage of any benefit . . . which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.'

[60] Section 25(2)(h) previously made express reference to pension benefits because, prior to the arrival of powers to attach and to share, a major anxiety of wives on divorce was the loss of pension rights earned by the husband.

[61] Inevitably different methods of valuation have to be employed for deferred pensions, which include a limited right to draw down in cash, and pensions in payment which are no more than whole life income streams akin to annuities. Mr Francis cites the cases of *Cowan v Cowan* [2001] 2 FCR 331, [2002] Fam 97 and *Maskell v Maskell* [2001] 3 FCR 296 which underline the special characteristics of pension funds. In the present appeal we are not dealing with deferred pensions and CETV. Our focus is upon pensions in payment and cash equivalent benefits. They are to be characterised as 'other financial resources' within the s 25(2)(a) classification. For they do not sit comfortably in the category of 'property', since they are unrealisable and non-transferable. Nor do they sit comfortably in the category of 'income' because, although purely an income stream, the income does not derive from future endeavour but from past employment or contribution which will generally have been effected during the years of marriage.

[62] This case provides a useful example of this analysis. The 'property' consists of the houses and the investments. The 'income' is the receipts anticipated from the parties continuing endeavours, the wife in her livery business and the husband in his fitted kitchen business. The 'other financial resources' are their respective pensions in payment.

[63] In the present case a clean break order was inevitable. The court had a duty under s 25A of the 1973 Act to pursue that goal and both parties sought that outcome, only contesting the surrounding provisions. Therefore the court had two alternative ways of treating the other financial resources: either the pensions could be left undisturbed, compensating the wife for disparity, in that hers provided an income of £5,818 pa gross whilst his provided an income of £37,840 pa gross. That exercise is what is called offsetting by specialist practitioners. Alternatively, the judge could have made a pension sharing order, adjusting the apportionment of the capital property to reflect the effect of this.

[64] The district judge adopted the former approach. She valued the parties' pension rights and then treated these as equivalent in quality to the other property, concluding that it was fair that the wife should have 57% of the value of the total property and the husband 43%. In determining how effect should be given to this apportionment, she directed that the husband should retain the entirety of his pension rights and be credited as having received the value of these.

[65] I do not consider that this achieved a fair result. The quality of pensions in payment differs so significantly from that of the other property, that a result which left the husband with the vast majority of the former, as a major part of his share of the property, was not fair. A pension sharing approach should have been adopted.

[66] What then is to be done? The parties have already spent about £700,000 on the litigation to date. An order remitting the case for retrial is to be avoided at almost all costs. In my judgment this court can substitute a fair order for the flawed orders below by avoiding the route of offsetting, preferring the route of pension sharing. The starting point is the judge's conclusion that all the property should be divided in a way that would leave 57% of their value with the wife and 43% with the husband. Neither party sought to challenge this apportionment. This apportionment should be achieved as follows. The husband's pension rights

should be shared with the wife in such a way as to bring the value of her own and the appropriate part of the husband's pension rights up to 57% of the value of the totality of the two pension rights. The remaining property should be shared in a manner which allocates to the wife 57% of its value and to the husband 43% of its value. This will require a substantial balancing payment to be made by the wife to the husband.

[67] I would accordingly allow the appeal to the extent of replacing the order made by the judge with an order that provides for the sharing of the all the property in this way. If agreement cannot be reached on the implementation of this order, the matter should be restored to this court.

THE FUTURE

[68] The difficulties that have been encountered in the present case should hopefully not recur. The Family Proceedings (Amendment) (No 5) Rules 2005, SI 2005/2922 came into force on 5 December 2005. Rule 118(f)(i) introduces Form P (Pension Inquiry Form) which should be used in every case where a pension is significant and where a pension sharing order might be made. It can be used on a voluntary basis if the scheme member signs to give his authority on the first page or can be ordered to be completed by the court, probably at the first direction appointment. The commencement date for this new practice is set by r 123, the effect of which, in my opinion, makes the new form available for use in any case where a Form A was filed after 5 December 2005.

[69] The virtue of Form P is that it directs the attention of the professions to the information which is required for the just disposal of the claim, whether by consent or by order of the court. That information includes the value of the pension and the valuation method to be used.

[70] Where proportionate the court should be ready to act on the recommendations contained in para 47 of the Social Security Select Committee Report (referred to at [10], above) for the instruction of an expert in a case that requires a bespoke valuation. In such cases it will usually be appropriate for the court to direct valuation by a single joint expert.

[71] Any completed Form P should be in the court bundle prepared for a financial dispute resolution hearing and for any subsequent trial. In any case where there has been a bespoke valuation both the letter of instruction and the report should be included in the court bundle.

[72] The introduction of pension orders, both attachment and sharing, has required the resolution of a number difficult issues. Accordingly the Ancillary Relief Working Group of the Family Justice Council some time ago established a pensions sub-committee to work with the pension industry and with government officials in the resolution of these issues. The chairman of the pension sub-committee is Mrs Maggie Rae and I acknowledge gratefully the assistance that she has given in the preparation of this guidance as to the future.

DYSON LJ.

[73] The essential facts relevant to this appeal can be stated quite shortly. The district judge found that the husband and wife started their married life together with assets of approximately £1·67m, of which the husband had contributed about 18% and the wife about 82%. By the time of the hearing, they had by their joint efforts amassed an estate worth about £6·3m. The approximate values of the principal capital assets were Green Lane Farm (£3·1m), Leander (£310,000), Eton Design Ltd (£1,175,000), Offspec Kitchens Ltd (£530,000), the husband's

British Airways (BA) pension in payment (£940,000) and the wife's Friends Provident pension in payment (£100,000).

THE JUDGMENTS BELOW

[74] The district judge aggregated all these sums and concluded (at p 32) that weighing everything in the balance:

> 'a fair outcome is to divide the parties' global assets of approximately £6,326,000 in the proportions 57% to the wife and 43% to the husband, giving the wife assets totalling approximately £3,600,000 to include Green Lane Farm at approximately £3,100,000 net of costs and her pension at approximately £100,000. By keeping Green Lane Farm her needs for a home and a way to be self-sufficient and support her children are met.'

[75] At p 17 of her judgment, the district judge said:

> 'I must make a proper allowance for the impact in this case and in this marriage for the unequal assets each party brought to it. It is one of the circumstances of the case; it is a reason for a slight departure from equality. However, I do not see this task as a simple arithmetical exercise. I have weighed all the other s 25 factors in the balance before coming to my conclusion about a fair distribution.'

[76] The valuations of the pensions in payment were described as 'cash equivalent transfer values' (CETVs). But evidence obtained since the hearing of this appeal shows that the value of the husband's pension was in fact a cash equivalent of benefits (CEB) calculated in accordance with reg 3 of the Pensions on Divorce etc (Provision of Information) Regulations 2000. There is no reason to suppose that the value of the wife's pension was not calculated on the same basis. The confusion generated by the use of the CETV nomenclature has now been set at rest: on the material now placed before this court, I am satisfied that the values of the pensions have been properly computed.

[77] The net effect of the district judge's order was that the wife's income needs would be sufficiently met by the income from the livery business at Green Lane Farm together with her pension and a notional return on her residual cash; and the husband's income needs would be sufficiently met by his income from Offspec Ltd, together with his pension and a notional return on his residual cash. It is clear that the district judge contemplated that the wife would keep Green Lane Farm.

[78] The husband appealed against the district judge's decision on a number of grounds. These included a challenge to the way in which she had dealt with the pensions. The husband did not challenge the district judge's apportionment of 57:43 as such. But he did contend that the pensions should have been excluded from the value of the parties' capital assets because they are fundamentally different in kind from the parties' other assets. He further argued that, by including the CETV values of the pensions in the computation of capital and also taking account of the pension payments when considering income, the district judge had been guilty of double counting. There were other grounds of appeal with which we are not concerned.

[79] The submissions addressed to the judge have been essentially repeated in this court. Mr Nicholas Francis QC submits that a pension in payment is not the same as other capital assets. In particular, unlike other capital assets it is not transferable and is a vanishing fund which ceases to exist on the death of the

recipient. In these two respects at least, it is fundamentally different from other assets. The district judge was wrong in principle to 'mix currencies' in the way that he did. The pensions should have been treated as income streams. The husband's pension was no more a capital asset than the wife's livery business to which no one had ascribed a capital value.

[80] The judge rejected this criticism of the district judge's approach. He noted (at [78]) that the courts had been alert to the need to avoid 'excessive distortion' resulting from the difference in quality of the assets to be distributed. He referred in particular to illiquidity and risk as being two areas of potential distortion or unfairness. The judge said (at [85]) that he did not accept that a calculation that excluded disparate pensions in payment was a 'valid presentation of the position of either party'. He distinguished cases where it has been said that pensions should not be treated as equivalent currency to other assets. The judge's reasons for dismissing the challenge to the district judge's approach are contained in two paragraphs of his judgment:

> '[88] This is a case where the district judge examined with care the impact of her order and departed from strict equality. She determined 57/43 in her discretion on consideration of all the factors. The wife did not succeed in relating the award to her initial contribution or extracting a lump sum from the husband. While she succeeded in her major objective of retaining Green Lane Farm, she did so at a price nearer to paper equality.
>
> [89] Those factors may include and in my judgment could include in this case factoring in the nature of an asset as an element in calibrating the precise percentage award. I do not consider that I should re-open consideration of the judgment below on the basis that the district judge did not expressly address the characteristics of the pension fund Mr Francis relies upon. I am, however, clear that if I were to do so, I would arrive at the same or a very similar result in terms of the assets awarded to each party.'

[81] Mr Valentine Le Grice QC seeks to uphold the decisions below. He submits that the approach adopted by the district judge and the judge was conventional and unexceptionable. The non-pension assets were aggregated to a sub-total; and the capital values of the pension funds then added to create a grand total. In this way, the court was able to see the difference between the realisable resources and the deferred assets comprised in the pension funds. The parties' overall resources were compared. He acknowledges the different nature of pension funds and recognises that it is incumbent on judges to bear that distinction in mind in their appraisal of resources. He submits, however, that there is no reason to suppose that the judges did not do just that in the present case.

THE PROPER TREATMENT OF THE PENSIONS IN THE PRESENT CASE

[82] The district judge did not explicitly state that, in arriving at her 57:43 split, she gave any weight to the fact that the pensions were different in kind from the other assets. The only factor that she expressly identified as justifying her 'slight' departure from equality was the unequal value of the assets that were brought by the parties to the marriage. Her statement 'I have weighed all the other s 25 factors in the balance' does not give me confidence that she calibrated her percentage award by factoring in the different nature of the pensions. The submission on behalf of the husband that the pensions should be left out of account because they were different in kind from the other assets was an

important submission. He was entitled to a reasoned response from the district judge and the judge if this submission was to be rejected. In my judgment, he did not receive one. The district judge did not state whether she accepted that the pensions were different in kind from the other assets or whether, if she did, she considered that the difference required any, and if so, what adjustment to be made to the percentage distribution of the assets, and if not, why not. For his part, the judge gave no explanation as to why, if he were engaged on the exercise de novo, he would have arrived at the same or a very similar result.

[83] The question for the court was how to distribute the parties' assets fairly having regard to the matters specified in s 25(2) of the Matrimonial Causes Act 1973 (see *White v White* [2001] 1 All ER 1 at 9, [2001] 1 AC 596 at 604). Fairness requires the court to take account of all the circumstances of the case. In my view, it may be appropriate in some circumstances to aggregate the value of pensions in payment with all the other assets of the parties and make a distribution of the resultant value that is fair in all the circumstances. There is no rule of law that prohibits such an approach. Our attention was drawn to *Maskell v Maskell* [2001] EWCA Civ 858, [2001] 3 FCR 296. The judge had said (see [5]):

> 'If one looks at this as a comparatively long marriage . . . one could then see £26,000 and the £6,000 endowment policies, £32,000, going to the mother. The father has his £40,000 pension fund, plus the £4,000 endowment, so £44,000, less the debts of about £8,000, so that brings him to £36,000. So there is a rough equivalent.'

[84] Thorpe LJ said (at [6]):

> 'That passage seems to be fundamentally flawed, for the judge is making the seemingly somewhat elementary mistake of confusing present capital with a right to financial benefits on retirement, only 25% of which maximum could be taken in capital terms, the other 75% being taken as an annuity stream. He simply failed to compare like with like. I have a grave anxiety that the district judge made the same mistake.'

[85] But I do not read Thorpe LJ as saying that, as a matter of law, it is never open to the court to aggregate the value of pensions with that of other assets and distribute the resultant total value between the parties. Examples of where such an approach might be appropriate could be where the parties have pensions in payment which are of approximately equal value and/or where the value of the pensions is small in comparison with that of the other assets. It will all depend in the particular circumstances of the case.

[86] In the present case, the value of the husband's pension (if included as part of his assets) represented approximately 35% of his assets. The value of the wife's pension (if included as part of her assets) represented approximately 3% of her assets. Moreover, the husband's pension was approximately ten times more valuable than the wife's pension. In these circumstances, it seems to me that a failure to treat the pensions as different in kind from the other assets, without at any rate making a significant adjustment to reflect the difference, was bound to lead to unfairness. The proportion of the husband's assets that would vanish on his death was far greater than the proportion of the wife's assets that would vanish on hers. That in itself was a factor which meant that it was unfair to treat the pensions as having the same character as the other assets. Furthermore, not only were the other assets transferable, but they also had the potential to increase

in value over time, whereas the income stream represented by the pensions remained just that: a constant income stream whose nominal value remained fixed, but which was likely over time to become less valuable by reason of inflation.

[87] It might have been possible for the district judge to make an adjustment in the husband's favour to reflect the fact that the pensions in payment were in truth no more than an income stream which would cease on death and that his pension was so much more valuable than hers. The problem with this approach is that it is difficult to see how the adjustment would have been calculated. No formula was suggested in argument. Percentage adjustments cannot simply be plucked out of the air. Mr Le Grice submits that it is sufficient if the judge bears in mind the different nature of pensions when conducting his or her appraisal of the parties' resources. I find such an approach as unsatisfactory as it is lacking in transparency.

[88] It seems to me that in a case such as this the better course is to take the pensions out of the assets altogether and to make a pension sharing order. This reflects the reality that the pensions are in truth non-transferable income streams and are quite different in kind from the other assets owned by the parties. In my judgment, it is artificial to say that the pensions are capital assets valued at £940,000 (husband) and £100,000 (wife). The reality is that the sole value of their pensions to the parties is that they produce gross incomes of £37,840 and £5,818 respectively. In my judgment, the judge below, in effect, mischaracterised the pensions as being, or being equivalent to, capital assets.

[89] It follows in my view that the appeal should therefore be allowed. The question that arises next is whether this court can substitute a pension sharing order. In view of the enormous costs already incurred, I would be reluctant to remit the matter for a further hearing. There has been no challenge to the 57:43 apportionment of the capital assets. I agree with Mr Francis that it does not necessarily follow from the fact that the fair distribution of capital assets is 57:43 that the same distribution of the combined pensions should be adopted. It seems that neither party submitted below that, if a pension sharing order were made, the combined pensions should be apportioned in a different ratio from that determined by the district judge. It is true that before this court Mr Francis suggested a 50:50 split of the pensions, but he gave no reason to justify a departure from the district judge's apportionment. I think that it is fair to apply the 57:43 ratio to the pensions for the purpose of determining the pension sharing order. There is no obvious alternative.

[90] It is said by Mr Le Grice that such a course would destroy the balance of the district judge's carefully structured decision, an important element of which was her wish to ensure that the wife kept Green Lane Farm so that the wife's needs for a home and self-sufficiency were met. The net effect of allowing the appeal in the way that I have described will be to require the wife to make a much larger balancing payment to the husband than under the order made by the district judge. The judge referred (at [84]) to a balancing figure of £766,753. Mr Francis refers to a payment of £646,325 instead of £146,179 under the order of the district judge. I am unable to identify the precise figure. The district judge made no finding as to what the effect would be on the wife's ability to stay at Green Lane Farm if a pension sharing order were made in any particular ratio. So far as I am aware, she had no material on which to decide whether the wife would be able to stay at Green Lane Farm if a pension sharing order were made in any particular ratio. There is nothing in her judgment to indicate that she decided to

aggregate the pensions with the other assets in order to ensure that the wife was able to retain Green Lane Farm. The judge recorded (at [84]) that it was conceded on behalf of the husband that the wife should retain Green Lane Farm, but that she might have to borrow against the property to fund the balancing payment that would have to be made if the appeal were successful. In his skeleton argument for this appeal, Mr Le Grice submits that, if the appeal were allowed even to the limited extent of introducing a pension sharing order in the ratio of 57:43, the wife would have to sell Green Lane Farm.

[91] If I were satisfied that the probable effect of allowing the appeal to the extent that I have indicated would be that the wife would have to sell the property, then (with considerable reluctance) I would have concluded that the matter should be remitted to the district judge for reconsideration. But the wife has placed no material before this court which persuades me that such an outcome is probable. It is not clear whether she placed any such material in either of the courts below. If that were the probable outcome of a pension sharing order, I would have expected one or both of the judges below to have made a finding to that effect. The effect of a pension sharing order in the ratio 57:43 would be to increase the wife's income. Moreover, if she needed to borrow money to fund the balancing payment, Green Lane Farm would provide more than adequate security.

THE DOUBLE COUNTING POINT

[92] Finally, I come to the so-called double counting point. Since I have concluded that the district judge was in error to treat the pensions as capital, the double-counting point falls away: she should have treated them as income.

CONCLUSION

[93] For the reasons that I have given, I would allow this appeal to the extent that I have indicated. The pensions should be the subject of a sharing order in the ratio of wife 57%: husband 43%.

LORD PHILLIPS OF WORTH MATRAVERS CJ.

[94] I agree that this appeal should be allowed to the extent indicated and for the reasons given by Thorpe LJ and Dyson LJ.

Appeal allowed.

James Wilson Barrister (NZ).

Forbes v Secretary of State for the Home Department

[2006] EWCA Civ 962

COURT OF APPEAL, CIVIL DIVISION

SIR IGOR JUDGE P, SCOTT BAKER AND HALLETT LJJ

20 JUNE, 11 JULY 2006

Criminal law – Indecent photographs of persons under 16 – Fraudulent evasion of prohibition or restriction – Prosecution not having to prove that offender not only knew goods were prohibited but also nature of goods – Right to respect for private and family life – On conviction offender subject to notification requirements relating to sexual offences – Whether notification requirements compatible with offender's right to respect for private and family life – Customs and Excise Management Act 1979, s 170(2)(b) – Human Rights Act 1998, Sch 1, Pt I, art 8 – Sexual Offences Act 2003, Sch 3, para 14.

On his return to the United Kingdom from abroad the claimant had been found to be in possession of video tapes containing indecent photographs of persons under the age of 16. The importation of indecent or obscene articles was prohibited by the Customs Consolidation Act 1876. The claimant was convicted under s 170(2)(b)[a] of the Customs and Excise Management Act 1979 of the offence of fraudulent evasion 'of any prohibition or restriction . . . with respect [to any goods] under or by virtue of any enactment'. The offence did not require that the claimant knew or believed he was importing indecent images of children; it was sufficient that he knew that prohibited goods were involved and that a prohibition on their importation was being avoided. The result of the claimant's conviction and sentence of six months' imprisonment was that he automatically became subject to the notification requirements contained in the Sex Offenders Act 1997 and subsequently, after the repeal of the 1997 Act, to the notification requirements in Pt 2 of the Sexual Offences Act 2003 as the claimant's offence fell within para 14[b] of Sch 3 to the 2003 Act, being an offence under s 170 of the 1979 Act in relation to goods prohibited to be imported which included indecent photographs of persons under 16, the conviction had been before the commencement of Pt 2 of the 2003 Act and the offender had been aged over 18. The claimant brought proceedings for a declaration that the provisions which required him to comply with the notification requirements of the 2003 Act were incompatible with the right to respect for his private and family life contained in art 8[c] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The judge held that they were not incompatible and the claimant appealed. He argued that the notification requirements imposed on him after conviction for an offence in which the prosecution had not been required to prove that he knew or

a Section 170, so far as material, is set out at [5], below

b Paragraph 14, so far as material, provides: 'An offence under section 170 of the Customs and Excise Management Act 1979 . . . in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 . . . if the prohibited goods included indecent photographs of persons under 16 . . .'

c Article 8 is set out at [13], below

believed that he was importing indecent material involving children were too broad and disproportionate. He argued that as the objective of the legislative provisions was the prevention of sexual offences and the detection of those responsible for them, they could have no application unless it were established that the offender had committed a sexual offence; a defendant who did not know or believe he was importing child pornography could not be said to have done so. The automatic nature of the notification requirements, without any discretion in the trial judge to disapply them, thus constituted an unacceptable infringement of the right under art 8 to respect for private life.

Held – Paragraph 14(a) of Sch 3 to the 2003 Act was not incompatible with the rights provided by art 8 of the convention. The form and extent of the interference by a public authority with the right of the individual to respect for his or her private and family life created by the statutory notification requirements fell within the ambit of the permitted exceptions. It was inevitable that a scheme which applied to sex offenders generally would bear more heavily on some individuals than others but the proportionality of the notification requirements had to be examined principally in relation to its general effect; the particular impact that it had on individuals had to be of secondary importance. It was entirely appropriate for notification requirements to be imposed on those who had deliberately decided to import prohibited goods into the United Kingdom, careless or heedless of the risk that the goods so imported contained or included child pornography. The individual who chose to break the law against the importation of prohibited goods was responsible for the importation of the goods he had actually imported. The automatic notification requirements contributed to the protection of children everywhere, as well as the detection of offenders minded to exploit them, or to involve themselves in the exploitation of children by others. Accordingly, the appeal would be dismissed (see [16]–[21], below).

Re Gallagher's application for judicial review [2003] NIQB 26 adopted.

Notes

For notification requirements: persons formerly subject to Part 1 of the Sex Offenders Act 1997, see Supp to 11(1) *Halsbury's Laws* (4th edn reissue) para 528B.2, and for the right to respect for private life, see 8(2) *Halsbury's Laws* (4th edn reissue) para 150.

For the Customs and Excise Management Act 1979, s 170, see 13 *Halsbury's Statutes* (4th edn) (2004 reissue) 323.

For the Human Rights Act 1998, Sch 1, Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 707.

For the Sexual Offences Act 2003, Sch 3, para 14, see 12(2) *Halsbury's Statutes* (4th edn) (2005 reissue) 1369.

Cases referred to in judgment

A v Secretary of State for the Home Dept, X v Secretary of State for the Home Dept [2004] UKHL 56, [2005] 3 All ER 169, [2005] 2 AC 68, [2005] 2 WLR 87.

Adamson v UK (1999) 28 EHRR CD 209, ECt HR.

Gallagher's application for judicial review, Re [2003] NIQB 26, HC of Just.

R (on the application of ProLife Alliance) v BBC [2003] UKHL 23, [2003] 2 All ER 977, [2004] 1 AC 185, [2003] 2 WLR 1403.

R v Forbes [2001] UKHL 40, [2001] 4 All ER 97, [2002] 2 AC 512, [2001] 3 WLR 428.

R v Hussain [1969] 2 All ER 1117, [1969] 2 QB 567, [1969] 3 WLR 134, CA.
R v Taaffe [1984] 1 All ER 747, [1984] AC 539, [1984] 2 WLR 326, HL.

Appeal

Giles Forbes brought proceedings in August 2004 against the Secretary of State for the Home Department for a declaration that the provisions of the Sex Offenders Act 1997 which required him to comply with the notification requirements of the 1997 Act were incompatible with arts 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). By consent it was ordered that the question whether s 81 and para 14(a) of Sch 3 to the Sexual Offences Act 2003 (which replaced the 1997 Act) were compatible with art 8 of the convention should be tried as a preliminary issue. On 26 July 2005 Stanley Burnton J held that the provisions were not incompatible (see *XY v Secretary of State for the Home Dept* [2005] EWHC 1597 (QB), [2005] All ER (D) 371 (Jul)). Mr Forbes appealed. The facts are set out in the judgment of the court.

Helen Malcolm (instructed by *Davis Hanson*) for the appellant.
Steven Kovats (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

11 July 2006. The following judgment of the court was delivered.

SIR IGOR JUDGE P.

[1] In August 2004, Giles Forbes (the appellant) began proceedings for a declaration that the provisions of the Sex Offenders Act 1997 which required him to comply with the notification requirements of the Act were incompatible with arts 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). By consent, it was ordered that the question whether s 81 and para 14(a) of Sch 3 to the Sexual Offences Act 2003, which contain the current notification provisions, were compatible with art 8 of the convention should be tried as a preliminary issue. On 26 July 2005, Stanley Burnton J held that they were not incompatible ([2005] EWHC 1597 (QB), [2005] All ER (D) 371 (Jul)). The simple contention on behalf of the appellant is that this decision was wrong in law and that he was entitled to the declaration he was seeking: hence this appeal.

[2] On 23 March 1999 the appellant was convicted at Isleworth Crown Court of fraudulent evasion of the prohibition on the importation of goods, contrary to s 170(2)(b) of the Customs and Excise Management Act 1979. The full circumstances are narrated in the speech of Lord Hutton in the House of Lords in *R v Forbes* [2001] UKHL 40, [2001] 4 All ER 97, [2002] 2 AC 512, dismissing the appellant's appeal against conviction. In brief, however, he was returning to this country via Heathrow Airport from abroad when he was found to be in possession of two video tapes which contained indecent photographs of children under 16 years of age.

[3] The critical feature of the decision of the House of Lords was that it was not a pre-requisite to the appellant's conviction that he knew or believed that he was importing indecent images of children. The headnote to the law report ([2002] 2 AC 512) accurately summarises the effect of the decision:

'it was sufficient for the prosecutor to prove that a defendant knew that the operation on which he was engaged involved prohibited goods and was designed to evade a prohibition on their importation, and it was not necessary also to prove that the defendant knew the nature of the goods in question; that application of that principle gave rise to no injustice since, for the purposes of section 170(2), a defendant was to be judged on the facts as he believed them to be, so that a defence was available to him where the goods he was carrying, in fact and contrary to his belief, were not subject to prohibition . . .'

The appellant claimed in his evidence at trial that although he believed that the importation of these video films was prohibited in the United Kingdom, he did not know that they contained indecent photographs of children. The judge directed the jury that they should not convict him unless they were sure that his defence was untrue. As Lord Hope of Craighead put it (at [29]), '[p]lainly they did not believe his explanation, because they convicted him'. That said, we must examine the issue of incompatibility on the basis upon which the conviction was upheld. In any event, there may be others who during the course of fraudulent importation bring this kind of prohibited material into the United Kingdom without fully appreciating its true nature.

[4] On 18 May the appellant was sentenced to six months' imprisonment. The result of his conviction and sentence was that he automatically became subject to the notification requirements created under Pt 1 of the 1997 Act for a period of seven years from the date of his conviction. The notification requirement expired in March 2006, but by then the 1997 Act had been repealed, and with effect from 1 May 2004, replaced by equivalent provisions in the 2003 Act.

[5] The importation of indecent or obscene articles is prohibited by s 42 of the Customs Consolidation Act 1876. The offence of which the appellant was convicted is found in s 170(2)(b) of the 1979 Act, which, so far as relevant provides:

'Without prejudice to any other provision of the Customs and Excise Act 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion . . . (b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment . . . he shall be guilty of an offence under this section . . .'

[6] The notification requirements imposed on those who commit sexual offences were created by the 1997 Act. The sexual offences to which these requirements applied were specified in Sch 1. They include:

'1(1). . . (d) an offence under section 1 of the Protection of Children Act 1978 (indecent photographs of children); (e) an offence under section 170 of the Customs and Excise Management Act 1979 (penalty for fraudulent evasion of duty etc) in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (prohibitions and restrictions); and (f) an offence under section 160 of the Criminal Justice Act 1988 (possession of indecent photographs of children) . . .'

Paragraph (e) is subject to the express limitation that it does not apply where the prohibited goods 'did not include indecent photographs of persons who were under the age of 16' (sub-para 2(c)). These requirements were replaced by, but in

effect repeated in, paras 13, 14, and 15 of Sch 3 to the 2003 Act respectively. The requirements themselves are found in ss 83–85, and they are no less, and may be rather more burdensome than before.

[7] Section 1 of the Protection of Children Act 1978 is directed at the making, distribution, possession with a view to publication, and publication of indecent photographs with children. Section 160 of the Criminal Justice Act 1988 is concerned with the possession of such material. For both offences a limited statutory defence is made available to the defendant who proves what for present purposes only can be summarised as innocent possession.

[8] Neither of these offences directly addresses the specific problem of the importation of child pornography and similar material from abroad. This distinct and specific conduct is not covered by either the 1978 Act or the 1988 Act. While it is correct for Miss Malcolm to point out that, by contrast with the offences created by the 1978 Act and the 1988 Act, no statutory defence is available, the defence provided at common law is perfectly well understood, and easily identified. Perhaps it is best encapsulated in the speech of Lord Hope in *R v Forbes*, where he said (at [31]):

> 'It was, of course, open to the appellant to say, if this was the fact, that he believed the videos to contain indecent photographs of adults and that he acted as he did because he believed, contrary to the fact, that they were prohibited. The line of defence which was approved in *R v Taaffe* ([1984] 1 All ER 747, [1984] AC 539) ensures the acquittal of people who genuinely believe that they are importing indecent photographs of adults which are not obscene, when they are in fact photographs of children. But it is for the defendant to put forward that defence. The prosecution does not have to prove what the accused knew the goods were which he was seeking to import knowing that they were prohibited goods.'

The existence of the defence, and the reasons for the limitations on it, were expressed by Lord Hutton. He explained (at [57]):

> 'In many cases a person who . . . brings into the United Kingdom an article, knowing that he is taking part in the fraudulent evasion of a prohibition against importation, will not know the precise nature of the article which he is carrying. In such a case the task for the prosecution in proving an offence would be virtually impossible if, in addition to having to prove that the article was a prohibited one and that the defendant knew that he was involved in the evasion of prohibition, it also had to prove that he knew the precise nature of the article. In my opinion the application of the principle stated in *R v Hussain* ([1969] 2 All ER 1117, [1969] 2 QB 567) gives rise to no injustice in a case such as the present one, as it is open to the defendant to rely on the "*Taaffe* defence" if his case is that he believed that he was carrying an article which in reality and contrary to his belief was not prohibited.'

[9] We should therefore underline that the offence created by s 170(2)(b) of the 1979 Act is not an absolute offence. Furthermore, if it were necessary for the prosecution to prove that the defendant knew the precise nature of the goods he was importing, for the reasons given by Lord Hutton, the efficacy of s 170(2)(b) would be reduced virtually to extinction. That, in the context of the importation of indecent material relating to children, would be inimical to the protection of children, and the subsequent distribution of such material following its

importation, would be a corrupting and corrosive influence, damaging to the public interest.

[10] There is no doubt that notification requirements impose significant burdens on the individuals who are subject to them. They are intended to do so. The precise details are not significant, but the requirements include an obligation on an offender released from prison to provide to the police information about his date of birth, his name and his home address, to notify any change of address (or name) and any address at which he has stayed in the United Kingdom for an aggregate period of seven days in one year within three days. There are further notification requirements which may arise in the context of foreign travel. Unreasonable non-compliance with notification requirements is itself a criminal offence, punishable, at present, on summary conviction with a maximum of six months' imprisonment, or a fine not exceeding the statutory maximum, or both, and by up to five years' imprisonment on conviction on indictment.

[11] Stanley Burnton J summarised the allegations in the particulars of claim:

> 'a) During the time that the claimant was in prison he was classified as a sexual offender, and was in the vulnerable prisoners' unit, among prisoners who had committed sexual crimes. When he came into contact with persons outside that unit, he was abused because he was considered to be a sexual offender.
>
> b) The claimant was automatically considered for home detention curfew before the end of the sentence. However, because he was subject to the notification requirements, he was subject to a Prison Service policy that denied curfew in the absence of "exceptional circumstances". No such circumstances were found to exist in his case, as a result of which his release on home detention curfew was refused.
>
> c) After his release on 13 August 1999, the claimant complied with the notification requirements. He suffered persistent distress and anxiety at the prospect of his status as a person subject to those requirements being discovered by members of the public. That was not an unreasonable or unjustified fear, having regard to the then national press campaign threatening the publication of details of sex offenders, which led to public order disturbances and violence towards people perceived to be such.
>
> d) In August 2001, the police sent correspondence to the claimant referring to his status under the 1997 Act. It was sent to the wrong address. When he received that correspondence, it appeared to have been opened. He was offered the opportunity to move his address, but did not want to leave the community with which he was familiar, and declined. The possibility that his neighbours might be aware of his status caused him substantial anxiety.
>
> e) The claimant is permanently anxious that his status as a person subject to the notification requirements, commonly described as "being on the sex offenders' register", will become known. He is fearful of consulting a doctor about his anxiety because any reference to his status would be noted on his medical records and remain there indefinitely.
>
> f) In 2003, police officers attended upon him unannounced and asked him to visit them. They have also corresponded with him. The claimant has been informed that such police contact is in accordance with the monitoring role they undertake in relation to all persons who are subject to the notification requirements. The claimant finds these police activities

a intrusive and uncomfortable, and they cause him further distress and anxiety.'

[12] Correspondence subsequent to the hearing before Stanley Burton J suggests that further potential problems may arise from information which may be retained after the end of the relevant notification period. In short, the impact of the notification requirements may continue after the expiry of the notification period.

[13] These requirements undoubtedly involve an interference by a public authority with the right of the individual to respect for his or her private and family life. Article 8 of the convention provides:

c '1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, d for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The question, therefore, is whether the particular form and extent of interference created by the statutory notification requirements fall within the ambit of the permitted exceptions.

e [14] The notification requirements were examined by the European Court of Human Rights in *Adamson v UK* (1999) 28 EHRR CD 209. The court considered whether they constituted an infringement of the applicant's rights under art 8. It concluded that they did not. In the context of art 8, the court explained (at 212):

f 'Since the measures in question are set out in clear terms under the Act, it cannot be doubted that they are "in accordance with the law". Furthermore, the Court considers that the measures pursue legitimate aims, namely the prevention of crime and the protection of the rights and freedoms of others. It remains to be decided whether they are "necessary in a democratic society", that is, proportionate to the aims pursued.'

g After examining the effect of the notification requirements, the court balanced the burdens imposed on the applicant against the importance of the aims pursued by the Act:

h 'The Court has previously referred to the gravity of the harm which may be caused to the victims of sexual offences . . . and has held that States are under a duty under the Convention to take certain measures to protect individuals from such grave forms of interference. Against this background, the Court does not consider that the requirement to provide information to the police can be said to be disproportionate to the aims pursued'

j [15] The submission, carefully and succinctly advanced on behalf of the appellant by Miss Malcolm, is that the notification requirements imposed on the appellant after conviction for an offence in which the prosecution was not required to prove that he knew or believed that he was importing indecent material involving children, were too broad and disproportionate, and fell outside the exceptions specified in art 8(2). The argument is confined to a narrow point. It does not involve criticism of the notification provisions which follow

conviction of any of the other sexual offences specified in the statutory scheme. However, as the objective of these legislative provisions is the prevention of sexual offences, and the detection of those responsible for them, it is submitted that they can have no application unless it is established that the offender has committed what is in fact a sexual offence. A defendant who does not know or believe that he is importing child pornography cannot be said to have done so. The automatic nature of the notification requirements, without any discretion in the trial judge to disapply them, constitutes an unacceptable infringement of the right to respect for private life.

[16] Our attention was drawn to the decision of the High Court of Justice in Northern Ireland in *Re Gallagher's application for judicial review* [2003] NIQB 26, where Kerr J rejected a submission that the automatic imposition of the notification requirements of the 1997 Act infringed the applicant's rights under art 8. He observed:

> 'It is inevitable that a scheme which applies to sex offenders generally will bear more heavily on some individuals than others. But to be viable the scheme must contain general provisions that will be universally applied to all who come within its purview. The proportionality of the reporting requirements must be examined principally in relation to its general effect. The particular impact that it has on individuals must be of secondary importance . . . The automatic nature of the notification requirements is in my judgment a necessary and reasonable element of the scheme. Its purpose is to ensure that the police are aware of the whereabouts of all serious sex offenders. This knowledge is of obvious assistance in the detection of offenders and the prevention of crime.'

[17] We respectfully adopt this analysis of the principles which underpin and justify the notification requirements. Their objective is to provide children, wherever in the world they may live, with such protection as the law in this country can offer them against exploitation for sexual purposes. In any civilised country it is elementary. Article 19 of the United Nations Convention on the Rights of a Child 1989 (New York, 20 November 1989; TS 44 (1998); Cm 1976), to which the United Kingdom is a party, provides, in unequivocal terms, that 'all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse . . .' should be taken.

[18] Parliament decided that the statutory scheme for notification should encompass, among other forms of sexual offences, the importation into this country of indecent material involving children in contravention of s 170(2)(b) of the 1979 Act. This decision must be afforded what can be compendiously summarised as a wide margin of discretion. (See *R (on the application of ProLife Alliance) v BBC* [2003] UKHL 23, [2003] 2 All ER 977, [2004] 1 AC 185, and the well-known speech of Lord Hoffman, and *A v Secretary of State for the Home Dept, X v Secretary of State for the Home Dept* [2004] UKHL 56, [2005] 3 All ER 169, [2005] 2 AC 68.)

[19] It is entirely appropriate for notification requirements to be imposed on those who have been convicted of offences which are directly connected with such exploitation. Plainly that applies to those who deliberately import child pornography. In our judgment, however, it also applies to those who decide quite deliberately to import prohibited goods into this country, careless or

heedless of the risk that the goods so imported contain or include such material. As Mr Kovats put it, in his equally concise and thoughtful argument, the individual who chooses to break the law against the importation of prohibited goods is, and should be, responsible for the importation of the goods he has actually imported. We agree. Our conclusion is reinforced by the evidential difficulties which normally face those seeking to establish that a defendant knew the precise nature of the prohibited goods he was importing. The consequent, automatic, notification requirements contribute to the protection of children everywhere, as well as the detection of offenders minded to exploit them, or to involve themselves in the exploitation of children by others.

[20] In our judgment the extent of the interference with the rights of an individual responsible for a prohibited importation of indecent material involving children who becomes subject to the statutory notification requirements is not disproportionate. Accordingly, para 14(a) of Sch 3 to the 2003 Act is not incompatible with the rights provided by art 8 of the convention.

[21] We indorse the judgment and the reasoning of Stanley Burnton J. The appeal will be dismissed.

Appeal dismissed.

Dilys Tausz Barrister.

Miklis v Deputy Prosecutor General of Lithuania

[2006] EWHC 1032 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

LATHAM LJ AND TUGENDHAT J

31 MARCH, 11 MAY 2006

Extradition – Evidence – Evidence not available at extradition hearing – Judge ordering extradition after extradition hearing – Test to be applied to determine whether to admit further evidence on appeal – Extradition Act 2003, s 27(4)(a).

The appellant who had served five years' imprisonment in Lithuania for drugs offences agreed to become an informer for the Lithuanian police. As a result, a number of those with whom he had been involved in the drug culture were convicted and jailed. He broke up with his girlfriend who told his friends that he had been acting as an informer. He then told the police that he did not wish to work for them any longer. Following an attack upon him by persons who were not identified he came to the United Kingdom. The respondent requested the appellant's extradition to face charges of theft and burglary. The district judge ordered his extradition. The appellant appealed. He argued, inter alia, that the district judge should not have made the order he had because, on the evidence before him, he should not have been satisfied that the extradition would be compatible with appellant's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) not to be subjected to torture, inhuman or degrading treatment. On the appeal the appellant adduced evidence, inter alia, as to the treatment of offenders in Lithuania which he contended could not have been obtained in time for the hearing before the district judge. It was submitted that had the district judge seen that evidence, he would have come to a different decision and therefore the matter could be considered pursuant to s 27[a] of the Extradition Act 2003, which provided that a court could allow an appeal only if evidence was 'available that was not available at the extradition hearing'.

Held – The word 'available' in s 27 of the 2003 Act made it plain that although the requirements laid down by the Court of Appeal Civil Division for admissibility of new evidence on appeal, namely that the evidence could not have been obtained with reasonable diligence for use at the first instance hearing, that it would probably have had an important (though not necessarily decisive) influence on the result of the case, and that it was credible, did not have to be met where the liberty of the individual or matters relating to human rights were in issue, none the less the court would require to be persuaded that there was some good reason for the material not having been made available to the district judge. Furthermore, where there could be any suggestion of the appellant 'keeping his powder dry' he had to expect the court to view any application to rely on such

a Section 27, so far as material, provides: '... (2) The court may allow the appeal only if the conditions ... in subsection (4) are satisfied ... (4) The conditions are that—(a) ... evidence is available that was not available at the extradition hearing ...'

evidence with some scepticism. In the instant case, the additional evidence regarding evidence of police brutality in Lithuania could not have been obtained in time for the hearing before the district judge. It would, therefore, be admitted as part of the material on which the appeal should be determined. That material undoubtedly gave rise to concern about the way the police had behaved and the ability of the authorities to control that behaviour, but it did not establish that the appellant would be at real risk of torture or other inhuman or degrading treatment. It followed that if the district judge had seen that evidence, there would have been no sufficient basis upon which he could have concluded that the appellant's life would be at risk or that there was a real risk he would be subject to torture or other inhuman or degrading treatment if he were to be returned. Accordingly the appeal would be dismissed (see [3], [16], [20], [21], below).

Ladd v Marshall [1954] 3 All ER 745 considered.

Notes

For the court's powers on appeals against extradition, see Supp to 17(2) *Halsbury's Laws* (4th edn reissue) para 1419.

For the Extradition Act 2003, s 27, see 18 *Halsbury's Statutes* (4th edn) (2005 reissue) 826.

Cases referred to in judgments

Ladd v Marshall [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.

Osman v UK (1998) 5 BHRC 293, ECt HR.

Soering v UK (1989) 11 EHRR 439, [1989] ECHR 14038/88, ECt HR.

Cases referred to in skeleton arguments

Aziz v Secretary of State for the Home Dept [2003] EWCA Civ 118.

Boudhiba v Central Examining Court No 5 of the National Court of Justice, Madrid [2006] EWHC 167 (Admin), [2006] 3 All ER 574, DC.

Chahal v UK (19960 1 BHRC 405, ECtHR.

D v UK (1997) 2 BHRC 273, ECt HR.

Faraj, Re [2004] EWHC 2950 (Admin), [2004] All ER (D) 137 (Dec), DC.

Farinha (Antonio Da Costa), Re [1992] Imm AR 174, DC.

Government of the USA v Bentley [2005] EWHC 1078 (Admin), [2005] All ER (D) 172 (May).

Guisto, Re [2003] UKHL 19, [2003] 2 All ER 647, sub nom *R (Guisto) v Governor of Brixton Prison* [2004] 1 AC 101, [2003] 2 WLR 1089.

Kalashnikov v Russia (2003) 36 EHRR 587, [2002] ECHR 47095/99, ECt HR.

Kociukow v District Court of Bialystock III Penal Division [2006] EWHC 56 (Admin), [2006] 2 All ER 451, DC.

Liversidge v Anderson [1941] 3 All ER 338, [1942] AC 206, HL.

Office of the King's Prosecutor, Brussels v Cando Armas [2005] UKHL 67, [2006] 1 All ER 647, [2005] 3 WLR 1079.

Puzinas v Lithuania [2002] ECHR 44800/98, ECt HR.

R (on the application of Bagdanavicius) v Secretary of State for the Home Dept [2003] EWCA Civ 1605, [2004] 1 WLR 1207; *affd* [2005] UKHL 38, [2005] 4 All ER 263, [2005] 2 AC 668, [2005] 2 WLR 1359.

R (on the application of Razgar) v Secretary of State for the Home Dept [2004] UKHL 27, [2004] 3 All ER 821, [2004] 2 AC 368, [2004] 3 WLR 58.

R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 AC 323, [2004] 3 WLR 23.

R (on the application of Warren) v Secretary of State for the Home Dept [2003] EWHC 1177 (Admin), [2003] All ER (D) 115 (Jun). a

Ramda v Secretary of State for the Home Dept [2005] EWHC 2526 (Admin), [2005] All ER (D) 223 (Nov), DC.

Appeal

Edgaras Miklis appealed pursuant to s 26 of the Extradition Act 2003 against an extradition order made at Bow Street Magistrates' Court on 13 February 2006 by District Judge Anthony Evans whereby it was ordered that he be returned to Lithuania to face trial for two offences of theft and one offence of burglary. The facts are set out in the judgment of Latham LJ. b c

Ben Cooper (instructed by *Hodge, Jones & Allen*) for the appellant.

Brian Gibbins of the *Crown Prosecution Service* for the respondent.

Cur adv vult

11 May 2006. The following judgments were delivered. d

LATHAM LJ.

[1] This is an appeal pursuant to s 26 of the Extradition Act 2003 against an extradition order made at Bow Street Magistrates' Court on 13 February 2006 by District Judge Anthony Evans. He ordered the appellant to be returned to Lithuania to face trial for two offences of theft and one offence of burglary. It is accepted by the appellant that these offences are extradition offences pursuant to s 64(3) of the 2003 Act. But he submits that the district judge should not have made the order that he did because on the evidence before him he should not have been satisfied as he must under s 21(1) of the 2003 Act, that extradition would be compatible with the appellant's convention rights (see the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)), and that, again on the evidence, it would be unjust or oppressive to extradite the appellant by reason of his mental condition so as to require his discharge pursuant to s 25 of the 2003 Act. Alternatively, it is submitted that the district judge would have come to a different decision on these two issues had he had before him evidence now provided to this court, firstly as to treatment of offenders in Lithuania, and second as to the appellant's health, pursuant to s 27 (2) and (4)(a) of the 2003 Act. e f g

[2] As far as the new evidence is concerned, this consists of an expert report from Dr Brad Blitz exhibiting thirteen reports relating, in particular, to the conduct of the police and conditions in prisons in Lithuania, and a psychiatric report from Dr Olumoroti dated 29 March 2006. None of this material was before the district judge. Mr Cooper on behalf of the appellant accepts that this material should, ideally, have been before him. He explained that as far as the material relating to conditions in Lithuania was concerned, there had been substantial difficulties in collating it which had not only been experienced by him and his instructing solicitors, but also by others instructed on behalf of Lithuanians in respect of whom extradition has been sought. I hope that the material provided by Dr Blitz means that this will no longer be a problem in Lithuanian cases. It is not only important that a district judge, who has the task of assessing the credibility of any oral witnesses, as well as evaluating objective h j

material such as that obtained by Dr Blitz, should have all of the material before him in order to carry out that exercise properly.

[3] It should be remembered that s 27(4) of the 2003 Act, dealing with new evidence, refers to evidence at the appeal 'that was not available at the extradition hearing'. The word 'available' makes it plain that, whilst I would not consider that the requirements of *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, had to be met where not only the liberty of the individual, but also matters relating to human rights are in issue, nonetheless the court will require to be persuaded that there is some good reason for the material not having been made available to the district judge. And where there could be any suggestion of the appellant 'keeping his powder dry' he must expect the court to view any application to rely on such evidence with some scepticism. In the present case, I am prepared to accept that the material provided by Dr Blitz could not have been obtained in time for the hearing before the district judge. I am less convinced that the medical evidence could not have been. Nonetheless, in the circumstances of this case, we have read and are prepared to admit that evidence as part of the material upon which we should determine this appeal.

[4] The evidence before the district judge included oral evidence from the appellant. The salient parts of his evidence were that he was involved in the drugs culture. He had served five years' imprisonment for an offence involving drugs. After his release he continued to sell drugs. According to the findings of the district judge, some time in the winter of 2004 he was seized in the street by a group of police officers, bundled into a van and taken to the police station. He was subjected to violence in the van and at the police station when he arrived there. He agreed to work for the police, in other words to act as an informer. As a result, a number of those with whom he had worked were convicted and jailed. He then broke up with his girlfriend who by way of reprisal, it would appear, told his friends that he had been acting as an informer. He then told the police that he did not wish to work for them any longer. His evidence was that some time after that, which he did not identify, he was attacked in the street by men wearing masks and was stabbed, as a result of which he was in hospital for three weeks. He could not remember whether he had reported this matter to the police. Eventually, in June 2005, he came to this country.

[5] The district judge, having referred to *Osman v UK* (1998) 5 BHRC 293, and *Soering v UK* (1989) 11 EHRR 439, concluded that the test in relation to a breach of art 2 of the convention was whether there was 'an almost certainty' of the applicant being killed. This was accepted by the appellant, who did not pursue that point. As far as art 3 of the convention was concerned, the district judge identified the test as requiring substantial grounds for believing that there would be a real risk of the appellant being tortured or subjected to inhuman or degrading treatment on his return. He concluded that there was no such risk, but in doing so put his findings in the following terms: 'The evidence given by him is not up to the appropriate standard ie on the balance of probabilities, that he would be in danger if returned, nor (sic) kept in inappropriate conditions.'

[6] The appellant further submitted that there was a real risk of his being deprived of a fair trial, contrary to art 6 of the convention. The district judge, having reviewed the evidence in that respect concluded that the appellant had not made out his case, and rejected his arguments. There is no appeal against the district judge's decision in that regard.

[7] As far as s 25 of the 2003 Act is concerned, that is, the argument that it would be unjust or oppressive to extradite him, the evidence of the appellant was

that on two occasions, on 14 and 16 October 2005, he had cut his wrists, on the latter [sic] occasion twice and on the final occasion deeply. He was taken to hospital for the wound to be sutured. In his evidence he said that in the first instance he wanted to die, but on the second occasion he did not really want to die. The district judge concluded that his actions were merely attention seeking and no more. He noted that the appellant was not on suicide watch. There has been no indication that the appellant has taken any steps by way of self-harm since then.

[8] As far as s 21 of the 2003 Act is concerned, that is the argument that the district judge could not be satisfied that extradition would not be contrary to the appellant's human rights, the appellant further relied upon four reports, two produced by the Human Rights Monitoring Institute in 2004 and 2005, a report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), and an Amnesty International report of 2002. The district judge acknowledged that these raised questions about the reliability of justice in Lithuania, and the ability of the authorities to provide satisfactory protection. This was of importance in the context of the appellant's argument that he would be seen as an informant if he were to be returned to Lithuania, which would expose him to the risk of reprisals in prison. The district judge was not impressed by this material. As far as the European Committee reports and the Amnesty International report were concerned, they related essentially to visits in February 2000. As far as the reports of the Institute were concerned, the district judge considered that, since it had been set up specifically to look at the question of human rights in Lithuania, 'caution must be exercised in considering these reports in view of the agenda of the reporting body'. He did not consider that any of these reports raised sufficient concerns to justify the conclusion that he should not order extradition.

[9] Dealing first with the appeal in so far as it relates to the district judge's decision on the material before him, there are, it seems to me, two valid criticisms of his approach. First, as I have already indicated, he would appear to have applied the wrong standard of proof in relation to the risk of art 3 ill-treatment. In so far as he applied the balance of probabilities test, he was clearly wrong. He himself had identified the appropriate test as requiring substantial grounds for believing that there would be a real risk of the appellant suffering art 3 ill-treatment. Even if, which I doubt, he did apply the wrong test in fact, I have no reason to doubt that on the evidence that the appellant gave as to his treatment in Lithuania before he left, this came nowhere near establishing substantial grounds that there was a real risk of art 3 ill-treatment. He does not identify who his attackers were in the street. He gave no evidence as to how long before he left Lithuania that the attack had occurred. The police, however they may have behaved at the time they persuaded him to be an informer, seemed to have accepted his decision to cease that activity.

[10] Second, as to the risk for the future, the district judge gave, as one of his reasons for concluding that there would be no risk, the fact that although there were generalised allegations of police ill-treatment in the reports to which he was referred, the appellant would be returned to the custody of the prison authorities. In fact, the likelihood is that he would be returned in the first instance to police custody, and then transferred to prison. But in the light of the district judge's conclusion, which in my view is justified on the evidence, that the police would not appear to have any current interest in the appellant save for the purposes of obtaining his return to face trial, the fact that he could well spend a short period of time in police custody could not justify the conclusion that there would be a

real risk of his suffering art 3 ill-treatment. As the district judge found, the real fear that the appellant appeared to express was a fear of reprisals in prison from other prisoners because of his activities as an informer. The district judge was entitled, in my view, to reject the argument that he would not be given adequate protection by the authorities on the basis of the reports that were before him.

[11] The final point made in relation to the district judge's decision in this respect is that he was unduly dismissive of those reports. There is no doubt that he approached them with a degree of scepticism. That is not surprising bearing in mind the very general nature of the allegations that were made. That is not intended to belittle the reports. It is, however, important that reports which identify breaches of human rights, or other reprehensible activities on the part of governments or public authorities are kept in context. The fact that human rights violations take place is not of itself evidence that a particular individual would be at risk of being subjected to those human rights violations in the country in question. That depends upon the extent to which the violations are systemic, their frequency and the extent to which the particular individual in question could be said to be specifically vulnerable by reason of a characteristic which would expose him to human rights abuse. In relation to the risk of ill-treatment from other prisoners, the district judge was right to conclude that the reports before him gave no sufficient support to the contention that the appellant would not be given protection by the prison authorities. He himself made no complaints about ill-treatment whilst he had been in prison before. And he gave no details of those from whom he considered himself to be at risk so as to enable any judgment to be made as to the chances of their still being in prison, and being in a position, if they so wished, to harm him. The material could go no further than raising a speculative, as opposed to a real risk of his being harmed in prison. And that goes nowhere near establishing substantial grounds for believing that there would be a real risk of art 3 ill-treatment in the sense that the authorities themselves would either be responsible for it, or be unable or unwilling to provide him protection from it.

[12] As far as the issue under s 25 of the 2003 Act was concerned, namely whether it would be unjust or oppressive to extradite him because of his mental condition, the district judge only had the evidence of the appellant himself. The conclusion of the district judge, that he was simply making a cry for help, was fully justified.

[13] I turn then to the new material. This, as I have already said, consists of the report of Dr Blitz and its exhibits, and the report from Dr Olumoroti. The report of Dr Blitz is critical to the appellant's case. The first part consists of an overview of the reports. He sets out his key findings in para 1.1. in the following terms:

> '• There is considerable and reliable evidence of ill-treatment by police and abuse, often at the point of arrest and transfer which is consistent with the defendant's witness statement.
>
> • There is considerable and reliable evidence of police brutality. The nature of injuries sustained by the defendant are consistent with these reports of police brutality.
>
> • There is considerable evidence of corruption and bribery in the police force that is consistent with the defendant's witness statement.
>
> • Prison conditions have been described by human rights monitors as poor and "life threatening". The increase in numbers on overcrowded

populations and the rise of incidents of prisoners self-harming is especially worrying.

• The current provisions for prisoners requiring mental health treatment is poor and has been linked to increased rates of suicide within Lithuanian prisons.

• The quality of provision for detainees and prisoners who require psychiatric care has been described by the Council of Europe's Committee on the Prevention of Torture as anti-therapeutic, inadequate and the source of serious concern.

• The defendant's mental and emotional state would be at risk if he were returned to Lithuania and housed in either a prison or mental health institution within a prison.'

[14] Dr Blitz then considered the appellant's position in the light of these reports. Having stated that the reports provide support for the appellant's account of the way he was treated by the police, he then continued as follows:

'7.2 There are two important issues regarding the potential return of the appellant to Lithuania.

7.3 First, while the CPT (the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in a report based upon a visit in 2004) has noted few instances of deliberate ill-treatment to convicted defendants, there are multiple instances of police abuse at the point of arrest and pre-trial which could apply, especially if his transfer were under police guard. Guarantees would need to be provided that the defendant is not at risk of potential abuse by police or prison staff in advance of a trial hearing—this is especially important given the nature of his complaint.

7.4 There is a second concern that should be raised concerning the defendant's fragile mental state and above all his history of suicide. The current provisions in Lithuania for institutional treatment, whether it is outside the prison system or in one of the prison hospitals, have been described by international monitors as sub-standard and detrimental to the well being of vulnerable individuals. In recognition of the appalling material conditions of both the general prison level and in the prison hospitals, there is a real possibility of the defendant suffering further damage to his mental state and possibly attempting suicide once again.

8. Conclusion

8.1 This report introduces two essential claims in the case of *Edgaras Miklis v Deputy Prosecutor of Lithuania*. First there is the considerable evidence of police brutality, as established by authorative monitoring bodies such as the Committee for the Prevention of Torture, US State Department and Human Rights Monitoring Institute.

8.2 Second, there is also good reason to presume that should the defendant be returned to Lithuania, he would not receive suitable mental health care in either a dedicated institution or a prison hospital. The universal accusations of overcrowding and the strong statements included in the CPT and State Department reports suggest that the anti-therapeutic environment, the poor facilities and the lack of adequate provision would further damage the defendant's fragile mental state.'

[15] The general statements by Dr Blitz are borne out by the contents of the reports. There is little doubt that the behaviour of the police has been the subject of adverse comment over a significant period of time. There is, it should be said, also clear evidence that the authorities do not condone it, although clearly there is scepticism about the extent to which effective steps are being taken to improve the situation. In the latest CPT report, which would appear to be the most informative and authoritative, the way it is described is as follows:

> '12. As was the case during the 2000 visit, the delegation received many allegations of ill-treatment of persons—including minors—deprived of their liberty by the police. The allegations heard related mainly to the time of apprehension and to the period surrounding the investigation by the police; certain persons alleged ill-treatment during transport by the Convoy Division. The forms of ill-treatment alleged consisted of mostly of blows with hands or fists, or with objects such as batons or belts. In several cases the alleged ill-treatment—asphyxiation by placing a gas mask or a plastic bag over the person's face, severe beating, infliction of electric shocks and mock execution—could be considered to amount to torture.
>
> In a number of cases, the delegation was able to verify that the person concerned had been held in police establishments during the periods to which the ill-treatment in question could be ascribed; moreover, certain of them provided accurate descriptions of the offices where they claim it had taken place. Further, medical records reveal that upon their admission to prison or a police detention centre, numerous persons had displayed injuries consistent with their allegations of ill-treatment.'

[16] This material undoubtedly gives rise to concern about the way that police have behaved and the ability of the authorities to control that behaviour. But it does not go anywhere near establishing that the appellant, who it is accepted would only be in police custody temporarily, would be at real risk of art 3 ill-treatment, that is torture or other inhuman or degrading treatment. The evidence does not suggest that the police systematically ill-treat those who are arrested. Whilst it undoubtedly supports the appellant's evidence in relation to the way he was treated when he was taken to the police station and persuaded to become an informer, it by no means follows that there is a real risk that he will be ill-treated were he to be returned into police custody now, let alone ill-treated to an extent to amounting to a breach of art 3.

[17] In so far as the assertion is that the appellant would be at real risk of art 3 ill-treatment in prison, this falls into two parts. The first is his concern about the behaviour of fellow prisoners. There is certainly evidence that in two prisons at which he might be held, there have been serious incidents of inter-prisoner violence. Only a few in the relevant prisons made any complaints about ill-treatment by staff. The material does not suggest that inter-prisoner violence is commonplace, let alone condoned. The most that can be said is that the CPT was not satisfied that sufficient steps had been taken to institute prosecutions when such incidents occurred. This material does not provide a sufficient basis upon which the district judge could have concluded that the appellant's life was at risk in the sense envisaged in the case of *Osman v UK* (1998) 5 BHRC 293, nor does it support the conclusion that there is a real risk that he will be subject to art 3 ill-treatment were he to be returned.

[18] The second aspect of the appellant's argument in relation to treatment in prison is the effect on his mental health, and the availability of appropriate

treatment. The validity of Dr Blitz's conclusion depends upon the extent to which the medical evidence supports Dr Blitz's premise that the appellant's mental state is fragile and that he has a history of suicide. We now have the psychiatric report of Dr Olumoroti who has been the psychiatrist responsible for his care at HM Prison Brixton. He assessed him after the second occasion when he self-harmed. He describes how the appellant appeared stressed regarding his extradition to Lithuania. He describes him as vulnerable. But he says that the appellant displayed no behavioural or other abnormalities. He was suffering from an acute distress reaction and had self-harmed due to the prospect of being extradited. Although he had made remarks to staff that he was willing to die in prison, he did not maintain this position for long. He told the doctor that there was no point in harming himself any further and was resigned to being extradited. He had no psychiatric history. As a person who had self-harmed, the doctor's view is that there is the risk that he might self-harm again, and therefore requires a higher level of supervision than other prisoners, at least for a period of time. But there is no evidence in the appellant's case of depression or any other psychiatric illness which requires any treatment.

[19] Further there is no evidence of any reoccurrence of self-harming episodes since October 2005. It does not seem to me that in those circumstances the appellant's mental state can properly be described as 'fragile' in the sense that he is at risk of any significant psychiatric or other harm. In the light of the report, it must be at the very least doubtful that there was any real attempt at suicide. The doctor's repeated use of the phrase 'self-harm' accords with the district judge's assessment of the situation at the hearing. In those circumstances, the further evidence with which we have been provided would not have affected his decision. Nor should it have done.

[20] I would therefore dismiss this appeal.

TUGENDHAT J.

[21] I agree.

Appeal dismissed.

Dilys Tausz Barrister.

Oxfordshire County Council v Oxford City Council and another

[2006] UKHL 25

HOUSE OF LORDS

LORD HOFFMANN, LORD SCOTT OF FOSCOTE, LORD RODGER OF EARLSFERRY, LORD WALKER OF GESTINGTHORPE AND BARONESS HALE OF RICHMOND

27–30 MARCH, 3 APRIL, 24 MAY 2006

Commons – Registration – Town or village green – Land on which significant number of inhabitants of locality had indulged in lawful sports or pastimes as of right for not less than 20 years and 'continue to do so' – Whether registration of such land as town or village green in itself conferring rights on inhabitants to indulge in lawful sports and pastimes – Whether such a green falling within scope of nineteenth-century legislation rendering it an offence to interfere with enjoyment of town or village greens – Whether lawful sports and pastimes having to continue to date of registration – Whether registration authority having power to amend application for registration to exclude part of land included in application or to register as a green part only of land included in application – Inclosure Act 1857, s 12 – Commons Act 1876, s 29 – Commons Registration Act 1965, ss 10, 22(1A).

The first defendant city council owned an area of undeveloped land which it wished to use for housing development. In 2002, the second defendant, a local resident, applied to the claimant registration authority, the county council, for the land to be registered as a 'town or village green' under the Commons Registration Act 1965, claiming that it had become such a green by 1 August 1990 because it had by then been used by local residents for lawful pastimes as of right for an unbroken period of 20 years. That was a period of 20 years commencing immediately after 'the appointed day' under the 1965 Act after which no land capable of being registered under the 1965 Act was to be deemed to be common land or a town or village green unless it was so registered. By virtue of s 10[a] of the 1965 Act registration was conclusive evidence of the matters registered as at the date of registration. The definition of 'town or village green' relied on by the applicant (a class c green) was contained in s 22(1A)[b] of the 1965 Act after an amendment made by the Countryside and Rights of Way Act 2000 being land on which a significant number of the inhabitants of any locality or of any neighbourhood within a locality, had indulged in lawful sports and pastimes as of right for not less than 20 years and continued to do so. Prior to the amendment, which came into force on 30 January 2001, the final part of the definition of a class c green had been 'on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years'. The city council objected to the application for registration. The county council held an inquiry at which the applicant applied to amend her application so as to exclude certain land. It became clear at the inquiry that despite the date of 1 August 1990 in the application form the applicant was relying on the period of 20 years before the date of her application. The county council then initiated proceedings with a

a Section 10, so far as material, is set out at [19], below

b Section 22, so far as material, is set out at [26], below

view to obtaining rulings on a number of issues arising on the application, namely (i) whether the relevant inhabitants had rights to indulge in lawful sports and pastimes on land which had become a class c green; (ii) whether land which had become a class c green fell within the scope of s 12[c] of the Inclosure Act 1857 (which created various summary offences prohibiting any act interrupting the use or enjoyment of a town or village green as a place for exercise or recreation) and s 29[d] of the Commons Act 1876 (which provided that any encroachment, erection or interference made on a town or village green was to be deemed a public nuisance so as to give rise to summary offences under the 1857 Act); (iii) whether the words 'continue to do so' in s 22(1A) of the 1965 Act meant that the lawful sports and pastimes had to continue up to the date of the application to register or the date of registration or some other date; (iv) whether all applications for registration of land as a class c green made on or after 30 January 2001 automatically engaged (and engaged only) the amended definition of such a green made in the 2000 Act; (v) whether the application could as a matter of law succeed on the basis that the land had become a green on 1 August 1990 or whether an application was bound to fail if it specified a date earlier than that immediately preceding the date of the application; (vi) whether the registration authority had power to treat the application as if a different date (namely that immediately preceding the date of the application) had been specified, and to determine the application on that basis; (vii) whether as a matter of law it was open to the registration authority to permit the application to be amended so as to refer to some lesser area; or (viii) without any such amendment, to register as a green only part of the land included in the application. In issues (ix) and (x) the county council sought guidance as to its approach to the application in the light of the evidence in relation to user of the land and guidance as to the relevance of the existence of public rights of way. The judge made declarations as to each of the ten issues. Each of the parties appealed against one or more of those rulings. The Court of Appeal reversed certain of the rulings and affirmed others. All the parties appealed to the House of Lords.

Held – (1) (Per Lord Hoffmann, Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe) Registration would give rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes on the land. The rational construction of s 10 of the 1965 Act was that land registered as a town or village green could be used generally for sports and pastimes including those (Lord Scott dissenting) which were different in kind from the user that had satisfied the statutory criteria for registration. The owner would still have the right to use the land in any way which did not interfere with the recreational rights of the inhabitants. The applicant's appeal on issue (i) would therefore be allowed (see [50], [51], [53], [69], [104], [113], [114], [124], below).

(2) (Per Lord Hoffmann, Lord Rodger and Lord Walker) On registration land would be subject to the 1857 and 1876 Acts. There was no special definition of a town and village green in those Acts which might suggest that when s 10 of the 1965 Act said that registration was to be conclusive evidence of the matters registered, and the matter registered was that the land was a village green, Parliament had not intended that it should be a village green for the purposes of

c Section 12, so far as material, is set out at [54], below
d Section 29 is set out at [55], below

the 1857 and 1876 Acts. The city council's appeal on issue (ii) would therefore be dismissed (see [56], [57], [69], [114], [124], [128], below).

(3) For the purposes of s 22, as amended by the 2000 Act, under which the inhabitants had to 'continue' to use the land for sports and pastimes, the period of use had to continue until the date of the application to register, although (per Lord Scott) if an application were made reasonably promptly after and in response to action taken by the owner or others to obstruct the continued user, the user was to be taken to have continued to the date of the application. The applicant's appeal on issue (iii) would therefore be allowed (see [42], [44], [60], [69], [109], [113], [114], [124], [143], [147], below).

(4) (Baroness Hale of Richmond dissenting) Applications made on or after 30 January 2001 had to satisfy the amended definition of a town or village green. The argument that on the expiry, after the appointed day, of a 20-year period of user the land had become a village green was a misreading of the 1965 Act. One purpose of that Act had been to enable buyers of land and other members of the public to ascertain from the register whether land was common land or a village green. It would defeat that purpose if unregistered greens could come into existence after the appointed day. The mere fact that land would at some earlier time have come within the statutory definition was irrelevant if it had not been registered as such. The applicant's application could not succeed on the basis that the land had become a green on 1 August 1990. The applicant's appeal on issues (iv) and (v) would therefore be dismissed (see [43], [60], [69], [110], [113], [114], [116], [123], [124], below).

(5) The registration authority had power to treat the application as if a different date, namely the date immediately preceding the date of the application, had been specified in the application as the commencement date for the green and to determine the application on that basis. The procedure for registration had been intended to be relatively simple and informal and the registration authority should be guided by the general principle of being fair to the parties. It would be pointless to insist on a fresh application, with a new application date, if no prejudice would be caused by an amendment, or if any prejudice would be prevented by an adjournment to allow the objectors to deal with points for which they had not prepared. It was open to the registration authority to permit the application to be amended to refer to a lesser area. The registration authority was also entitled, without any amendment of the application, to register only that part of the land which the applicant had proved to have been used for the necessary period. It was hard to see how that could cause prejudice to anyone. The county council's appeal on issues (vi), (vii) and (viii) would therefore be dismissed (see [61], [62], [69], [111], [113], [114], [124], [144], [147], below).

(6) The statutory question whether a significant number of the inhabitants of a locality or neighbourhood had indulged in sports or pastimes on the relevant land for the requisite period would depend in every case upon its facts and it would be inappropriate to provide the guidance requested in issues (ix) and (x) (see [68], [69], [112], [113], [114], [124], [147], below).

Decision of the Court of Appeal [2005] 3 All ER 961 reversed in part.

Notes

For town and village greens, see 6 *Halsbury's Laws* (4th edn) (2003 reissue) paras 426, 427, 430.

For the Inclosure Act 1857, s 12, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 1028.

For the Commons Act 1876, s 29, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 1065.

For the Commons Registration Act 1965, ss 10, 22, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 1105, 1115.

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Brocklebank v Thompson [1903] 2 Ch 344.

Caerphilly County BC v Gwinnutt (16 January 2002, unreported).

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Delaney v Staples [1992] 1 All ER 944, [1992] 1 AC 687, [1992] 2 WLR 451, HL.

Dyce v Lady Hay (1852) 1 Macq 305, HL.

Edwards v Jenkins [1896] 1 Ch 308.

F v West Berkshire Health Authority [1989] 2 All ER 545, sub nom *Re F (mental patient: sterilisation)* [1990] 2 AC 1, [1989] 2 WLR 1025, HL.

Fitch v Fitch (1798) 2 Esp 543, 170 ER 449.

Fitch v Rawling (1795) 2 Hy Bl 393, 126 ER 614, Ct of CP.

Forbes v Ecclesiastical Comrs for England (1872) LR 15 Eq 51.

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Lockwood v Wood (1844) 6 QB 50.

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Mounsey v Ismay (1863) 1 H & C 729, 158 ER 1077.

New Windsor Corp v Mellor [1975] 3 All ER 44, [1975] Ch 380, [1975] 3 WLR 25, CA.

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Appeal

Catherine Mary Robinson, the applicant for registration as a town or village green under s 13 of the Commons Registration Act 1965 by Oxfordshire County Council (the county council), as registration authority, of land, known as the Trap Grounds, Oxford, owned by Oxford City Council (the city council); the city council; and the county council each appealed with permission of the House of Lords Appeal Committee from parts of the decision of the Court of Appeal (Peter Gibson, Carnwath LJJ and Blackburne J) on 24 February 2005 ([2005] EWCA Civ 175, [2005] 3 All ER 961) allowing in part the appeals of the parties from the decision of Lightman J on 22 January 2004 ([2004] EWHC 12 (Ch), [2004] All ER (D) 181 (Jan)) making declarations on ten issues (set out at [35], below) on an application to the court by the county council to which the county council and the applicant were defendants. The Secretary of State for Environment, Food and Rural Affairs appeared as intervener. The facts are set out in the opinion of Lord Hoffmann.

Douglas Edwards and *Jeremy Pike* (instructed by *Public Law Solicitors*, Moseley) for the applicant.
Charles George QC and *Philip Petchey* (instructed by *Jeremy Thomas*, Oxford) for the city council.
George Laurence QC and *Ross Crail* (instructed by *Peter Clark*, Oxford) for the county council.
Jonathan Karas and *James Maurici* (instructed by the *Solicitor for the Department for Environment, Food and Rural Affairs*) for the Secretary of State.

Their Lordships took time for consideration.

24 May 2006. The following opinions were delivered.

LORD HOFFMANN.

THE TRAP GROUNDS

[1] My Lords, this appeal arises out of an application on 21 June 2002 by Miss Catherine Robinson, who lives in North Oxford, to register the Trap Grounds as a town or village green under the Commons Registration Act 1965. The site as it is today does not fit the traditional image of a town or village green. Mr Vivian Chapman, a member of the Bar expert in the law of commons and greens, described it in a report on the application which he wrote for the registration authority, the Oxfordshire County Council:

> 'The Trap Grounds are nine acres of undeveloped land in North Oxford. They lie between the railway to the west and the Oxford Canal to the east.

> About one third . . . is permanently under water . . . This part . . . is usually called "the reed beds". [They] are inaccessible to ordinary walkers since access would require wading equipment. The other two thirds ["the scrubland"] . . . are much drier and consist of some mature trees, numerous semi-mature trees and a great deal of high scrubby undergrowth, much of which is impenetrable by the hardiest walker . . . The scrubland is noticeably less overgrown at the southern end and there is a pond and wet areas in the central eastern part of the scrubland. Throughout the dry parts of the scrubland there are piles of builders' rubble, up to about a yard high, which are mostly covered in moss and undergrowth. The Trap Grounds are approached from the east by a bridge . . . over the canal. From the bridge a track, known as Frog Lane, leads along the northern edge of the reed beds and gives access to a circular path around the scrubland. Off this circular path there are numerous small paths through the undergrowth. Some peter out after a few yards. Some lead to small glades and clearings. I estimate that a total of about 25% of the surface area of the scrubland is reasonably accessible to the hardy walker.'

[2] Not idyllic. But town and village greens are in theory survivals from the mediaeval past, established by immemorial local customs dating back to before the accession of Richard I in 1189. When counsel for the landowner in *Mounsey v Ismay* (1863) 1 H & C 729, 158 ER 1077 protested that the fields on which the inhabitants of Carlisle claimed a custom of holding horse races in May were arable land, Martin B replied: 'It must be assumed that the custom has existed since the time of Richard the First; and why may it not have been reasonable in the then state of the land?' The Trap Grounds no doubt looked very different before they were cut off, first by the eighteenth century canal and then by the nineteenth century railway, from the great north Oxford common of Port Meadow. In those days Frog Lane was called My Lady's Way and led across the meadow to the nunnery at Godstow where Charles Dodgson and Alice Liddell picnicked and fair Rosamund, mistress of Henry II, lies buried.

VILLAGE GREENS

[3] The traditional village green is a creation of the literature of sensibility in the late eighteenth century. The green at Auburn in Goldsmith's *The Deserted Village* (1770) is the best example; a place where—

> 'toil, remitting, lent its turn to play,
> And all the village train, from labour free,
> Led up their sports beneath the spreading tree!
> While many a pastime circled in the shade,
> The young contending as the old survey'd;
> And many a gambol frolick'd o'er the ground,
> And sleights of art and feats of strength went round;
> And still, as each repeated pleasure tired,
> Succeeding sports the mirthful band inspired . . .'

[4] No doubt there were, and perhaps are, village greens like that, but the law took a more prosaic view of the matter. It was not particularly concerned with the spreading tree and the ancient turf but simply with whether there was an immemorial custom for inhabitants of a parish, borough or similar locality to use the land for sports and pastimes. As Martin B said, the custom had in theory to

date from before 1189, but such antiquity could be inferred from proof that the inhabitants had in fact used the land for such purposes for a long period in the past. The inference could be rebutted only by showing that it was impossible for such a custom to have existed in 1189.

[5] The early cases do not use the term 'village green'. In *Abbot v Weekly* (1666) 1 Lev 176, 83 ER 357 a custom that 'the inhabitants of the vill, time out of memory, &c. had used to dance there at all times of the year at their free will, for their recreation' was held to be a good custom. In *Fitch v Rawling* (1795) 2 Hy Bl 393, 126 ER 614 the custom was to use some land at Steeple Bumpstead in Essex for 'all kinds of lawful games, sports and pastimes ... at all seasonable times of the year'. As *Halsbury's Laws* has said in successive editions (for example 4 *Halsbury's Laws* (1st edn, 1908) para 1247):

> '... the essential characteristic of a town or village green is that by immemorial custom the inhabitants of the town, village, or parish should have acquired the right of playing lawful games thereon and enjoying it for purposes of recreation.'

[6] In *Mounsey v Ismay* (horse racing on arable land on Kingsmoor, outside Carlisle), *Virgo v Harford* (11 August 1892, unreported) (noted in Hunter *The Preservation of Open Spaces, and of Footpaths, and other Rights of Way* (1896) pp 181–182) (football, rounders and cricket on 65 acres of open land on a hill outside Walton-in-Gordano in Somerset) and *Lancashire v Hunt* (1894) 10 TLR 310 (cricket and other games on 160 acres of Stockbridge Common Down) the courts upheld recreational customs on land which bore no resemblance to the village green at Auburn.

[7] The first instance to which we were referred of the use of the term 'village green' in a case or statute was in s 15 of the Inclosure Act 1845 (8 & 9 Vict c 118), which provided that 'no town green or village green shall be subject to be inclosed under this Act'. The Act offered no definition and Mr Woolrych, in his notes on *The New Inclosure Act* (1846) said that the term did not refer to all the 'grassy plains' on commons which were 'known by the name of greens' but only to the 'little patches' which 'adjoin a town or hamlet and are used in the nature of easements by the inhabitants'. There is no authority on the point but it seems likely that, on what would now be called a purposive construction, 'town green or village green' would have been construed as Woolrych suggested, namely as any land upon which the local inhabitants enjoyed customary rights of recreation. The purpose of inclosure under the 1845 Act was after all to extinguish manorial rights of common over the land inclosed, so that it could be at the free disposal of the owner, but the Act did not extinguish customary rights (see *Forbes v Ecclesiastical Comrs for England* (1872) LR 15 Eq 51). It was therefore logical to exclude land subject to customary recreational rights from the inclosure procedure.

[8] The increase in the urban population in the nineteenth century made the preservation of open spaces a matter of great public concern. Near the large cities the traditional use of commons for depasturing animals declined and their principal use became the recreation of the people. This use was threatened by owners who recognised no interests in the land apart from those of a declining band of commoners and their own. The House of Commons Select Committee on Open Spaces near the Metropolis (1865) asked why long use of the commons by members of the public for recreation should not give rise to public rights. Why should Hampstead Heath not be the village green of London? The answer

was that the law recognised only local customs. Rights of recreation could be established for the benefit of a parish or a town, but not for the public at large. London was too big. As Lord St Leonards LC said in *Dyce v Lady Hay* (1852) 1 Macq 305 at 309, a claim for all the Queen's subjects 'to go at all times upon the . . . Appellant's property . . . for the purposes of recreation' was: 'a claim so large as to be entirely inconsistent with the right of property . . .'

[9] The Select Committee said in its Second Report that this rule was illogical: it appeared to 'rest upon no very intelligible principle'. But the judges and writers insisted on applying it strictly. In *Hammerton v Honey* (1876) 24 WR 603 Sir George Jessel MR rejected a claim to rights of recreation over Stockwell Green on the ground (among others) that the evidence did not show that use of the green was confined to inhabitants of Stockwell:

> 'If you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom.' (See 604.)

[10] In the same year as *Hammerton v Honey* Mr Charles Elton of Lincoln's Inn wrote a pamphlet on the bill which became the Commons Act 1876 (39 & 40 Vict c 56), in which he said by way of riposte to those who held the same views as the Select Committee:

> 'There have been some proposals of late years to extend the doctrine of village greens in a very curious way. It was thought that the commons and open fields around London might be secured as public greens by setting up a kind of national-local custom of rambling and playing at games—such as football and donkey-races,—and so the payment of compensation to private owners might be evaded by a legal fiction.' (See *Observations on the Bill for the Regulation and Improvement of Commons, 1876* pp 16–17.)

[11] Mr Elton had written a sustained attack on the same heretical doctrine in his *Treatise on the Law of Commons and Waste Lands* (1868) pp 281–301. The strictest application of the locality rule was in *Edwards v Jenkins* [1896] 1 Ch 308, in which Kekewich J held that the inhabitants of the contiguous Surrey parishes of Beddington, Carshalton and Mitcham could not have a customary right of recreation over land in Beddington. One parish, one custom. In *New Windsor Corp v Mellor* [1975] 3 All ER 44 at 47, [1975] Ch 380 at 387 Lord Denning MR thought that Kekewich J had gone too far. 'So long as the locality is certain, that is enough.' But there is no doubt that the locality rule was the pinch-point through which many claims to customary rights of recreation failed to pass.

THE ROYAL COMMISSION

[12] The Report of the Royal Commission on Common Land 1955–1958 (Cmnd 462) (1958) drew attention (in para 19) to the deterioration in many town and village greens:

> 'Unhappily, although many exquisite greens and small village commons do exist, reality all too frequently falls short of imagination. "Too often, however," it has been said "village greens are neglected and become rank with unmown grass and weeds, or trodden bare, used as dumps for rubbish and disfigured with litter." So far from being untouched, they may find the hand of the twentieth century lying heavy on them.'

[13] The commission recommended (para 404) that 'as the last reserve of uncommitted land in England and Wales, common land [an expression which the commission used to embrace both commons and town and village greens] ought to be preserved in the public interest'. The principal mechanism for preservation was to be a register, maintained by county and county borough councils, which would be a definitive record of all common land and town and village greens. Most of the report is about commons, but three of its references to town and village greens should be noted: (a) There was to be a register of common rights (because 'rights exercisable over [commons] . . . are as variable as their origin' (see para 128)) but no register of rights exercisable over greens. The purpose of greens was simply to 'serve the needs of the local inhabitants for exercise and recreation in attractive surroundings' (see para 368). (b) Many village greens in fact originated not in customary rights but in allotments set aside for recreation in inclosure awards. The commission said (para 373) that there was 'no advantage in perpetuating these distinctions' and that local authorities should be able to maintain such allotments as village greens. (c) The commission said that there were 'probably very few villagers who will not know what they mean by "their green" . . .' and thought that such a claim would seldom be questioned (see para 369). But if it was challenged, 'the burden of proof would in all probability put them to considerable difficulty and expense'. This was presumably a reference to the rule that a customary right for the inhabitants of a locality to use land for 'lawful sports and pastimes' must have been exercised since before 1189.

[14] In order to deal with these three points, the commission proposed (in para 403) a definition of a town or village green:

> 'Any place which has been allotted for the exercise or recreation of the inhabitants of a parish or defined locality under the terms of any local Act or inclosure award, any place in which such inhabitants have a customary right to indulge in lawful sports and pastimes and in a rural parish any uninclosed open space which is wholly or mainly surrounded by houses or their curtilages and which has been continuously and openly used by the inhabitants for all or any such purposes during a period of at least 20 years without protest or permission from the owner of the fee simple or the lord of the manor.'

[15] Certain points about this proposed definition should be noted. First, there was to be a single concept of a village green, with a definition which could be satisfied in three different ways. Land allotted for recreation under the Inclosure Acts or similar statutes was to be assimilated to customary village greens. Secondly, customary village greens were defined simply as land in which the inhabitants of a parish or defined locality 'have a customary right to indulge in lawful sports and pastimes'. Following the earlier case law, there was no restriction by reference to the size or character of such land. Thirdly, the proposed third limb, allowing 20 years' use as of right as an alternative to proof of custom since 1189, was to be confined to rural parishes and to land 'wholly or mainly surrounded by houses or their curtilages'. The commission obviously felt some concern about allowing any land whatever to become a deemed village green after 20 years' use by local inhabitants for sports and pastimes. They may have foreseen cases like *R (on the application of Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 All ER 160, [2004] 1 AC 889 or, indeed, this case,

and thought that such land should not become a village green merely because the owner had neglected it for over 20 years.

[16] Besides relieving local inhabitants of the burden of proving immemorial custom, the Royal Commission wanted to encourage local authorities or parish councils to claim village greens rather than leaving it to individual initiative. So they recommended that if a local authority or parish council formally claimed land as a town or village green, it should be provisionally registered and title should thereupon vest in the local authority. That would enable the local authority immediately to maintain the green as if it had been acquired under the Open Spaces Act 1906 and make by-laws for its management (see para 372). Anyone with an interest in the land could then object to the provisional registration and have the objection determined by a Commons Commissioner but otherwise it would become final.

THE 1965 ACT

[17] The recommendations of the Royal Commission were largely, though not entirely, adopted in the 1965 Act. Section 1(1) provided for the registration of common land, town or village greens and rights of common. An application to register in proper form would be followed as of course by a provisional registration which would be publicly notified. If there were no objections, the provisional registration would become final. Otherwise, objections and disputes would be determined by Commons Commissioners and the provisional registrations confirmed or expunged accordingly. By s 4(6), applications for provisional registration had to be made before a prescribed date, which for most people was 2 January 1970. By s 1(2), after another prescribed date which, in the event, was 31 July 1970: '(a) no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered . . .'

[18] In *Re Turnworth Down* [1977] 2 All ER 105 at 111–112, [1978] Ch 251 at 260–261, Oliver J suggested in passing that this simply meant that the land was not *deemed* to be a village green but did not exclude the possibility that it actually was. The same opinion was expressed by Pill LJ in *R v Suffolk CC, ex p Steed* (1996) 75 P & CR 102 at 112–113. But this would not in my opinion be in accordance with the scheme of the 1965 Act. I think that the effect of non-registration was to extinguish such rights of recreation as may have existed by custom or statutory allotment and were registrable on the appointed day.

[19] On the other hand, by s 10, the registration of land as common land or as a town or village green was to be 'conclusive evidence of the matters registered, as at the date of registration'. So the register was to be definitive, both positively and negatively: registration was conclusive evidence that on that date it was a town or village green and non-registration was conclusive evidence that it was not.

[20] In its definition of a 'town or village green' for the purposes of the 1965 Act, s 22 departed from the recommendation of the Royal Commission. The conclusive presumption arising from upwards of 20 years' use was not confined to rural parishes or land surrounded by houses or their curtilages:

> 'In this Act, unless the context otherwise requires . . . "town or village green" means land [(a)] which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [(b)] on which the inhabitants of any locality have a customary right to indulge in lawful

> sports and pastimes or [(c)] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.'

(I have inserted into this definition the letters by which the alternative grounds upon which land may qualify for registration are usually designated.)

[21] The 1965 Act did not vest the ownership in all town and village greens in the local authority. If anyone could satisfy a Commons Commissioner that he was the owner of the soil, he would be registered as owner. It was only in cases in which no one could prove that he was owner that the land vested in the local authority, which became entitled to manage the green as if it was a public open space (see s 8(4)).

NEW TOWN OR VILLAGE GREENS

[22] Section 13 provided for events happening after the register had become final:

> 'Regulations under this Act shall provide for the amendment of the registers maintained under this Act where—(a) any land registered under this Act ceases to be common land or a town or village green; or (b) any land becomes common land or a town or village green; or (c) any rights registered under this Act are apportioned, extinguished or released, or are varied or transferred in such circumstances as may be prescribed . . .'

[23] Pursuant to s 13, the Minister of Housing and Local Government made the Commons Registration (New Land) Regulations 1969, SI 1969/1843. Regulation 3(1) provided for applications to register land which had become common land or a town or village green after 2 January 1970, the last date on which land which was already common land or a town or village green could have been originally registered. The notes appended to the 1969 regulations gave examples of how land could become a town or village green after 2 January 1970. One was 'By the actual use of the land by the local inhabitants for lawful sports and pastimes as of right for not less than 20 years' (see note 5(3) to Form 30). The 1969 regulations provided a simple procedure for such applications. There was a form of application to be sent to the registration authority (see reg 3(7)), of which notice was required to be published, posted upon the land and sent to the land owner and other interested parties (see reg 5(4)). Objections were to be sent to the applicant, who was to be given an opportunity to deal with the points which they raised and any grounds on which the registration authority considered that prima facie the application should be rejected. No procedure for adjudicating upon the applications and objections was prescribed.

PROOF OF USER

[24] The registration of village greens which had come into existence by virtue of 20 years' user as of right was at first restricted by the decisions of Carnwath J and the Court of Appeal in *R v Suffolk CC, ex p Steed* (1995) 70 P & CR 487; (1996) 75 P & CR 102, which held that user 'as of right' meant that the people indulging in sports and pastimes on the land must have believed that they were exercising a right claimed by the inhabitants of a particular locality. This requirement was, I think, intended to be, and was in practice, very difficult to satisfy. As in the case of the metropolitan commons in the Victorian era, people who went upon open land in urban areas for recreational purposes tended to

think (in so far as they thought about the matter at all) that they were exercising a general public right.

[25] In *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385, [2000] 1 AC 335, however, your Lordships' House rejected the requirement of a subjective state of mind by people using the land and thereafter, as Carnwath LJ observed in this case ([2005] EWCA Civ 175 at [55], [2005] 3 All ER 961 at [55], [2006] Ch 43) registration of new village greens became 'an area of unusually vigorous legal activity'. Once 20 years' user had been established, the only substantial hurdle which the applicant for registration had to overcome was, as it had been in the Victorian cases on customary greens, proof that the user had been by the inhabitants of a defined locality. This requirement was relaxed by the House in the *Sunningwell* case [1999] 3 All ER 385 at 397, [2000] 1 AC 335 at 357–358 only to the extent of saying that not all the users needed to be inhabitants of the locality in question. It was sufficient that the land was used 'predominantly' by such inhabitants.

THE AMENDMENT OF SECTION 22

[26] Soon after the decision in the *Sunningwell* case, the question of town and village greens was raised in Parliament. This was in the debates on the bill which became the Countryside and Rights of Way Act 2000. No one voiced any concern about the construction which the House in its judicial capacity had given to the 1965 Act. On the contrary, the only question raised in debate was whether the locality rule did not make it too difficult to register new village greens. In your Lordships' House, Baroness Miller of Chilthorne Domer described the need for the users to be predominantly from the local community, defined by reference to a recognised ecclesiastical parish or local government area, as a 'loophole' in the 1965 Act which 'allow[s] greens to be destroyed' (see 617 HL Official Report (5th series) col 865 (16 October 2000)). The government was sympathetic and introduced a suitable amendment which was adopted at the report stage (619 HL Official Report (5th series) col 513 (16 November 2000)). This became s 98 of the 2000 Act, which amended s 22 of the 1965 Act by substituting a new third limb of the definition (class (c)):

> '(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either—(a) continue to do so, or (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.'

No period has yet been prescribed under para (b).

[27] '[A]ny neighbourhood within a locality' is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries. I should say at this point that I cannot agree with Sullivan J in *R (on the application of Cheltenham Builders Ltd) v South Gloucestershire DC* [2003] EWHC 2803 (Admin), [2004] JPL 975 that the neighbourhood must be wholly within a single locality. That would introduce the kind of technicality which the amendment was clearly intended to abolish. The fact that the word 'locality' when it first appears in sub-s (1A) must mean a single locality is no reason why the context of 'neighbourhood within a locality' should not lead to the conclusion that it means 'within a locality or localities'.

[28] I mention for the sake of completeness that a new Commons Bill which repeals and replaces the 1965 Act is now before Parliament.

THE INQUIRY

[29] I come next to the procedure which was followed in this particular case. Although the 1969 regulations do not prescribe any particular method of adjudication, registration authorities in difficult cases tend in practice to engage the services of a member of the Bar to conduct a non-statutory inquiry with a view to advising the authority on the facts and the law (see *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385 at 389, [2000] 1 AC 335 at 348). This procedure is sanctioned by a number of judicial decisions and in *R (on the application of Cheltenham Builders Ltd) v South Gloucestershire DC* [2003] EWHC 2803 (Admin), [2004] JPL 975 at 986–987 Sullivan J decided that in some cases fairness would make an oral hearing not merely an option but a necessity. Mr Vivian Chapman, who had also been the inspector in the *Sunningwell* case, held an inquiry and produced a report. There was only one objector: the city council, as owner of the land.

[30] Miss Robinson's original application had been to register the whole of the Trap Grounds, including the submerged reed beds. At the hearing she applied to amend the application to exclude the reed beds and a ten-metre strip on the west boundary of the scrubland, on which the county council wanted to build an access road to a new school to the south. Mr Chapman decided that he (or the registration authority in whose name he was acting) had power to allow an amendment but refused leave on the ground that the owner of the land (the city council) was entitled to have the status of the whole application land determined and not be faced with the possibility of a later application in respect of land which had been excluded.

[31] The application form prescribed by the regulations contains the question (in Pt 4): 'On what date did the land become a town or village green?' Miss Robinson, apparently on the strength of a publication by the Open Spaces Society, *Getting Greens Registered* (para 59) wrote '1 August 1990'. This was calculated as 20 years after the period for original registration had expired. At the inquiry, however, it became clear that she was relying on the period of 20 years before the date of her application for registration on 21 June 2002 and Mr Chapman dealt with the application accordingly.

[32] Mr Chapman found that the scrubland had been proved to have been used for lawful sports and pastimes for more than 20 years before the date of application and recommended to the county council that it should be registered as a village green. But the reed beds and Frog Lane had not been so used and should be excluded from the registration.

THE COUNTY COUNCIL'S RESPONSE

[33] The county council then appears to have sought a second opinion on some of the legal points which had arisen. Mr George Laurence QC advised that the 20-year period could be any 20-year period ending after 1 August 1970 and before the date of the application and that an applicant must decide which period she wants to rely on. If she could not prove that it became a green by the date specified in the application, it must be rejected and she could not rely on evidence of use at a later date. He also advised that the authority could register part of the land specified in the application only if it was 'not substantially different' from the application land.

[34] Mr Chapman, sent this advice for comment, adhered to his recommendation. In his opinion, the relevant 20-year period was, even before the 2000 amendment, the period before the date of the application. Miss Robinson's answer to Pt 4 of the form (1990) was therefore, in law, a mistake. But the mistake had caused no prejudice to the city council, which had agreed that 20 years before 2002 was the relevant period and had conducted its case accordingly. Mr Chapman also rejected the opinion that the authority could not register a part of the land specified in the application, saying that it must have power to register a smaller area. It would be pointless to require a new application.

APPLICATION FOR DECLARATIONS AND DIRECTIONS

[35] In view of this conflicting advice, the registration authority applied to the court for directions. It decided that it should also ask for rulings and guidance on various other matters relevant to both whether the land should be registered and what the consequences of registration would be. As a result, Lightman J ([2004] EWHC 12 (Ch), [2004] Ch 253, [2004] 2 WLR 1291) was faced with an application for ten rulings: (i) whether the relevant inhabitants had rights to indulge in lawful sports and pastimes on land which had become a class (c) town or village green; (ii) whether land which had become a class (c) green fell within the scope of s 12 of the Inclosure Act 1857 (20 & 21 Vict c 31) and s 29 of the Commons Act 1876; (iii) a ruling as to the meaning of the words 'continue to do so' in s 22 of the 1965 Act, as amended, for which purpose the court was asked to rule whether (in the absence of regulations made under the section), the lawful sports and pastimes had to continue to (a) the date of the application to register, or (b) the date of registration, or (c) some other, and if so what, date; (iv) a ruling as to whether all applications for registration of land as a class (c) green made on or after 30 January 2001 automatically engaged (and engaged only) the amended definition in s 22 of the 1965 Act; (v) a ruling as to whether the application might as a matter of law succeed on the basis that the land had become a green on 1 August 1990, or whether (subject to (vi) below) an application which specified in the application form a commencement date for the green that was earlier than the date immediately preceding the date of the application had to fail; (vi) a ruling as to whether the county council had power to treat the application as if a different date (namely a date immediately preceding the date of the application) had been specified in the application as the commencement date for the green, and to determine the application on that basis; (vii) a ruling as to whether, as a matter of law, it was open to the county council to permit the application to be amended so as to refer to some lesser area, and if so, according to what criteria; (viii) a ruling as to whether, as a matter of law, it was open to the county council (without any such amendment being made) to accept the application in respect of, and to register as a green, part only of the land included in the application, and, if so, according to what criteria; (ix) guidance as to how the county council had to approach the application in the light of (a) the evidence in relation to user of the main track and subsidiary tracks, and (b) the fact that some of the land was not reasonably accessible; (x) guidance as to the relevance of the existence or potential for the existence of public rights of way. (We are told that the requests for what became rulings (i) and (ii) were added during the hearing at first instance at the suggestion of the judge, who took the view that the answers would inform his approach to what became rulings (iv) and (v).)

[36] Lightman J made declarations in response to each of these questions. Each of the parties appealed against one or more of these rulings and the Court of Appeal, in a judgment given by Carnwath LJ, allowed the appeal in respect of some of the declarations and dismissed it in respect of others. All parties appeal to your Lordships' House.

WHAT IS A VILLAGE GREEN?

[37] In *R (on the application of Beresford) v Sunderland City Council* [2004] 1 All ER 160, [2004] 1 AC 889, my noble and learned friend Lord Walker of Gestingthorpe said (at [92]) that the registration of a ten-acre grass arena in an urban area as a town or village green 'may be thought to stretch the concept of a town or village green close to, or even beyond, the limits which Parliament is likely to have intended'. Others may also feel a visceral unease at the lack of resemblance between the land registered in that case (and sought to be registered in this one) and the 'traditional' village green whose passing was lamented by Goldsmith in 1770. Perhaps, one might feel, the concept could be narrowed by importing into the definition some of the qualities which are associated with the ordinary use of the term defined—what might be called an 'Auburn test', not expressly stated in the definition but implied from the choice of the words 'town or village green'.

[38] My Lords, it is true that in construing a definition, one does not ignore the ordinary meaning of the word which Parliament has chosen to define. It is all part of the material available for use in the interpretative process. But there are several reasons why I think that it would be unwise for your Lordships, at any rate without full argument, to embark upon the process of introducing some elements of the traditional village green into the statutory definition.

[39] First, your Lordships will observe that the question of whether the Trap Grounds failed, by reason of their current character, to qualify as land capable of becoming a town or village green was not among the ten questions on which the parties sought rulings from the House. It was not discussed in any of the printed cases. Secondly, this is not surprising because there is no authority, either at common law or on earlier statutes which used the term 'village green', in which such a restricted meaning was applied. Thirdly, any restriction derived from the ordinary meaning of 'village green' must apply to all three limbs of the definition, but the Royal Commission plainly thought that all land with customary rights of recreation (such as Stockbridge Common Down) would fall within class (b). Fourthly, Parliament must have been alerted to the width of the definition by the Royal Commission's proposed restriction for class (c) greens but chose to define them without restriction. Fifthly, even if Parliament had not noticed in 1965, the subsequent practice of the very learned Commons Commissioners and the courts would have shown how the definition operated. On 19 May 1977 Mr CA Settle QC, as Commons Commissioner, registered as falling within the statutory definition some rocks at Llanbadrig, Ynys Mon, which had been used by the inhabitants of the locality to moor boats while engaged in the pastime of boating. On 24 May 1976 the Chief Commissioner Mr Squibb ordered registration of land which the local authority wanted to use for housing purposes but upon which there was a custom of having an annual Guy Fawkes bonfire. No doubt there are other examples in the archive of decisions of the Commons Commissioners. In *New Windsor Corp v Mellor* [1975] 3 All ER 44, [1975] Ch 380 the Court of Appeal confirmed the registration of a car park in Windsor as a customary (class (b)) green. Sixthly, Parliament in 2000 showed no unease at the way registration was operating. Seventhly, if Parliament thinks that the

definition needs to be narrowed, it will have an immediate opportunity to do so. Eighthly, the terms of the proposed Auburn test would be inherently uncertain. To say that the registration authority will recognise a village green when it sees one seems inadequate.

[40] My Lords, I therefore turn to the issues raised by the ten points on which declarations or guidance were sought. They may be divided into four groups. The first concerns the 20-year period: when must it have ended? The original definition did not specify. The 2000 amendment says 'and continuing' but does not say until when. The second group concerns the effect of registration. Do the local inhabitants obtain any rights and is a registered green protected by Victorian legislation enacted to prevent nuisance and encroachment on town and village greens? The third group raises some procedural questions about the form of applications and the powers and duties of the registration authority and the fourth group seeks guidance on the correct approach to certain kinds of evidence about user.

THE 20-YEAR PERIOD

[41] Section 22 as originally enacted said that land which the inhabitants of the locality have used for sports and pastimes 'for not less than twenty years' was a village green. It did not specify when that period should end. In *New Windsor Corp v Mellor* the Court of Appeal thought that it meant 20 years before the passing of the Act. In *Ministry of Defence v Wiltshire CC* [1995] 4 All ER 931 at 938 Harman J thought it meant 20 years before the date of the application for registration: see also *R v Norfolk CC, ex p Perry* (1996) 74 P & CR 1 at 5 (Dyson J) and *Caerphilly County BC v Gwinnutt* (16 January 2002, unreported) (Judge Hywel Moseley). But Mr Edwards, who appeared for Miss Robinson, and Mr Laurence, who appeared for the registration authority, said that as the definition did not specify any terminal date, it meant any period of 20 years. On the expiry of a 20-year period of user, the land became a village green. If it had become a green before 1970 and had not been registered, it would be deemed by s 1(2)(a) not to have been a village green on the appointed day. But any 20-year period expiring after the appointed day would do.

[42] The amended s 22, with the addition of the words 'and . . . continue to do so', plainly cannot be satisfied by any period of 20 years. It must be a period continuing until a given date, although, as I shall explain, the precise date is controversial. So one might have thought that the question of whether one could have taken any 20 years under the old law was now academic. But Mr Edwards says that if the land became a green under the old law, it would have remained a green thereafter. Once a village green, always a village green. It could not be retrospectively deprived of that status by the amendment of the definition in 2000. Lightman J agreed (see [2004] Ch 253 at [66]–[67], [2004] 2 WLR 1291).

[43] In my opinion it is unnecessary to decide when the 20-year period under the old law would have expired because the argument that it would have 'become a village green' is a misreading of ss 13 and 22 of the 1965 Act. Section 22 defines a village green for the purposes of the Act. When s 13 speaks of amendment of the register when land 'becomes' a village green, it means that by reason of events which have happened after 1970, the land now satisfies the definition. That makes it registrable. But, because the register is conclusive, it does not become a village green until it has been registered. The Act was a Commons *Registration* Act, not an act to change the substantive law of commons and village greens, although, as Carnwath LJ pointed out, the effect of the

conclusive presumption in s 10, read with s 22, may be to create rights in respect of land to which they would not have attached without registration. But one purpose of the 1965 Act was to enable buyers of land and other members of the public to ascertain from the register whether land was common land or a village green. It would defeat that purpose if unregistered greens could come into existence after the appointed day. I agree with Carnwath LJ's analysis ([2005] 3 All ER 961 at [100], [2006] Ch 43):

> '... The 1965 Act created no new legal status, and no new rights or liabilities, other than those resulting from the proper interpretation of s 10. Since that section only takes effect in relation to any particular land on registration, there is no legal basis for treating that land as having acquired village green status by virtue of an earlier period of qualifying use. The mere fact that it would at some earlier time have come within the statutory definition is irrelevant if it was not registered as such ...'

CONTINUE UNTIL WHEN?

[44] Since 2001, then, the land must satisfy the definition as amended by the 2000 Act. The inhabitants must 'continue' to use the land for sports and pastimes. Continue until when? Carnwath LJ said that user had to continue until the date of registration. But that would mean that any well-advised landowner, on receipt of an application to register, would erect barbed wire or take other steps to prevent the user from continuing, or at any rate continuing as of right. In *R (on the application of Cheltenham Builders Ltd) v South Gloucestershire DC* [2004] JPL 975 at 991 Sullivan J said, accurately as it seems to me, that such a construction would make nonsense of the Act. Carnwath LJ did not accept that his construction was 'so obviously unreasonable, or contrary to the legislative intention, that it must be rejected' (see [2005] 3 All ER 961 at [94], [2006] Ch 43). He gave three reasons for adopting it. First, the Secretary of State had power to prescribe a different period. But that seems to me neutral as to what the default position should be. Secondly, the history of the 1965 Act gives 'no support for a broad interpretation of the provisions for new greens'. That sounds like an attempt to refight the battle of Sunningwell green. Thirdly, a construction which made dedication of a new green in effect voluntary at the time of registration would 'help to provide an answer to possible human rights objections'. As I shall explain, I do not think that there are valid human rights objections. I would therefore reject the Court of Appeal's construction as irrational. In my opinion the correct date is that of the application. That appears to be assumed by cl 15(3)(b) of the Commons Bill now before Parliament.

DOES REGISTRATION CREATE ANY RIGHTS?

[45] Questions (i) and (ii), which raise the questions of whether the registration creates any rights and whether the registered land will be a town or village green for the purposes of the Victorian statutes, are not of immediate concern to the county council. Such questions will arise only once the land is registered and the county council is functus officio. I share the concern of my noble and learned friends Lord Scott of Foscote and Baroness Hale of Richmond that the House should not make declarations of abstract propositions of law. But the interest of the city council in these questions is concrete in the most literal sense. They wish to build houses on the land. If registration creates no rights and the land does not fall within the Victorian statutes, they will be able to do so.

If it does create rights or fall within the statutes, they will not be able to use the land in a way which wholly excludes the local inhabitants from using it for any sports or pastimes whatever. Accordingly, the city council have a real and immediate interest in having the question resolved and there is an appropriate contradictor, namely Miss Robinson. In the circumstances I consider that it would be a proper exercise of the House's discretion to answer questions (i) and (ii) and, as there has been no objection by anyone, I think that your Lordships should do so.

[46] Section 1(1) of the 1965 Act provides that land which is a town or village green shall be registered. Section 3(1) says that there shall be a register of town or village greens and that regulations may require or authorise a registration authority to note on the register 'such other information as may be prescribed'. Section 10 provides that registration as a town or village green shall be 'conclusive evidence of the matters registered'. In the case of a town or village green, the registration states simply that the land is a green. No other information is prescribed.

[47] What rights does registration create? In *New Windsor Corp v Mellor* [1975] 3 All ER 44 at 51, [1975] Ch 380 at 392 Lord Denning MR said that registration 'confers no rights in itself. All is left in the air'. Lord Denning MR said that the explanation was that 'Parliament intended to pass another statute dealing with these and other questions on common land and town or village greens'. If there was delay passing such a statute, Lord Denning MR said he would be 'tempted to infer' that Parliament intended that land registered as a town or village green should be available for sports or pastimes for the inhabitants. Browne LJ said ([1975] 3 All ER 44 at 54, [1975] Ch 380 at 395) he agreed that without further legislation, registration conferred no rights on the public.

[48] It is by no means clear that Parliament contemplated further legislation about rights over village greens. Section 1(3)(b) contemplated further legislation on the vesting of unclaimed common land, but sub-s (3)(a) appears to regard the provisions for the vesting of unclaimed town and village greens (s 8(4)) as sufficient. Section 15(3) contemplates further legislation affecting the exercise of rights of common, but there is no suggestion of further legislation about rights over village greens. Nor does Hansard throw much further light on the question. There are several references to registration being a 'first stage' and to a later measure 'for the better management and improvement of common land' (second reading debate, 263 Official Report (5th series) col 90 (9 February 1965)) but no indication of what might be done about village greens.

[49] So one has to look at the provisions about greens in the 1965 Act like those of any other legislation, assuming that Parliament legislated for some practical purpose and was not sending Commons Commissioners round the country on a useless exercise. If the Act conferred no rights, then the registration would have been useless, except perhaps to geographers, because anyone asserting rights of recreation would still have to prove them in court. There would have been no point in the conclusive presumption in s 10. Another possibility is that registration conferred such rights as had been proved to support the registration but no more. So, for example, if land had been registered on the strength of a custom to have a bonfire on Guy Fawkes Day, registration would confer the right to have a bonfire but no other rights. But this too would make the registration virtually useless. Although the 1965 Act provides for the registration of rights of common, it makes no provision for the registration of rights of recreation. One cannot tell from the register whether the village green

was registered on the basis of an annual bonfire, a weekly cricket match or daily football and rounders. So the establishment of an actual right to use a village green would require the inhabitants to go behind the registration and prove whatever had once satisfied the Commons Commissioner that the land should be registered.

[50] In my view, the rational construction of s 10 is that land registered as a town or village green can be used generally for sports and pastimes. It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner whether it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games (see *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385 at 396–397, [2000] 1 AC 335 at 357).

[51] This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides. *Fitch v Fitch* (1798) 2 Esp 543, 170 ER 449 was a sequel to *Fitch v Rawling* (1795) 2 Hy Bl 393, 126 ER 614, in which the custom of playing cricket on land at Steeple Bumpstead had been established. The evidence was that the defendants had trampled the grass which the owner had mowed, thrown the hay about and mixed some of it with gravel. Heath J said ((1798) 2 Esp 543 at 544, 170 ER 449 at 449–450):

> 'The inhabitants have a right to take their amusement in a lawful way. It is supposed, that because they have such a right, the plaintiff should not allow the grass to grow. There is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded . . .'

[52] The judge asked the jury to decide ((1798) 2 Esp 543 at 545, 170 ER 449 at 450) 'Whether the defendant had entered the close in the fair exercise of a right, or in an improper way' and the jury found for the plaintiff.

[53] Mr George QC, who appeared for the city council, submitted that there was a general presumption against interference with property rights without clear words. (He also relied upon the Human Rights Act 1998, to which I shall return later.) But the primary purpose of the 1965 Act, as applied to town and village greens, was not to create new rights which override those of the owner. It was to create a register of town and village greens which would include all land over which statutory or customary rights of recreation existed or probably existed. That would protect both the interests of the local inhabitants (so that public open spaces were not lost with the fading of memory) and also the interests of owners and buyers of land, who could clear their titles and rely upon the register, without being surprised by claims of public right of which they had been unaware. For this purpose, it was in my view a necessary implication that land conclusively presumed to be a village green should be subject to the rights which the statute treated as creating a village green, namely the right to indulge in sports and pastimes. This was the opinion of Pill LJ in *R v Suffolk CC, ex p Steed* (1996) 75 P & CR 102 at 114–115, Dyson J in *R v Norfolk CC, ex p Perry* (1996) 74 P & CR 1 at 7 and Lightman J in this case ([2004] QB 253, [2004] 2 WLR 1291). I agree.

THE VICTORIAN STATUTES

[54] Section 12 of the Inclosure Act 1857 recited that it was expedient to provide 'summary means of preventing nuisances' on town and village greens and land allotted for recreation. Therefore:

> 'If any person wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes, or rubbish, or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, such person shall for every such offence, upon a summary conviction thereof [pay a fine].'

[55] Further provision for the protection of town and village greens was made by s 29 of the Commons Act 1876:

> 'An encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty under section 12 of the Inclosure Act 1857, he may be summarily convicted thereof upon the information of any inhabitant of the parish in which such town or village green or recreation ground is situate, as well as upon the information of such persons as in the said section mentioned.'

[56] The first question is whether the effect of s 10 of the 1965 Act is to apply these statutes to land registered as a town or village green. I agree with Lightman J and the Court of Appeal that it does. There is no special definition of a town and village green in the 1857 or 1876 Acts which might suggest that when s 10 of the 1965 Act said that registration was to be conclusive evidence of the matters registered, and the matter registered was that the land was a village green, Parliament did not intend that it should be a village green for the purposes of the 1857 and 1876 Acts.

[57] There is virtually no authority on the effect of the Victorian legislation. The 1857 Act seems to have been aimed at nuisances (bringing on animals or dumping rubbish) and the 1876 Act at encroachments by fencing off or building on the green. But I do not think that either Act was intended to prevent the owner from using the land consistently with the rights of the inhabitants under the principle discussed in *Fitch v Fitch* (1798) 2 Esp 543, 170 ER 449. This was accepted by Sullivan J in *R (on the application of Laing Homes Ltd) v Buckinghamshire CC* [2003] EWHC 1578 (Admin), [2004] 1 P & CR 573 at [52]. In that case the land was used for 'low-level agricultural activities' such as taking a hay crop at the same time as it was being used by the inhabitants for sports and pastimes. No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so 'as of right'. But, with respect to the judge, I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of s 22 if in practice they were not. Nor do I follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question

of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application. I have a similar difficulty with para 141 of the judgment of Judge Howarth in *Humphreys v Rochdale Metropolitan BC* (18 June 2004, unreported), in which he decided that acts of grazing and fertilising by the owner which, in his opinion, would have contravened the 1857 and 1876 Acts if the land had been a village green at the time, prevented the land from satisfying the s 22 definition.

HUMAN RIGHTS

[58] Mr George submitted that a system of prescription by which land could after 20 years user become subject to recreational rights and the Victorian statutes was inconsistent with the human right of an owner of land not to be 'deprived of his possessions' except on the restricted grounds allowed by art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Section 3 of the 1998 Act therefore required the 1965 Act to be construed in a way which did not produce such an inconsistency. The way to achieve this result was to read s 10 as conferring no rights and as not applying the Victorian statutes.

[59] Before a court has to resort to s 3, it must first decide that an ordinary reading of the statute would be inconsistent with convention rights. But I do not think that the construction I have suggested would infringe any of a landowner's rights. (I ignore the fact that the city council is a public authority, since obviously the statute must have the same meaning whoever owns the land.) In support of this argument, Mr George relied principally upon the recent decision of the European Court of Human Rights in *JA Pye (Oxford) Ltd v UK* [2005] 3 EGLR 1. The court there held (by a majority of four to three) that the extinction of an owner's title to registered land by adverse possession was a deprivation of property which could not be justified. But that case is readily distinguishable. The European court stressed two matters: first, that the applicant's rights over the land were entirely extinguished and, secondly, that title was transferred by operation of law to another private individual. The first made it a 'deprivation' and the second made it difficult to justify as a control of 'the use of property' in the general interest. In the present case, first, the owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation and, secondly, the system of registration in the 1965 Act was introduced to preserve open spaces in the public interest.

QUESTIONS OF PROCEDURE

[60] It will be remembered that these proceedings began because Mr Laurence and Mr Chapman disagreed over whether Miss Robinson should have been allowed to prove user for a period different from that specified in Pt 4 of her application form. That particular question has been resolved by the answer which your Lordships have given to the question of substantive law, namely that the relevant definition was that specified in s 22 as amended in 2000 and that the only period upon which Miss Robinson could have relied was a period of upwards of 20 years ending with the date of her application. At the inquiry it was recognised, not least by the city council, that the statement on the application form that the land had become a green in 1990 was out of date and wrong and that it was best to ignore it.

[61] There remain, however, more general questions about the power of the registration authority (acting by its inspector) to allow amendments to the application form and to register an area of land different from that originally claimed. It is clear from the 1969 regulations that the procedure for registration was intended to be relatively simple and informal. The persons interested in the land and the inhabitants at large had to be given notice of the application and the applicant had to be given fair notice of any objections (whether from the land owner, third parties or the registration authority itself) and the opportunity to deal with them. Against this background, it seems to me that the registration authority should be guided by the general principle of being fair to the parties. It would be pointless to insist upon a fresh application (with a new application date) if no prejudice would be caused by an amendment, or if any prejudice could be prevented by an adjournment to allow the objectors to deal with points for which they had not prepared. I agree with the approach taken by Mr Chapman and the general remarks of Carnwath LJ [2005] 3 All ER 961 at [101]–[109], [2006] Ch 43. In case there should be any doubt, I add two footnotes. First, there is no rule that the amended application must be for substantially the same land as the original application. If it relates to a larger or different piece of land, the inspector or registration authority may well think that fairness requires republication of a new application. But the matter remains one for the exercise of their discretion. Secondly, the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties.

[62] I also agree with the Court of Appeal that the registration authority is entitled, without any amendment of the application, to register only that part of the subject premises which the applicant has proved to have been used for the necessary period. It is hard to see how this could cause prejudice to anyone. Again, I add that there is no rule that the lesser area must be substantially the same or bear any particular relationship to the area originally claimed.

EVIDENTIARY MATTERS

[63] The statutory question is whether 'a significant number' of the inhabitants of a locality or a neighbourhood have 'indulged in lawful sports and pastimes as of right'. The question as to what is meant by 'as of right' was considered by the House in *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385, [2000] 1 AC 335. So was the question of what 'sports and pastimes' may be taken into account. The present question concerns what counts as indulging in such sports and pastimes 'on' the land: must the 'significant number' of inhabitants have set their feet everywhere on the land and must such activity be exclusively referable to indulging in sports and pastimes rather than exercising or creating rights of way?

[64] In the present case, Mr Chapman's findings of fact were that 'the scrubland has been used throughout the 20-year period to a material extent for informal recreation by local people'. This was established by the evidence and furthermore:

> 'Standing back and applying common sense, it seems highly probable that such a disused and unprotected open area on the edge of a densely populated part of Oxford would be used by local people for dog walking, children's play and general informal recreation ... The character of the scrubland has changed over the 20 year period in that it has become more overgrown with

maturer vegetation. There have always been beaten tracks across the scrubland, but it has always been possible to leave the tracks and wander generally over the land, and many users have done so.'

[65] Mr Chapman dealt with the questions on which guidance was sought under questions (ix) and (x) at the end of his report. First, on the significance of footpath use:

'The city council argues that the evidence of recreational user of the Trap Grounds amounts to user of defined routes for the purpose of passage and not to general recreational user of the whole site. With regard to Frog Lane, I consider that this is a good point. Frog Lane, according to the evidence, has predominantly been used as a route for access to and egress from the scrubland rather than for its own intrinsic recreational qualities. This is consistent with its history as a road to the nunnery and latterly to the breakers' yard. Its very name suggests that use has been as a right of way rather than as a town or village green. However, I do not consider that this analysis holds good for the scrubland itself. It is true that, at present, there is a main track which circles the scrubland. However, this track appears to be a relatively recent creation . . . Further, there is strong evidence that many users do not stay on the main track but wander onto subsidiary tracks and enter the various glades and clearings which are to be found within the scrubland. I do not consider that the user of the scrubland by local people can realistically be characterised as the exercise of a right of way along a defined route.'

[66] Secondly, Mr Chapman dealt with the inaccessibility of a good deal of the scrubland:

'The city council argue that the scrubland is now so overgrown that the majority of it is inaccessible and that this in itself precludes registration as a green. As noted above, my estimate is that about 25% of the total area is reasonably accessible, the rest consisting of trees and scrub. In my view, the question whether land has become a town or village green cannot be determined by a mathematical assessment of the amount of the land which is open to recreation . . . Where the recreational use is informal and consists of activities such as walking, with or without dogs, children's play, exploring and watching wild life, I do not see why much more densely vegetated land should not be capable of being subject to recreational rights, either by custom or prescription. In my view, it is necessary to look at the words of the statutory definition and to ask whether the scrubland, considered as a whole, is land which falls within that definition. In my view, the evidence proves that the recreational use of the scrubland is, and has been over the relevant 20-year period, sufficiently general and widespread, by way of use not only of the main track but also of minor tracks, glades and clearings, to amount to recreational use of the scrubland viewed as a whole.'

[67] This is not an application for judicial review of Mr Chapman's decision and your Lordships are not invited to express a view on whether, on the facts, he was entitled to reach the conclusions which he did. For my part, in the absence of an inspection or at least photographs of the site, I would be very reluctant to do so. If the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land area would not in my view be inconsistent with a

finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flower beds, borders and shrubberies on which the public may not walk.

[68] Instead, your Lordships are invited to provide guidance on the correct approach to the evidence. But I share with Carnwath LJ a reluctance to offer what would amount to the equivalent of a Planning Policy Statement from the Office of the Deputy Prime Minister. Lightman J made a number of sensible suggestions about how such evidence might be evaluated and the judgments of Sullivan J likewise contain useful common sense observations; for example, on the significance of the activities of walkers and their dogs (see *R (on the application of Laing Homes Ltd) v Buckinghamshire CC* [2004] 1 P & CR 573 at [103]–[104]). But any guidance offered by your Lordships will inevitably be construed as if it were a supplementary statute. There is a clear statutory question: have a significant number of the inhabitants of a locality or neighbourhood indulged in sports and pastimes on the relevant land for the requisite period? Every case depends upon its own facts and I think that it would be inappropriate for this House in effect to legislate to a degree of particularity which Parliament has avoided.

DISPOSAL

[69] I would therefore allow Miss Robinson's appeal against the rulings of the Court of Appeal on issues (i) and (iii) and restore the declarations of Lightman J to the effect that issue (i) registration would give rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes on the land and issue (iii) for the purposes of s 22 as amended, the use for sports and pastimes has to continue until the date of the application. I would dismiss her appeal against ruling (iv) (that applications after 30 January 2001 had to satisfy the amended definition of a town or village green) and ruling (v) (that she could not succeed on the basis that the land had become a green on 1 August 1990). I would dismiss the city council's appeal against the ruling on issue (ii) (that the land on registration would be subject to the 1857 and 1876 Acts). I would dismiss the county council's appeal against the rulings on issues (vi) (that the registration authority could ignore the date specified on the application form as the date on which the land became a green); on issue (vii) (that the registration authority could allow the form to be amended) and issue (viii) (that the authority could, without amendment of the application, register a part of the land claimed). I would not answer questions (ix) and (x) further than indicated in this opinion.

LORD SCOTT OF FOSCOTE.

INTRODUCTION

[70] My Lords, this is an unusual and difficult case, raising difficulties both of substantive law and of procedure. The difficulties all relate, in one way or another, to the effect of the Commons Registration Act 1965, as originally enacted and as amended by s 98 of the Countryside and Rights of Way Act 2000, and the Commons Registration (New Land) Regulations 1969, SI 1969/1843 made thereunder. I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann and I very gratefully adopt his luminous exposition of the factual and legal background to the issues that arise on the appeals.

TOWN OR VILLAGE GREENS

[71] There is, however, one important matter of background on which I would respectfully take issue with the view expressed by my noble and learned friend and concurred in by a majority of your Lordships. The issue is as to what would have been understood by Parliament and by the public generally prior to the enactment of the 1965 Act by the expression 'town or village green' and, consequently, how the definition of 'town or village green' in s 22(1) of the 1965 Act should be applied. The issue has not been addressed by counsel who have appeared on this appeal, but, none the less, I do not think your Lordships can avoid forming a view on it, as indeed my noble and learned friend has done, for the meaning to be attributed to the expression has a heavy bearing on the answers to be given to some of the questions that have arisen in this case.

[72] Lord Hoffmann has concluded that the expression 'town or village green' prior to the 1965 Act would have been regarded as applicable to any land that by long custom had become subject to the right for local inhabitants to use it for some form of recreation. Hence, s 15 of the Inclosure Act 1845: 'no town or village green shall be subject to be inclosed under this Act . . .', and s 12 of the Inclosure Act 1857 which says that:

> 'If any person wilfully cause any injury or damage to any fence of any such town or village green . . . wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes or rubbish or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green . . . or to the interruption of the use or enjoyment thereof as a place for exercise and recreation . . .'

—that person shall be guilty of an offence, and s 29 of the Commons Act 1876:

> '. . . an encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance . . .'

—would apply to all such land whether or not the land answered to the normal understanding of what a town or village green was. In none of these Victorian Acts was the expression defined. In each of these Acts the meaning of the expression could not have been other than a meaning corresponding to that normal understanding. The *Concise Oxford Dictionary* (9th edn, 1995) offers as one of the several possible meanings of the word 'green' the following: 'a piece of public or common grassy land (village green).' This, I suggest, corresponds with what the normal understanding of the expression 'town or village green' would have been and with the understanding of the expression that the legislators who passed the Victorian statutes to which I have referred would have had.

[73] There are several old cases where a customary right to conduct a recreational activity was established over, or discussed in respect of, land to which these Victorian statutes could not possibly have been intended to apply. (1) *Millechamp v Jordan* (1740) Willes 205n, was a case in which the court accepted the possibility in law of a customary right to use a particular field for recreation but limited to 'legal and reasonable times of year' so as not to allow the user to deprive the landowner of all profits of the land (nb the adjective 'reasonable' appears in the note to *Bell v Wardell* (1740) Willes 202 but in a reference to the case by Kelly CB in *Hall v Nottingham* (1875) 1 Ex D 1 at 3 the adjective 'seasonable' is

substituted). (2) *Mounsey v Ismay* (1863) 1 H & C 729, 158 ER 1077 was a trespass case. One of the defences was that the free men of the city of Carlisle had acquired by 20 years' prescriptive user the right on Ascension Day each year to hold horse races on the land in question. The defence failed, Martin B holding that the right to have a race meeting could not be claimed under the Prescription Act 1832 (2 & 3 Wm 4 c 71). But he said, obiter (at 495), that it was 'perfectly clear that such a right as is here set up can only exist by custom' and (at 498–499) that a customary right to run horse races would be 'a lawful one at common law'. The right to have a race meeting once a year on someone else's land could not possibly justify describing the land as a town or village green. (3) Lord Hoffmann has referred at [6], above to *Virgo v Harford* (11 August 1892, unreported) in which a customary recreational right to play various games on 65 acres of open land on a hill in Somerset was apparently upheld. The notion that this land would have been understood to be a town or village green seems to me absurd. (4) *Lancashire v Hunt* (1894) 10 TLR 310 provides an equally (or more) extreme example of the point. The owner of Stockbridge Common Down in Hampshire applied for an injunction to prevent a local trainer from exercising and training his race horses over the 160 acres-odd of the common. The trainer claimed that he had a customary right to train his horses over the common. Wright J held that this customary right had not been established by the evidence but that the inhabitants of the borough did have the right to ride their horses for recreation over any part of the 160 acres. In a second action heard at the same time the owner of Stockbridge Common Down sought to restrain the inhabitants of Stockbridge from using the common for meetings, fêtes and cricket matches. Here, too, the defence was based on custom. It was said that the inhabitants had a customary right to use the downs for those purposes. This defence prevailed. The reporter of the case made the following comment (at 312):

> 'It will therefore be seen from Mr Justice Wright's decision in the two actions respectively that—(a) so long as that judgment stands the lord of the manor of Stockbridge will have in future a definite right to prevent racehorses from being trained on Stockbridge Common Down; but (b) that he will not, any more than formerly, be able to stop the inhabitants of Stockbridge using the common down as a recreation ground in the same way and for the same purposes as village greens are usually enjoyed by the villagers.'

It is to be noticed that the reporter did not comment on the absurdity of referring to the 160 acres of downs as a village green. No one, in my respectful opinion, could have supposed that the references in the Victorian statutes to village greens were applicable to the 160-acre Stockbridge Common Down. (5) In *Mercer v Denne* [1904] 2 Ch 534, [1904–7] All ER Rep 71 a customary right for fishermen in the parish of Walmer to spread their nets to dry on the land of a private owner at all times seasonable for fishing was held by Farwell J to be a good and valid custom. The customary right claimed was not a right for recreational purposes but for the purposes of the fishermen's trade as fishermen. However, the principles applied by Farwell J to the question whether the custom claimed was a good one were the same principles as those which had been established in the customary recreational rights cases, many of which he cited.

[74] These cases demonstrate, in my opinion, that a customary right for local inhabitants to use someone else's land, of whatever description, for a recreational purpose could be acquired, pre the 1965 Act, by evidence of user from time

immemorial provided that the custom were sufficiently certain and were reasonable in itself. The custom would become, in effect, a local common law for the place to which the custom extended (see Tindal CJ in *Lockwood v Wood* (1844) 6 QB 50 at 64 cited by Farwell J in *Mercer v Denne* [1904] 2 Ch 534 at 551, [1904–7] All ER Rep 71 at 75). The customary rights thus acquired might be limited by the nature of the user that had given rise to them. Thus, for example, the riding of horses over Stockbridge Common Down since time immemorial could not have given rise to a customary right to hold fêtes and play cricket matches on the common, and vice versa. A customary right for local inhabitants to course hares over the stubble fields of the lord of the manor could, I imagine, have been acquired by an exercise of that right since time immemorial. But the right to course hares over the fields after they had been ploughed and planted or to enjoy other recreative activities over the fields could not have been thereby acquired.

[75] Another way of making the same point is to observe that the residual rights of the landowner to make profitable use of the land subject to the customary rights must surely depend on the nature of the user that has created the rights. In some cases the landowner's residual rights might be negligible. In other cases the landowner's ability to use the land might be restricted only for a limited period of the year. All would depend on the nature of the customary right that had been established. And there would be many types of land over which customary rights of one sort or another might be established which no one could suppose would be subject to the various prohibitions imposed by the Victorian statutes on town and village greens.

[76] It follows, in my opinion, that, pre the 1965 Act, the fact that a piece of land was subject to a customary right of recreation would not, by itself, have sufficed to allow the land to be described for legal purposes as a town or village green, eg for the purposes of the Victorian statutes. Something more would have been needed. There is, as Lord Hoffmann has said (at [7], above), no authority on the point but I am unable to accept that a purposive construction of the expression 'town or village green' in the Victorian statutes would have led to the 160-acre Stockbridge Common Down, or a mountainside down which people skied in winter snow, or a dense wood in which people wandered to pick bluebells or search for mushrooms or for other dalliance, being so categorised.

[77] In my opinion, the 'something more' would have been a quality in the land in question that would have accorded with the normal understanding of the nature of a town or village green, namely, an area of land, consisting mainly of grass, either in or in reasonable proximity to a town or village and suitable for use by the local inhabitants for normal recreational activities.

[78] The Report of the Royal Commission on Common Land 1955–1958 (Cmnd 462) (1958) makes some, not very many, references to town and village greens. Three of these are mentioned by Lord Hoffmann at [13], above. For my part I can see no reason to suppose that the commissioners had in mind anything other than greens as normally understood. Lord Hoffmann notes, in sub-para (c), the commissioners' comment that there were 'probably very few villagers who will not know what they mean by "their green"'. I respectfully agree with this comment which, to my mind, goes to confirm that the commissioners had in mind normal traditional town or village greens.

[79] Section 22(1) of the 1965 Act defined 'town or village green' as meaning:

> '. . . land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.'

As Lord Hoffmann has observed, this definition brought together the two categories of land that, pre the 1965 Act, constituted land over which local inhabitants might be entitled to rights of exercise or recreation and then added a third, the so-called class (c), namely, land on which the inhabitants 'have indulged in such sports and pastimes as of right for not less than twenty years'. The important question for present purposes is whether this definition justifies classifying as a town or village green any land on which any form of lawful recreation is either the subject of a customary right or has been indulged in by the local inhabitants for at least 20 years. My instinctive reaction is to say that the definition was not intended to turn into a village green land subject to the exercise of customary rights that would not, pre the 1965 Act, have been regarded as a village green. The 160-acre Stockbridge Common Down was not, in my opinion, a town or village green before the enactment of the 1965 Act and did not become one afterwards. The landowner who owned arable land that, before the 1965 Act, had been subject to a customary right to course hares in the autumn would not after the enactment have found that he was the owner of a town or village green. And the addition of class (c) could not, in my opinion, have been intended to alter the status of land that had not previously been a town or village green or to turn into a town or village green land that had never previously been so regarded. The addition of class (c) was intended, in my opinion, in complete agreement on this point with Lord Hoffmann, to enable general recreational rights over town and village greens, as popularly understood, to be established without the necessity of proving user since time immemorial. Proof of 20 years' user as of right, a formula borrowed from the Prescription Acts, would do.

[80] However, unfortunately, at least in my view, cases since 1965 have led to the registration as town or village greens of land that did not remotely correspond to a town or village green in the normally understood sense. Some of these cases have been referred to by Lord Hoffmann (at [39], above). There was a case in 1977 in which some rocks at Llanbadrig, Ynys Mon, which had for upwards of 20 years been used by the local inhabitants to moor their boats was registered as a town or village green. In a case in 1976 a piece of land in Barnet on which for at least the past 20 years a Guy Fawkes bonfire had been held as of right was registered. No other evidence of use of the land for sports and pastimes is mentioned in the short report of the Chief Commons Commissioner. But the land was known as 'Bittacy Green' which certainly suggests such use and suggests that the nature of the land was consistent with it being a town or village green. If, however, all that had happened was that for the previous 20 years plus the local inhabitants had once a year as of right enjoyed a Guy Fawkes bonfire on the land, it does not seem to me that the statutory criteria were satisfied. And, in the course of counsels' submissions in the present appeal, reference was made to a quarry which, having been used for 20 years plus by the local inhabitants for recreational activities, was registered, in reliance on class (c), as a town or village green.

[81] It is, in my opinion, an error in construction of s 22(1) to suppose that any land, whatever the degree of divergence between the character of the land and a town or village green as normally understood, can be registered as a town or village green either in reliance on class (b) or in reliance on class (c) of the statutory definition. I do not think the problem would ever arise in relation to class (a) for I imagine that any land allocated by an inclosure award for general exercise and recreational purposes, would have been already or would soon have become a predominantly grassy area.

[82] In Bennion's *Statutory Interpretation* (4th edn, 2002) p 480, under the side-heading 'Potency of the term defined', the author says this:

> 'Whatever meaning may be expressly attached to a term, it is important to realise that its dictionary meaning is likely to exercise some influence over the way the definition will be understood by the court. It is impossible to cancel the ingrained emotion of a word merely by an announcement.'

The author gives a number of examples from decided cases which illustrate, convincingly in my opinion, his point. The two cases which seem to me particularly pertinent are *British Amusement Catering Trades Association v Westminster City Council* [1988] 1 All ER 740, [1989] AC 147, where Lord Griffiths construed ([1988] 1 All ER 740 at 745, [1989] AC 147 at 157) the term 'cinematograph exhibition' as excluding video games because the use of the term immediately brought to mind a film show, and *Delaney v Staples* [1992] 1 All ER 944, [1992] 1 AC 687, in which Lord Browne-Wilkinson in construing the definition of 'wages' in the Wages Act 1986 said ([1992] 1 All ER 944 at 947, [1992] 1 AC 687 at 692) that 'it is important to approach such definition bearing in mind the normal meaning of that word'.

[83] My Lords, I would apply the same approach to construction of the definition of 'town or village green' in s 22(1) of the 1965 Act, or, for that matter, to construction of 'town or village green' in the Victorian statutes to which I have referred. I do not believe it can be correct to insist on a literal application of the s 22(1) definition so as to apply it to land that no one would recognise as a town or village green.

THE RIGHTS OF USER OVER TOWN AND VILLAGE GREENS

[84] The dispute between the parties as to whether there are any, and if so what, rights of user over class (c) town and village greens would fall away if the literal construction of s 22(1) were set aside and, as I would regard it, a more sensible construction, based upon the normally understood characteristics of a town or village green, were adopted instead. It is relevant to notice that the class (c) addition to the previous means by which land may have become a town or village green was based upon the language of prescription. Prescriptive user for the requisite period entitles the prescriber, or the general public if public rights of way are being obtained, to a right commensurate with the prescriptive user. Prescriptive user of a path on foot may give a right of way on foot, prescriptive user of the path with a horse may lead to a bridleway, or with vehicles to a right of way with vehicles. It is a basic principle of prescriptive use that the user 'as of right' that has continued for the requisite period becomes a user 'of right'. There seems to me every reason to suppose that the 20 years' user contemplated by s 22(1) was intended to lead to the same consequence as prescriptive user, namely, the acquisition of rights commensurate with the nature of the user. This would match up class (c) with class (b), where the user that had created the

customary right would become the permitted user pursuant to that customary right.

[85] It is only if the literal construction of s 22(1) preferred by a majority of your Lordships is adopted that the 'rights' issue becomes difficult. If it is correct that any 20-year 'as of right' recreational use of any type of land justifies categorising the land as a town or village green, then it becomes necessary to ask what rights are thereby created over the town or village green? Why should a landowner's tolerance of a yearly Guy Fawkes bonfire on his land lead to the local public acquiring much broader, and more intrusive, rights over the land, rights that the landowner might well not have tolerated? But if there has been general recreational use of a parcel of mainly open grassy land that has continued as of right for 20 years plus, no problem arises. Mr Edwards, counsel for Miss Robinson, said that one single type of activity would not suffice to qualify land as a town or village green. But I would go further. The reference in s 22(1) to 'lawful sports and pastimes' is, in my opinion, a reference of generality. If, throughout the 20-year period the land were used for whatever lawful sports and pastimes the users chose, the requisite generality would be present. A management problem might arise if a new sport began to be played posing problems for other users of the land. User for the new sport might be unlawful if it presented unacceptable dangers to other users of the green but it would not necessarily be unlawful vis-à-vis the landowner. He could complain only if his residual rights in respect of the green were interfered with but, if the green were the typical town or village green, those rights would be likely to be negligible.

HUMAN RIGHTS

[86] The implications of art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and the 1998 Act to the acquisition by land of town and village green status under class (c) of s 22(1) were raised by Mr George QC on behalf of the city council. He referred your Lordships to the recent decision of the Strasbourg court in *JA Pye (Oxford) Ltd v UK* [2005] 3 EGLR 1. A loss by a landowner of rights over his land brought about by the operation of a statutory prescription provision and the expiry of the relevant prescriptive period would, I feel bound to accept, prima facie engage his art 1 of the First Protocol right 'to the peaceful enjoyment of his possessions'. But, in my opinion, notwithstanding the Strasbourg court's decision in the *Pye* case, and having taken account of that decision (see s 2(1)(a) of the 1998 Act), the operation of the statutory prescriptive provision in s 22(1) brings about a deprivation of the landowner's rights that is, in the judgment of Parliament, in the public interest. The purpose of the statutory prescriptive provisions in our domestic law is, as Lord Hoffmann put it in *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385 at 390, [2000] 1 AC 335 at 349, to 'prevent the disturbance of long-established de facto enjoyment'. Who could doubt that that is in the public interest?

[87] If, however, as I understand to be your Lordships' view, land can become a town or village green under class (c), or for that matter under class (b), on account of some long standing but limited recreational use (eg yearly Guy Fawkes bonfires) and then, after registration as a town or village green under the 1965 Act, the local public thereby become entitled to use the land for any 'lawful sports and pastimes', it is easy to see that the fact of registration may seriously limit the ability of the landowner to continue to enjoy the land in the manner

in which he had enjoyed it during the prescriptive period. The public interest in thus increasing the rights of the local public over and above their 'long-established de facto enjoyment' and correspondingly reducing the residual rights of the landowner is hard to discern. So if it is right that a limited recreational use can qualify the land, upon registration, for use for any and all 'lawful sports and pastimes' (see s 22(1)), a potentially serious problem regarding the landowner's art 1 of the First Protocol rights could, in my opinion, arise.

[88] There is a further point about human rights where, as in the present case, the landowner is a local authority, to which I should draw attention. The city council acquired the land from St John's College and, I imagine, ss 122 and 123 of the Local Government Act 1972 apply to the land. Section 122(2A) (added by amendment under the Local Government, Planning and Land Act 1980) allows a local authority owner of 'open space' land, which includes land 'used for the purposes of public recreation', to appropriate the land to other uses. And s 123(2A) gives a local authority power to dispose of the open space land provided certain specified statutory procedures are followed (see the general discussion on these provisions in the opinion I gave in *R (on the application of Beresford) v Sunderland City Council* [2004] 1 All ER 160 at [27], [28], [2004] 1 AC 889).

[89] The question whether these statutory powers allow a local authority such as the city council to appropriate open space land for housing use and then to dispose of the land free from any recreational rights of the local inhabitants whether or not the land has been registered as a town or village green remains for judicial decision. The purpose of the statutory powers I have referred to would, in relation to open space land that had been registered under the 1965 Act, be pointless if the local authority could not do so. It seems to me arguable that these statutory powers do enable local authorities to use town and village greens for housing purposes and to remove the land from the clutch of the 1857 and 1876 Victorian statutes as well as from the 1965 Act. The relevance of all this for present purposes is that if the city council does have power under the 1972 Act to dispose of the Trap Grounds for housing purposes whether or not the land in question is a town or village green, the city council would suffer no obvious detriment if the Trap Grounds were to be registered as a town or village green and any potential human rights point based upon that registration would evaporate.

[90] In the light of the matters I have been discussing it is interesting to look again at the facts of the 'Bittacy Green' case. It appears from the decision of the Chief Commons Commissioner, Mr George Squibb QC, that the piece of land on which the annual Guy Fawkes bonfire had been held was a relatively small part of a larger parcel of land that had been acquired in 1952 by Hendon Borough Council, the predecessor of the London Borough of Barnet. Mr Squibb records, in the second page of his decision, that—

> 'In 1970 the Council was minded to cease to use the land for the purposes of public walks and pleasure ground and to appropriate it for housing purposes. Since the land was an "open space", as defined in section 22(1) of the Town and Country Planning Act 1962, because it was used for the purposes of public recreation, it was necessary to make an appropriation order, confirmed by the Secretary of State for the Environment, under section 73 of that Act. This order, the London Borough of Barnet (Sanders Lane Housing Area) Appropriation Order 1970, provided that other land should be provided in exchange and that the appropriated land should be

discharged from the rights, trusts and incidents to which it was previously subject. *a*

The 1970 Order did not, however, apply to all the land comprised in the register unit. There was excluded from it a triangle of land, which still remains open and outside the curtileges of the houses which have been built on the remainder. In my view, the effect of this Order was to discharge the part of the land used for housing from the right to indulge in lawful sports and pastimes on it . . .' *b*

THE FUNCTION OF THE COURT

[91] There is one final problem, a procedural problem, that I want to mention before turning to the ten specific issues on which the county council seek rulings and guidance. *c* The problem arises out of the nature of some of the relief sought. The background to the commencement of the proceedings can be shortly stated. Miss Robinson, a resident in North Oxford, applied to register the Trap Grounds as a town or village green on the ground that 'local residents had used it for lawful pastimes as of right (without obstruction, permission, stealth or force) for an unbroken period of 20 years . . .' and continued to do so. *d* The city council, the landowner, objected to the application. They want to use the Trap Grounds, or some part, for housing development. The county council appointed Mr Vivian Chapman to inquire into the facts relevant to Miss Robinson's application and to advise them. Mr Chapman duly conducted a non-statutory inquiry and having done so presented the county council with a detailed report advising that a part *e* of the Trap Grounds qualified for registration and should be registered as a town or village green. But the county council then received advice from another expert in this field, Mr George Laurence QC, their counsel on this appeal, which in some important respects conflicted with the advice given by Mr Chapman in his report. The county council then commenced these proceedings in order to *f* obtain rulings on the several points regarding the effect of the 1965 Act, as amended, and the 1969 regulations made thereunder, that Miss Robinson's application and the conflicting advice they had received appeared to them to raise.

[92] Paragraphs (i)–(viii), inclusive, of the relief sought under the county council's re-amended CPR Pt 8 claim form sought rulings on legal issues. *g* Paragraphs (ix) and (x) sought guidance on certain factual matters relevant to Miss Robinson's application. The paragraphs are set out in Lord Hoffmann's opinion at [35], above. It will be apparent that what was sought from the High Court was a fairly comprehensive essay on the legal effect of the 1965 Act, as amended, and the 1969 regulations. The proceedings did not constitute a judicial *h* review application attacking any part of Mr Chapman's report, although it would, in my opinion, have been open to the city council to have sought leave to make such an application. The county council could have formed its own view about the conflicting advice it had received from Mr Chapman and Mr Laurence, have dealt with Miss Robinson's application accordingly and have left it to the *j* contestants, Miss Robinson and the city council, to attack, if so advised, the manner in which the application had been dealt with or the decision that had been reached, or both. If that course had been taken by the county council the issues for decision by the High Court, and on appeal by the Court of Appeal and this House, would have been formulated by the attack or attacks in question. The High Court would not have been presented, nor would the Court of Appeal

or your Lordships, with the examination paper that these proceedings have set. I do not wish to be over-critical of the county council's disinclination to come to a decision on Miss Robinson's application until all the legal issues which seemed to them to arise had been judicially resolved, but I do wonder whether all the ten paragraphs of declaratory relief sought in this case can be brought within the legitimate boundaries of the courts' jurisdiction to grant such relief.

[93] Lord Diplock said in *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 100, [1978] AC 435 at 501 that—

> 'the jurisdiction of the court is not to declare the law generally or to give advisory opinions: it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.'

In Zamir and Woolf's *The Declaratory Judgment* (2nd edn, 1993) pp 43–44 (para 3.008) the author, Lord Woolf, refers to *Royal College of Nursing of the United Kingdom v Dept of Health and Social Security* [1981] 1 All ER 545, [1981] AC 800 and *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402, [1986] AC 112 as providing 'good examples of courts being prepared to grant declarations at the extreme limits of their supervisory jurisdiction'. In the former case the issue was whether a circular issued by the Department of Health and Social Security had mis-stated the law regarding termination of pregnancy by medical induction. The well-known *Gillick* case involved an allegation that a departmental circular about the legality of prescribing contraceptives for girls under the age of 16 was erroneous in law. In both these cases the issue for decision was clearly defined.

[94] In the great majority of cases about registration of town or village greens to which your Lordships have been referred the case has come before the court on an application for judicial review of a decision on registration already taken by the registration authority (see eg *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385, [2000] 1 AC 335, *R (on the application of Beresford) v Sunderland City Council* [2004] 1 All ER 160, [2004] 1 AC 889, *R v Suffolk CC, ex p Steed* (1995) 70 P & CR 487, *R (on the application of Alfred McAlpine Homes Ltd) v Staffordshire County Council* [2002] EWHC 76 (Admin), [2002] 2 PLR 1, *R (on the application of Laing Homes Ltd) v Buckinghamshire CC* [2004] 1 P & CR 573 and *R (on the application of Cheltenham Builders Ltd) v South Gloucestershire DC* [2004] JPL 975). The only town or village green registration case previous to the present case that came before the court for a ruling before any decision had been taken by the registration authority that I have been able to discover is *Caerphilly County BC v Gwinnutt* (16 January 2002, unreported), a case in 2002 decided by Judge Moseley QC. The applicant borough council was the registration authority but had an interest in the land in question being developed as an industrial estate. The council took the view, very understandably, that this interest made it inappropriate for it to discharge the quasi-judicial function of deciding whether to accede to the application to register the land as a town or village green. So it made an application asking the court to determine the issue as to registration. Judge Moseley commented in his judgment that the procedure adopted had 'received the implicit indorsement' of this House in *Hampshire CC v Milburn* [1990] 2 All ER 257, [1991] 1 AC 325, but he was plainly puzzled about the legitimacy of asking the court to decide an issue that the applicant council had a statutory duty to decide. He said this (at para 8):

'In those circumstances what is the function of the court? In my judgment it can (1) determine any issue of law or construction submitted to it. Its determination on that issue must necessarily be final because there is only one correct answer to any such question, being the answer which the court provides and (2) provide guidance to the council as registration authority on the basis of the facts presented to it for its consideration. That guidance however in my view cannot possibly be final because after judgment the council may take into account other information available to it when it finally disposes of the application.'

[95] It seems to me likely that the county council's procedure in the present case, asking for various rulings on points of law and for guidance as to the approach it should take to some of the facts, was borrowed from the cited passage from Judge Moseley's judgment. Be that as it may, I do not think *Caerphilly County BC v Gwinnutt*, where the council had, in effect, recused themselves and had no alternative but to ask the court to decide the registration issue, should be regarded as a precedent of general application.

[96] Lightman J in the present case, referring to the procedure the county council had adopted, drew comfort, as Judge Moseley had done, from *Hampshire CC v Milburn*. In *Hampshire CC v Milburn* the owner of two parcels of land which, with other land, had been registered as common land, had applied for the land to be removed from the register. The issue was whether certain conveyancing transactions had had the result in law that the two parcels had ceased to be common land. The county council, as registration authority, asked the court to determine whether they should accede to the deregistration application. Millett J, at first instance, made a declaration that they should. In a leap-frog appeal this House allowed the appeal and held that they should not. There was no attention paid, either in the arguments of counsel or in the opinion delivered by Lord Templeman, concurred in by the other members of the appellate committee, to the propriety of the procedure that had been adopted. Nor, in my opinion, need there have been, for the sole issue in the case was the legal effect of the conveyancing transactions which were said to have deprived the parcels of land of their character as common land.

[97] I would accept that if there is an issue of law that needs to be decided before a decision can be made on a registration, or deregistration, application, the registration authority can refer the issue of law to the court for a ruling. And the court may, if in its discretion it thinks it right to do so, make a declaration accordingly. But the propriety of a registration authority asking the court to give a ruling on an issue of law in which it has no interest as registration authority or in any commercial respect and that does not need to be decided in order for a decision to be reached on a pending registration, or deregistration, application seems to me to be highly dubious. Each of the first five of the declaratory rulings sought by the county council in the present case raises an issue of substantive law. The propriety of the county council asking the court to give these rulings depends, in my opinion, on the rulings being necessary for a decision to be taken by the county council on Miss Robinson's registration application. The rulings sought by paras (i) and (ii) cannot, in my opinion, pass this test. (At the end of [35], above, Lord Hoffmann has explained the circumstances in which those rulings came to be added to the county council's original list.)

[98] The criteria for registration of land as a class (c) town or village green, as set out in the 1965 Act in its original form and as amended, direct attention to the

user of the land. The criteria do not require any investigation into what rights of user the inhabitants of the relevant neighbourhood or locality will have after registration. There is no present issue regarding the post-registration rights and such future issue as may arise, if and when registration takes place, will be an issue between the relevant inhabitants, of whom Miss Robinson will be one, and the city council. The county council would not be a necessary party to litigation instituted to resolve the issue.

[99] The same point applies, even more strongly, to the ruling sought by para (ii). Whether the Victorian statutes, to which I have already referred, apply to a class (c) town or village green has no conceivable relevance to the registration issue. It was, in my respectful opinion, impermissible for the county council to ask the court to give what is, in effect, an advisory opinion on an issue that has not yet arisen and, if and when it does arise, will not concern the county council in its registration authority role or in any other capacity.

[100] The rulings sought in paras (iii), (iv) and (v), on the other hand, do relate to issues of law that can be represented as necessary to be resolved on Miss Robinson's registration application.

[101] Paragraphs (vi), (vii) and (viii) relate to procedural issues that have arisen and that the county council, as registration authority, needs to deal with before reaching a decision on the registration application.

[102] As to paras (ix) and (x), which seek the court's guidance as to how the county council should deal with certain factual matters, it seems to me quite inappropriate for the county council to seek, or for the court to give, 'guidance' of this sort. The county council, as registration authority, must make up its mind how to deal with the facts thrown up by Mr Chapman's report. They have a quasi-judicial role under the 1965 Act and must discharge it to the best of their ability. Trustees, if they do not know what to do, can ask the court to tell them or, alternatively, they can surrender their discretion to the court and ask the court to exercise it for them. The county council's procedure in the present case in seeking the paras (ix) and (x) guidance, and Lightman J's response, seem to me, if I may respectfully say so, to be assimilating the county council's role as registration authority to that of trustees. I would, for my part, deprecate this.

[103] For the reasons I have endeavoured to explain Lightman J should, in my opinion, have declined to entertain the county council's requests made in paras (i), (ii), (ix) and (x) and, for the same reasons, the Court of Appeal should, in my opinion, have set aside the declaratory relief granted by the judge under these paragraphs. What should your Lordships now do? My noble and learned friend Lord Hoffmann has said (at [45], above) that because the city council want to build houses on the Trap Grounds, or to sell the land for housing development purposes, they (the city council) have 'a real and immediate interest' in obtaining answers to the questions raised in paras (i) and (ii), namely, whether registration of the Trap Grounds as a class (c) town or village green would create rights to enable the local inhabitants to use the land for lawful sports and pastimes and would subject the land to the various prohibitions imposed by the Victorian statutes on town and village greens. My noble and learned friend has concluded that in these circumstances it would be a proper exercise of the House's discretion to entertain the request for rulings under paras (i) and (ii). Moreover Lightman J at first instance ([2004] QB 253, [2004] 2 WLR 1291) and Carnwath LJ in the Court of Appeal [2005] 3 All ER 961, [2006] Ch 43) have supported their respective rulings with careful argument and the correctness of them has been debated before your Lordships. My Lords, there seems to me, if I may respectfully say so,

a good deal of force in the view that in these circumstances the House should give answers to the questions raised by these two paragraphs. But, having regard to the cogent arguments put forward by my noble and learned friend Baroness Hale of Richmond, whose opinion I have had the advantage of reading in draft, and having regard also to the opinion of this House expressed by Lord Diplock in *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 100, [1978] AC 435 at 501 (cited at [93], above), the answers should be limited to those that are strictly necessary and that are not in any way dependent on facts not yet known or not in evidence. On that footing I must now deal with the ten paragraphs of relief sought under the county council's re-amended Pt 8 claim form.

THE TEN ISSUES

[104] *Issue (i).* Paragraph (i) asks whether the 'relevant inhabitants had rights to indulge in lawful sports and pastimes on land which had become a class c town or village green'. The point of this question is that it has been contended that a class (c) registration simply settles the status of the land (see s 10 of the 1965 Act) and that the local inhabitants do not thereby obtain any rights of recreation over the land. The obtaining of these rights, it was contended, was intended by Parliament when enacting the 1965 Act to await further legislation which would confer the requisite rights, legislation that is still being awaited. If these contentions are right, the registration of the Trap Grounds as a class (c) town and village green would confer no rights on Miss Robinson and the other local inhabitants. The development of the Trap Grounds for housing purposes would interfere with no rights that Miss Robinson and the others can claim. My Lords I am in full agreement with what Lord Hoffmann has said about these contentions at [47]–[49], above. I agree that the effect of registration under the 1965 Act of a class (c) town or village green is to confer on the local inhabitants rights of recreation over the land and I agree that a declaration so stating could, in the particular circumstances of this litigation, properly be made, or upheld, by your Lordships.

[105] But I do not agree that registration can authorise local inhabitants to enjoy recreative user of the land that is different in kind from the 20 years' user that has satisfied the statutory criteria for registration or that would diminish the ability of the landowner to continue to use the land in the manner in which he has been able to use the land during that 20-year period. I do not accept that a tolerant landowner who has allowed the local inhabitants to use his grass field for an annual 5 November bonfire for upwards of 20 years must, after registration, suffer his field to be used throughout the year for all or any lawful sports and pastimes with the consequential loss of any meaningful residual use that he could continue to make of the field. I do not understand how anyone can suppose that that is what Parliament had in mind in 1965. And if registration of land as a class (c) town and village green were to bring about a diminution of the landowner's property rights, not simply by establishing the local inhabitants' right to go on doing what they had been doing for the last 20 years but by depriving the landowner of the right to go on doing what he had been doing for the last 20 years, there would, in my opinion, be a very real question as to the compatibility of such a legal regime with the landowner's rights under art 1 of the First Protocol to the convention.

[106] While, therefore, I agree with Lord Hoffmann that registration of the Trap Grounds as a class (c) town or village green would entitle the local inhabitants to recreative rights of user over it, those rights would, in my opinion,

be commensurate with the nature of the user that had led to that result and would not necessarily extend to the right to use the land for all or any lawful sports or pastimes. For instance, clay pigeon shooting is a popular lawful sport or pastime. Would clay pigeon shooting be permissible on the Trap Grounds if registration took place? It presumably would be if clay pigeon shooting had taken place reasonably regularly over the 20-year period. Or what about archery contests? Those walking their dogs would have to be warned to keep out of the way. In my opinion any sort of declaration that went beyond the very limited form of declaration to which I have referred at the end of [104], above, would be a misuse of the discretionary power to give declaratory relief. It would not settle any current issue. If, after registration, some recreative activity were to take place on the land to which the city council or some local inhabitants objected, there would be an issue for decision and a declaration settling the issue could be made. These proceedings are not the proper occasion for settling issues that have not yet arisen.

[107] *Issue (ii).* Paragraph (ii) asks whether land which has become a class (c) town or village green falls within the scope of s 12 of the Inclosure Act 1857 and s 29 of the Commons Act 1876. The answer depends on which approach to construction of s 22(1) is right. If the approach I have advocated were to be accepted, the meaning of 'town or village green' in those Acts would be no different from the meaning of 'town or village green' in the 1965 Act. The only difference would be the additional, class (c), means by which land might become a town or village green. In that case a class (c) green would, in my opinion, fall within the scope of the two sections. But, since a majority of your Lordships favour the literal construction of s 22(1), land is capable of becoming registered as a town or village green notwithstanding that it is not land to which either of the two sections has been or would have been at any time applied eg arable land over which customary recreative rights are enjoyed or the rocks at Llanbadrig, Ynys Mon, to which local inhabitants moor their boats (see Lord Hoffmann's opinion at [39], above). An 'always speaking' approach to the construction of statutory provisions is only permissible if there can be a reasonable certainty that the legislative intendment underlying the statutory provision would envelop the new situation that had developed (see *Victor Chandler International Ltd v Customs and Excise Comrs* [2000] 2 All ER 315 at 323–324, [2000] 1 WLR 1296 at 1304 (para 32)). How can that certainty be present in relation to class (c) if the literal approach to construction is adopted? An arable field may become a town or village green and ploughing of the field by the landowner would then be barred by s 29 of the 1876 Act. The manuring of the field, too, would be barred by s 12 of the 1857 Act. The notion that this would have [been] intended by the legislature cannot, I respectfully suggest, be maintained.

[108] As to the propriety of your Lordships making a declaration on this issue, a declaration that the Trap Grounds would, on registration, become subject to the two Victorian statutes will not settle the question whether the city council's housing development intentions for the land will be frustrated. That question will not be answered until the scope of a local authority's statutory powers to appropriate open space land to housing purposes and its ability then to sell the land for housing development free from town or village green restraints has been judicially determined. That being so, I can see no good reason why the House should, in relation to issue (ii), depart from the practice indorsed and recommended by Lord Diplock in *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 100, [1978] AC 435 at 501.

[109] *Issue (iii).* Paragraph (iii) seeks a ruling as to the meaning to be attributed to the words 'continue to do so' in s 22 of the 1965 Act, as amended. This issue is addressed by Lord Hoffmann at [44], above with which, with one slight qualification, I am in complete agreement. I agree that the amendment introduced by the 2000 Act does not require that the user of the land for sports and pastimes continues until registration and, I agree that, prima facie, the user must continue up to the date when the registration application is made. If, however, 20 years' appropriate user having passed and while the user is still continuing the landowner bars the user, a more or less immediate application to register the land in response to the landowner's action would, in my opinion, suffice. But if the barring of the user were not responded to reasonably promptly, the continuance criterion introduced by the 2000 Act would not be able to be satisfied. My reason for this slight qualification is that an applicant for registration is quite likely, before making the application, to attempt to stir up neighbourhood support or to obtain suitable evidence from local inhabitants. The landowner is quite likely to hear of this and a race to see who could act first, the landowner in barring the use of the land or the applicant in making the application, would not be satisfactory. The requirement of continuance needs, I think, to be approached in a commonsense fashion. Has the previous public user fallen into disuse is, in my opinion, the right question to be asked.

[110] *Issues (iv) and (v).* I agree with Lord Hoffmann for the reasons he has given at [43], above that the amended s 22 applies to all registration applications made after the 2000 Act came into effect and that the land in question becomes a town or village green on registration.

[111] *Issues (vi), (vii) and (viii).* These questions are dealt with by Lord Hoffmann at [59]–[61], above and I am in entire agreement with his answers to the questions raised and his reasons for them. I would like, particularly, to emphasise my agreement that a registration authority should be guided by the general principle of being fair to those whose interests may be affected by its decision.

[112] And, finally, there is the guidance sought by issues (ix) and (x) in relation to the factual matters referred to. I would, for my part, for the reasons I have given, prefer to express no view at all on these factual matters. It is for the county council to weigh the evidence, consider whether it satisfies the criteria for registration of the Trap Grounds as a town or village green prescribed by s 22(1) of the 1965 Act, correctly construed, and come to a decision accordingly. If the city council or Miss Robinson wish to challenge the decision on any points of law, they may then do so.

DISPOSAL

[113] For the reasons I have given: (1) On issue (i) I would allow Miss Robinson's appeal against the ruling of the Court of Appeal but set aside the declaration of Lightman J and make the limited declaration referred to at [104], above. (2) On issue (ii) I would allow the city council's appeal against the ruling of Lightman J, concurred in by the Court of Appeal, and decline to answer the question posed. (3) On issue (iii) I would allow Miss Robinson's appeal against the ruling of the Court of Appeal and restore Lightman J's declaration but with the addition to the declaration of the words:

> 'and so that if an application is made or legal proceedings are commenced reasonably promptly after and in response to action taken by the landowner

or others to obstruct the continued indulgence as of right by the relevant inhabitants in lawful sports and pastimes, the said indulgence shall be taken to have continued to the date of the application or the commencement of the legal proceedings.'

(4) On issues (iv) and (v) I would dismiss Miss Robinson's appeal against the Court of Appeal's ruling (allowing the city council's appeal against Lightman J's ruling on these issues). (5) On issues (vi), (vii) and (viii) I would dismiss the county council's appeal. (6) I would not answer issues (ix) and (x) and would set aside the 'guidance' declarations made by Lightman J.

LORD RODGER OF EARLSFERRY.

[114] My Lords, I have had the advantage of considering the speeches of my noble and learned friends in draft. For the reasons Lord Hoffmann gives, I would dispose of the appeal as he proposes. I also have sympathy with the reservations about the nature of the relief sought which my noble and learned friends, Lord Scott of Foscote and Baroness Hale of Richmond, have expressed, but, like Lord Hoffmann, I would answer questions (i) and (ii). I simply wish to add a short comment on one particular aspect of the case.

[115] Before doing so, I should confess that, like Lord Walker of Gestingthorpe, my feeling at the end of the hearing of the appeal was that it would be desirable, if reasonably possible, to interpret the definition of 'town or village green' in s 22 of the Commons Registration Act 1965 in a manner that would confine its application in the case of village greens to areas which were, more recognisably, the kinds of area which readily come to mind when the expression is used—in other words to 'traditional' village greens. But the terms of the definition in s 22 present a formidable obstacle to such an approach, an obstacle which it would be legitimate to surmount only if the House could be satisfied that it was necessary to do so in order to give effect to the intention of Parliament. Despite Lord Scott's arguments, having studied the speech of Lord Hoffmann, I cannot actually be sure that Parliament intended the provision to have this narrower scope. Moreover, the potentially wide implications of the definition became apparent, at the latest, in the decision of the House in *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385, [2000] 1 AC 335 in June 1999. It is striking that, when subsequently amending the definition by enacting s 98 of the Countryside and Rights of Way Act 2000, Parliament did not use the opportunity to restrict its scope in this way. At present there is a Bill before Parliament dealing with some of the same subject matter. Again, it contains no measure to narrow the definition in s 22 so as to limit it to more 'traditional' village greens. But if, having taken account of your Lordships' speeches in the present appeal, Parliament wished to change the definition in this way, a suitable amendment could doubtless be introduced.

[116] My Lords, for the reasons given by Lord Hoffmann, I am satisfied that an area does not become a village green unless and until it is registered. It follows that I would reject Mr Edwards's submission that, before s 22 was amended by s 98, an area of ground on which the inhabitants of a locality had indulged in sports and pastimes as of right for 20 years or more had ipso facto become a village green. The position was, rather, that once that period had elapsed it was open to an interested party to apply to have the register of town and village greens amended to include an entry for the area in question. The applicant

would not have needed to show that the inhabitants were continuing to indulge in the sports and pastimes when the application was made.

[117] Section 98 came into force on 30 January 2001, two months after the 2000 Act received the royal assent (see s 103(2)). As the House now holds, under the amended version of s 22, anyone applying to have the register amended had to show either (a) that the inhabitants continued to indulge in the sports and pastimes at the date of his application or (b) that they had ceased to do so for not more than a prescribed period. Since no period has ever been prescribed for the purposes of para (b), the operative paragraph is (a).

[118] Miss Robinson lodged her application after 30 January 2001 but on the basis that the area had become a village green in 1990. Her counsel, Mr Edwards, contended, however, that the amendment to s 22 did not apply 'retrospectively' and so, where the period of 20 years had been completed before s 22 was amended, an applicant still did not need to prove that the inhabitants were continuing to indulge in the sports and pastimes at the date of the application. An applicant such as Miss Robinson could rely on s 22 in its unamended form.

[119] Although the issue was presented as one of the retrospective effect of s 98 of the 2000 Act, that is to ignore its true nature. I refer to, without repeating, the lengthy observations on this topic in my speech in *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816. Put shortly, there is nothing in the 2000 Act to rebut the powerful presumption that s 98 ought not to be understood as affecting the substantive law in relation to events taking place before it came into force (see *Wainwright v Home Office* [2001] EWCA Civ 2081 at [27], [2003] 3 All ER 943 at [27], [2002] QB 1334 per Lord Woolf CJ). In any event, despite the language he used, that was not really the point Mr Edwards was making. The true question raised by his submission is whether s 98 applied generally or applied only to situations which arose after it came into force, with the result that the unamended version of s 22 continued to apply to other cases. If s 98 applied generally, then the amended version of s 22 applied, for the future, to situations which were already underway when it came into force.

[120] In effect, Mr Edwards was arguing that s 98 did not apply generally but applied only to situations where the relevant activities of the inhabitants occurred after 30 January 2001. Accordingly, for an indefinite period of decades or more into the future, in making an application based on activities before that date, an interested party could rely on the unamended version of s 22. Down all those decades, as he accepted, two different systems would operate in parallel, one which required the applicant to prove the continuation of the sports and pastimes and one which did not. I would reject the submission.

[121] First, there is nothing in s 98 or in any other provision of the 2000 Act to limit its application in this way. Moreover, Mr Edwards's interpretation would mean that Parliament had chosen to postpone the operation of the amendment indefinitely in what might well be a significant number of cases. He did not advance, and I am unable to see, any reason why Parliament would have intended that the new policy which it was enacting should not apply to all applications made after s 98 came into force. Indeed, the administrative and other complications of operating two different systems afford powerful reasons for supposing that Parliament would have intended that there should be only one.

[122] The position might have been different if it could be said that the amendment to s 22 prejudicially affected a vested right of the applicant. But, by the time the amendment to s 22 took effect, the applicant had not applied to have

the register amended. Like others in a similar position, she simply had a right to apply which she had not yet exercised. And, since the purpose of legislation is to alter the existing legal situation, there is no presumption that it will not alter rights which individuals have, but have not exercised. Cf *Abbott v Minister for Lands* [1895] AC 425 at 431 per Lord Herschell LC. On the contrary, like everyone else, those interested in having the register of village greens amended ran the risk that sooner or later Parliament might intervene to change the law regarding such applications. That, and nothing more, is what happened when Parliament enacted s 98 and amended s 22: applicants found that they now had to meet an additional requirement before they could have the register amended. No question of vested rights arises.

[123] I am accordingly satisfied that s 98 applied generally and that the amended version of s 22 applied to situations which were already underway when s 98 came into force, including situations where an application was made after that date on the basis of the inhabitants' activities before that date. Therefore the amended version of s 22 applied to Miss Robinson's application. It is unnecessary to express any view on the rather different issue of applications which had been made but which had not been determined when s 98 came into force.

LORD WALKER OF GESTINGTHORPE.

[124] My Lords, I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I am in full agreement with his opinion and I would dispose of the appeal as he proposes. I add a few words of my own on the question of 'what is a village green?' discussed at [37]–[40], above of Lord Hoffmann's opinion.

[125] In *R (on the application of Beresford) v Sunderland City Council* [2003] UKHL 60 at [92], [2004] 1 All ER 160 at [92], [2004] 1 AC 889, I expressed some unease at a result which appeared to stretch the concept of a town or village green close to the limit of what Parliament is likely to have intended. I have felt a similar, but rather stronger, sense of unease about the prospect of the recognition as a town or village green of all or part of the land to which Miss Robinson's application relates—an over-grown, rubble-strewn, semi-submerged area, sandwiched between the canal and the railway in north-west Oxford.

[126] This intuitive feeling gets some support from legal principle in that a town or village green has traditionally been classified as a sub-set of a larger class, that is land over which inhabitants of a neighbourhood enjoy customary rights, sometimes recreational, sometimes non-recreational (as in *Mercer v Denne* [1904] 2 Ch 534, [1904–7] All ER Rep 71 (Farwell J); [1905] 2 Ch 538 (Court of Appeal)).

[127] In *Lancashire v Hunt* (1894) 10 TLR 310 (Wright J); (1894) 11 TLR 49 (Court of Appeal), the case about 'a cricket match or fete' held on Stockbridge Common Down, counsel argued ((1894) 10 TLR 310 at 311), not that the down was a village green, but that there was a right to use the down '*in the same way as* villagers had a right to enjoy and use a village green' (my emphasis) and Wright J is reported (at 312) as having accepted that submission. The Court of Appeal dismissed the appeal without comment on this aspect of the case. Other customary rights hover on the verge of recreation, such as a right for parishioners (but not the general public) to walk across parkland to attend the parish church (*Brocklebank v Thompson* [1903] 2 Ch 344). The construction of the statute proposed by Lord Hoffmann would, as he recognises (at [49], above), put all customary recreational rights into a single one-size-fits-all category.

[128] Nevertheless the cumulative force of the eight points set out at [39], above of Lord Hoffmann's opinion appears to me to be irresistible. In enacting the Commons Registration Act 1965 Parliament deliberately chose not to adopt the narrower definition proposed by the Royal Commission on Common Land 1955–1958. In enacting the Countryside and Rights of Way Act 2000 Parliament (while amending the statutory definition in other respects) did not consider it appropriate to narrow its scope by reference to the area or character of the land in question. Parliament now has the opportunity to re-visit this topic again if it thinks fit. It is not for your Lordships' House to intervene in the legislative process.

BARONESS HALE OF RICHMOND.

[129] My Lords, town and village greens are not just picturesque reminders of a by-gone age. They are a very present amenity to the communities they serve. The village green in Scorton, in the North Riding of Yorkshire, is a perfect example. Most of it is contained within a three-foot high old stone wall and raised to the level of the top of that wall, thus giving it a character all its own. It is surrounded by the old village houses, including the former vicarage, the two remaining pubs, the shop, the village institute, and the eighteenth century building which was until recently the old grammar school. It was and is the centre of the community. Both villagers and grammar school boys played cricket there in the summer; archery contests were held there; a bonfire was built for Guy Fawkes' Day; the fair and other events of Scorton feast were held there every August; and all the villagers could walk and play games upon it. It is just the sort of place that the Royal Commission on Common Land 1955–1958 had in mind when it proposed the definition of a town or village green quoted by my noble and learned friend, Lord Hoffmann, at [14], above.

[130] But how much should our answers to the examination paper which we have been set by the parties be influenced by that image? That has emerged as an important issue between us. So too has the propriety of the examination paper itself.

[131] I confess that it did not occur to me during the hearing (to which I came rather later than your Lordships); but having now had the benefit of reading in draft the opinion of my noble and learned friend Lord Scott of Foscote, I share his misgivings about the propriety of our being asked, still less of our answering, some of the questions on the examination paper. These are private law proceedings, not an application for judicial review in which a declaration is sought as to the legality of the actions of a public body. The declaratory jurisdiction has been expanded considerably in recent decades, as we from the Family Division are very well aware (see the judgment of Sir Thomas Bingham MR in *Re S (hospital patient: court's jurisdiction)* [1995] 3 All ER 290, [1996] Fam 1). Nevertheless, it remains a discretionary jurisdiction to make 'binding declarations of right'. As Lord Diplock famously said in *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 100, [1978] AC 435 at 501:

> 'But the jurisdiction of the court is not to declare the law generally or to give advisory opinions: it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.'

Since then, but not without some misgivings, the jurisdiction has been extended to enable the courts to declare whether or not a proposed course of action,

such as the sterilisation of, or the withdrawal of artificial nutrition and hydration from, a person who lacks the capacity to decide it for himself will be lawful. In the leading case of *F v West Berkshire Health Authority* [1989] 2 All ER 545 at 570–571, sub nom *Re F (mental patient: sterilisation)* [1990] 2 AC 1 at 82, Lord Goff of Chieveley, after quoting from the speech of Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448, [1921] All ER Rep 329 at 332, said this:

> '. . . indeed there is authority in the English cases that a declaration will not be granted where the question under consideration is not a real question, nor where the person seeking the declaration has no real interest in it, nor where the declaration is sought without proper argument . . . In the present case, however, none of these objections exists. Here the declaration sought does indeed raise a real question; it is far from being hypothetical or academic. The plaintiff has a proper interest in the outcome, so that it can properly be said that she is seeking relief . . . The matter has been fully argued in court . . . I wish to add that no question arises in the present case regarding future rights: the declaration asked relates to the plaintiff's position as matters stand at present.'

[132] These proceedings were launched by the registration authority because of a difference of opinion between the inspector they had appointed to conduct an inquiry into Miss Robinson's application to register the Trap Grounds as a town green and their own legal adviser. Could Miss Robinson be allowed to amend her application, either to claim that the land had become a town green on a different date from that first stated or to reduce the area of land to be registered? Even if she could not amend her application, could the registration authority nevertheless adopt a different date or register a different area?

[133] On one view, the better course would have been for the registration authority to take a decision, following whichever advice seemed best to them. Whichever party was aggrieved, Miss Robinson or the Oxford City Council, would be left to apply for judicial review. Leave would have been required and the issues would have been confined to those raised by the authority's decision. But the authority clearly did have an immediate interest in knowing what their powers were. There was nothing hypothetical or academic about the issues. There were opposing parties who also took different views on these matters, so that they could be properly argued. This could therefore be seen as a proper case for seeking an advisory opinion from the court, tied specifically to the issues relating to the powers of the registration authority in the circumstances which had arisen.

[134] But this does not apply to issues (i) and (ii). Both are entirely hypothetical. They are pure questions of law, not related to any existing set of facts. Issue (i) is asking the court 'whether the relevant inhabitants have rights to indulge in lawful sports and pastimes on land which has become a [new] green'. It is not even asking the more precise question: if the Trap Grounds are registered as a town green, will Miss Robinson and other local inhabitants be entitled to continue to walk their dogs and/or conduct other lawful sports and pastimes and/or clear some land so that they can play football and other games (which would, I imagine, horrify Miss Robinson more than the city council) without let or hindrance from the city council? Issue (ii) is asking whether land which has become a new green falls within the scope of s 12 of the Inclosure Act 1857 and s 29 of the Commons Act 1876. It is not even asking the more precise question:

if the whole of the Trap Grounds (apart from the reed beds) are registered as a town green, will it be a criminal offence to construct an access route to the new school?

[135] The county council as registration authority have no interest in the answers to those questions (although as education authority they would have an interest in a more precisely formulated version of the second). Miss Robinson and Oxford City Council do have an interest, in that their legal positions may in future be affected by the answers. The government and the public at large have an interest, in the sense that they might have preferences, for any number of policy and other reasons, for the answers to be one way or another. But the court has a discretion whether or not to make a declaration. I question whether any of these are good enough reasons for a court to make general declarations as to the future legal position, in advance of any actual set of facts raising a precise question upon which the court may make a 'binding declaration of right'.

[136] Unlike academic textbook writers and examiners, the courts do not decide legal questions in a vacuum. They know that, while hard cases may indeed make bad law, the particular facts of the case before them do cast a particularly bright light upon the legal issues and may throw up important questions which no rehearsal of the legal arguments in the abstract can ever do. Why, after all, do the best legal examination papers require candidates to answer problems based upon a precise, though imaginary set of facts? Because that is the way in which our case law has developed over the centuries. It is only legislators who make legal rulings in general and without reference to a specific set of facts. Yet this is exactly what our legislators have so far declined to do on questions (i) and (ii). They have an immediate opportunity, in the Commons Bill currently before Parliament, to fill in those two important gaps. Both raise important policy issues of a kind which courts should not have to resolve by reference to legal rather than policy arguments. Above all, if we give an answer to these questions, it will be taken as binding—not only on the parties before us now but on all future parties before any future court, including a criminal court, because the way in which we state the law will be binding upon the judges who decide those cases.

[137] My Lords, as an academic lawyer and examiner of students, I would see nothing wrong in essaying an answer to those questions, secure in the knowledge that if I turned out to have overlooked some important consideration which emerged in a later case, a court could and would ignore my views. As a judge, I see every objection to answering those questions. The fact that all parties and all courts have so far proceeded on the basis that we both can and should answer them does not to my mind outweigh the formidable objections to our doing so. Their efforts will be more than rewarded by our answers to the other questions on the examination paper. I would therefore set aside 'rulings' (i) and (ii) made by the Court of Appeal in the judgment of Carnwath LJ ([2005] EWCA Civ 175 at [117], [2005] 3 All ER 961 at [117], [2006] Ch 43) and declarations (i) and (ii) made by Lightman J ([2004] EWHC 12 (Ch), [2004] Ch 253, [2004] 2 WLR 1291) and put nothing in their place.

[138] The other declarations and 'rulings' are different. For what it is worth, I would have agreed with Lightman J, supported by counsel for Miss Robinson and the Secretary of State for the Environment, Food and Rural Affairs, on the effect of events occurring after 31 July 1970 and before 31 January 2001. As I understand that your Lordships take a different view, I shall state my reasons briefly.

[139] After 31 July 1970, by virtue of s 1(2)(a) of the Commons Registration Act 1965, 'no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered'. At that date, the definition of a 'town or village green' in s 22(1) of the 1965 Act contained three categories: (a) land 'which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality'; (b) land 'on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes'; and (c) land 'on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years'.

[140] Clearly, once the axe had fallen in 1970, there could be no more class (b) greens. By definition, such customary rights must have existed since time whereof the memory of man knoweth not the contrary, and so the land must have been registrable then. Whether or not the Trap Grounds had previously been part of Port Meadow became totally irrelevant. But there could be new class (a) and (c) greens. Indeed, land which had previously been a class (b) green but had been left off the register might subsequently become a green once more by virtue of statute or, more probably, 20 years' continuing exercise of what had previously been the local inhabitants' customary rights (as has happened with the ancient town green in Richmond, North Yorkshire). Section 98 of the Countryside and Rights of Way Act 2000 altered the definition of a class (c) green in three ways: the use had to be by a 'significant number' of local inhabitants; but they could be inhabitants of any locality 'or [a] neighbourhood within a locality'; and, relevantly for present purposes, they had to 'continue' to use the land in that way. That amendment came into force after the expiry of two months from royal assent on 30 November 2000, but there were no transitional provisions governing the earlier position.

[141] Section 13 of the 1965 Act requires that regulations are made to provide for the amendment of registers where '(b) any land *becomes* common land or a town or village green . . .' (my emphasis). It could have said 'where (b) any land becomes registrable as a village green' but it does not. Elsewhere in s 13 itself there is a reference to 'matters capable of being registered under this Act'. When different expressions are used in the same statute, let alone in the same section, it is usually assumed that they have different meanings. This is reinforced by s 1, which first envisages in s 1(1) that land already '*is* common land or a town or village green' (my emphasis) and requires that it be registered, and then provides in s 1(2)(a) for the effect of failure to register any 'land capable of being registered'. Obviously, land could (before the axe fell) *be* a town or village green without being registered as such. I see no reason why land could not later *become* a village green without being registered as such. Section 10 provides that the register is conclusive evidence of the matters registered. It does not say anything about matters which are not registered. Section 1(2)(a) does that. But s 1(2)(a) cannot apply to land which became a green after the axe fell: otherwise there could be no new greens at all. (Some might have considered this a good thing, because then the register would be conclusive for all land and all time, which land lawyers and conveyancers like; but we must beware of translating the principles of other registration schemes relating to land into this one.) Parliament quite clearly envisaged the creation of new greens, however tiresome they may have turned out to be. There is no other provision in the 1965 Act catering for the effect of non-registration.

[142] If that is right, then land might become a new green at any time after the axe fell. Twenty years after the axe expired on 31 July 1990, so it is not surprising

that 1 August 1990 was the date claimed in the application. Nothing in the 2000 Act provided that land which had already become a new green should cease to be such when the new definition came into force; nothing in the 2000 Act provided that land which had already become registrable as a new green should cease to be so registrable when the new definition came into force. Left to myself, therefore, I would have concluded that there is a short period of time, from 1990 to 2001, when land might become a new green and remain registrable as such even though the required use was not still continuing.

[143] Be that as it may, I entirely agree, for the reasons given by my noble and learned friend Lord Hoffmann, that the use need continue no longer than the date of the application for registration as a green. I would have liked to agree that it need continue no longer than when it is first put in issue, either by the landowner in some way challenging the inhabitants' right so to use the land, or by the inhabitants taking some steps to assert their right. But the Act is all about registration. Its main provisions deal with the requirement to register, the process of registration, the effect of registration, and in the case of old greens and commons, the effect of non-registration. In that context, it is difficult to read the words 'and continuing' as continuing until some date entirely divorced from the registration process. This is reinforced by the express power (in s 22(1A)(b)) to make provision for land where the use has ceased some time previously. If, as I understand counsel's argument, the Secretary of State would prefer an earlier date than the date of application, he has only to provide accordingly.

[144] I also entirely agree that the registration authority may allow amendments or deal with an application in accordance with the evidence before them, provided always that they have given every person who might wish to object (or who otherwise has a legitimate interest in the process) a fair opportunity to consider what is proposed and make representations about it.

[145] The final issue was not on the examination paper at all, but it is relevant to the guidance requested on the actual facts of this case—in particular to whether scrubland, 75% of which is inaccessible to the local inhabitants who might wish to use it for lawful sports and pastimes, can possibly qualify as a town or village green. Indeed, it seems that it is that very inaccessibility, and the habitat it provides for wildlife, which makes Miss Robinson so anxious to preserve the Trap Grounds in their present state. Is there some essence of the very expression 'town or village green' which would preclude or at least militate strongly against the registration of such land as a green? My Lords, we have not been asked this question and any view which we express upon it would, I believe, be obiter dictum. I myself have considerable sympathy for the views expressed by my noble and learned friend, Lord Scott of Foscote. The very powerful points made by my noble and learned friend Lord Hoffmann at [39], above depend to a large extent on events since the 1965 Act was passed rather than on the meaning of the phrase at the time when it was enacted. I believe that it would be much better for us to leave this issue to be properly fought out on another day, whether in answer to whatever decision Oxfordshire County Council make in relation to the Trap Grounds or elsewhere.

[146] There are major policy considerations underlying many of the issues raised by this and similar cases: between preserving local amenities of whatever kind for the benefit of the local people and permitting the appropriate development of land, in particular to meet the needs of local people for somewhere to live. Consideration needs to be given to how and in what circumstances land can cease to be a town or village green (as also envisaged in

s 13 of the 1965 Act) as well as to how and in what circumstances it can become one. Parliament may not choose to deal with these on this occasion but sooner or later it may have to do so.

[147] In the meantime, I would make no ruling or declaration on issues (i) and (ii), make the declaration proposed by my noble and learned friend Lord Hoffmann on issue (iii), restore the declarations made by Lightman J on issues (iv) and (v), and agree with the rulings of the Court of Appeal on issues (vi), (vii) and (viii). I too would not answer questions (ix) and (x) even to the extent indicated by my noble and learned friend, Lord Hoffmann.

Order accordingly.

Dilys Tausz Barrister.

R v Saik

[2006] UKHL 18

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOPE OF CRAIGHEAD, BARONESS HALE OF RICHMOND AND LORD BROWN OF EATON-UNDER-HEYWOOD

22, 23 FEBRUARY, 3 MAY 2006

Criminal law – Conspiracy – Mens rea – Money laundering – Proceeds of criminal conduct – Intention or knowledge that fact or circumstance necessary for commission of offence shall or will exist – Whether suspicion that money representing proceeds of criminal conduct sufficient – Criminal Law Act 1977, s 1(2) – Criminal Justice Act 1988, s 93C(2).

Under s 93C(2)[a] of the Criminal Justice Act 1988 a person was guilty of an offence if, knowing or having reasonable grounds to suspect that any property was, or in whole or in part directly or indirectly represented, another person's proceeds of criminal conduct, he (a) concealed or disguised that property; or (b) converted or transferred that property or removed it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for an offence to which the confiscation order regime applied. The defendant, who operated a bureau de change, was charged with conspiracy to commit an offence under s 93C(2) contrary to s 1(1)[b] of the Criminal Law Act 1977. That section provided: '(1) . . . if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions . . . (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement . . . he is guilty of conspiracy to commit the offence or offences in question. (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.' The prosecution case was that the defendant had converted sterling provided by other defendants in the form of cash into foreign currency, and that the cash was or represented the proceeds of drug trafficking or other criminal activity. The essence of the particulars of the offence was that the appellant and others had 'conspired together . . . to convert . . . banknotes, for the purpose of assisting another to avoid prosecution for . . . a criminal offence . . . knowing or having reasonable grounds to suspect that such property . . . represented another person's proceeds of . . . criminal conduct'. The defendant pleaded guilty 'on the basis of laundering money which he suspected was the proceeds of crime'. He appealed against conviction unsuccessfully and further appealed to the House of Lords.

a Section 93C, so far as material, is set out at [22], below

b Section 1, so far as material, is set out at [3], [6], below

Held – (1) (Baroness Hale dissenting) A defendant could not be convicted of a statutory conspiracy to contravene s 93C(2) of the 1988 Act if he entered into an agreement to convert property in respect of which he had reasonable grounds to suspect and did in fact suspect but did not actually know was the proceeds of crime. Section 1(2) of the 1977 Act applied whenever the existence of a particular fact or circumstance was the ingredient of an offence. Thus, even where liability for an offence could be incurred without knowledge on the part of the person committing it of a particular fact or circumstance, s 1(2) required that to be guilty of the offence of conspiracy those conspiring had to 'intend or know' that that fact or circumstance 'shall or will' exist when the conspiracy was carried into effect. The criminal provenance of the property was a fact necessary for the commission of an offence under s 93C(2) so that the prosecution had to prove that the conspirator intended or knew that that fact would exist when the conspiracy was carried out. Where the property had not been identified when the conspiracy agreement was reached, the prosecution had to prove that the conspirator intended that the property would be the proceeds of criminal conduct. In the case of identified property the prosecution had to prove that the conspirator knew the property was the proceeds of criminal conduct. Suspicion was not sufficient in respect of a fact to which s 1(2) of the 1977 Act applied. Accordingly, the appeal would be allowed (see [19]–[21], [23], [25], [26], [30], [37], [38], [68], [69], [80], [81], [102], [103], [122], [123], below).

R v Montila [2005] 1 All ER 113 applied.

Per curiam. The substantive offence under s 93C(2) of the 1988 Act requires that the accused actually suspects that the money was the proceeds of crime. Without that actual suspicion he could not act with the purpose required (see [37], [55], [102], [108], below).

Notes

For statutory conspiracy and for the mental element in conspiracy, see 11(1) *Halsbury's Laws* (4th edn) (2006 reissue) paras 67, 69, and for money laundering offences, see 11(2) *Halsbury's Laws* (4th edn) (2006 reissue) paras 789–796.

For the Criminal Law Act 1977, s 1, see 12(1) *Halsbury's Statutes* (4th edn) (2005 reissue) 704.

Section 93C of the Criminal Justice Act 1988 was repealed by the Proceeds of Crime Act 2002, ss 456, 457, Sch 11, paras 1, 17(1), (2)(a), Sch 12, with effect from 24 February 2003.

Cases referred to in opinions

Churchill v Walton [1967] 1 All ER 497, [1967] 2 AC 224, [1967] 2 WLR 682, HL.

Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] 1 All ER 142, [1942] AC 435, HL.

O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] 1 All ER 129, [1997] AC 286, [1997] 2 WLR 1, HL.

R v Ali [2005] EWCA Crim 87, [2006] QB 322, [2006] 2 WLR 316, CA.

R v Ardalan [1972] 2 All ER 257, [1972] 1 WLR 463, CA.

R v Griffiths (1974) 60 Cr App Rep 14, CA.

R v Harmer [2005] EWCA Crim 1, [2005] 2 Cr App Rep 23.

R v Jackson [1985] Crim LR 442, CA.

R v Kidd, R v Canavan, R v Shaw [1998] 1 All ER 42, [1998] 1 WLR 604, CA.

R v Montila [2004] UKHL 50, [2005] 1 All ER 113, [2004] 1 WLR 3141.
R v O'Hadhmaill [1996] Crim LR 509, CA.
R v Reed [1982] Crim LR 819, CA.
R v Sakavickas [2004] EWCA Crim 2686, [2005] 1 WLR 857.
R v Singh [2003] EWCA Crim 3712, [2003] All ER (D) 358 (Dec).

Cases also referred to in list of authorities

A-G's Ref (No 4 of 2003) [2004] EWCA Crim 1944, [2005] 1 WLR 1574.
Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA [1992] 4 All ER 161, [1993] 1 WLR 509n; *affd on other grounds* [1992] 4 All ER 279n, CA.
R v Anderson [1985] 2 All ER 961, [1986] AC 27, [1985] 3 WLR 268, HL.
R v El-Kurd [2001] Crim LR 234, CA.
R v G [2003] UKHL 50, [2003] 4 All ER 765, [2004] 1 AC 1034, [2003] 3 WLR 1060.
R v Hussain, R v Bhatti [2002] 2 Cr App Rep 363, CA.
R v Matthews, R v Alleyne [2003] 2 Cr App Rep 461, CA.
R v Rizvi [2003] EWCA Crim 3575.
R v Siracusa (1989) 90 Cr App Rep 340, CA.
R v woollin [1998] 4 All ER 103, [1999] 1 AC 82, [1998] 3 WLR 382, HL.
Roper v Taylor's Central Garages (Exeter) Ltd [1951] 2 TLR 284, DC.
Westminster City Council v Croyalgrange Ltd [1986] 2 All ER 353, [1986] 1 WLR 674, HL.

Appeal

The defendant Abdulrahman Saik appealed with leave of the House of Lords Appeal Committee given on 17 October 2005 from the decision of the Court of Appeal on 24 November 2004 ([2004] EWCA Crim 2936, [2004] All ER (D) 383 (Nov)) dismissing his appeal against his conviction for conspiracy contrary to s 1(1) of the Criminal Law Act 1977 on 18 October 2002 in the Crown Court at Kingston upon Thames. The Court of Appeal certified the points of law of general public importance set out at [46], below. The facts are set out in the opinions of Lord Nicholls of Birkenhead and Lord Hope of Craighead.

Ivan Krolick and *Nicola Shannon* (instructed by *Bishop & Light*, Hove) for the appellant.
Nigel Peters QC and *Duncan Penny* (instructed by the *Revenue and Customs Prosecutions Office*) for the Crown.

Their Lordships took time for consideration.

3 May 2006. The following judgments were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, this appeal raises questions about the ingredients of the statutory offence of conspiracy and their application in the circumstances of this case. Shorn of its complexities the context is a charge of conspiracy to launder money brought against the appellant, Mr Abdulrahman Saik. He operated a bureau de change in London, near Marble Arch. At his trial he pleaded guilty, subject to the qualification that he did not know the money was the proceeds of crime. He only suspected this was so. This qualified plea

was accepted. The issue before your Lordships is whether the offence to which the appellant pleaded guilty in this qualified way is an offence known to law. Reasonable grounds for suspicion are enough for the substantive offence of laundering money. But are they enough for a conspiracy to commit that offence?

[2] The mental ingredient in the statutory offence of conspiracy has given rise to difficulty. Some of the case law is confusing, and the academic commentators do not always speak with one voice. The best way to tackle this conundrum is to consider first the ingredients of criminal conspiracy, then apply this approach to a conspiracy to commit the substantive offence of laundering, and finally consider the complication introduced by the form of the plea entered by the appellant.

THE STATUTORY OFFENCE OF CRIMINAL CONSPIRACY

[3] The Criminal Law Act 1977 redefined conspiracy and put it on a statutory footing. The offence-creating provision is s 1(1). So far as material for present purposes s 1(1), as substituted by the Criminal Attempts Act 1981, provides:

> '. . . if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions . . . (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement . . . he is guilty of conspiracy to commit the offence or offences in question.'

The offence therefore lies in making an agreement. Implicitly, the subsection requires also that the parties intend to carry out their agreement. The offence is complete at that stage. The offence is complete even if the parties do not carry out their agreement. The offence is complete even if the substantive offence is not thereafter committed by any of the conspirators or by anyone else.

[4] Thus under this subsection the mental element of the offence, apart from the mental element involved in making an agreement, comprises the intention to pursue a course of conduct which will necessarily involve commission of the crime in question by one or more of the conspirators. The conspirators must intend to do the act prohibited by the substantive offence. The conspirators' state of mind must also satisfy the mental ingredients of the substantive offence. If one of the ingredients of the substantive offence is that the act is done with a specific intent, the conspirators must intend to do the prohibited act and must intend to do the prohibited act with the prescribed intent. A conspiracy to wound with intent to do grievous bodily harm contrary to s 18 of the Offences Against the Person Act 1861 requires proof of an intention to wound with the intent of doing grievous bodily harm. The position is the same if the prescribed state of mind regarding the consequence of the prohibited act is recklessness. Damaging property, being reckless as to whether life is endangered thereby, is a criminal offence: s 1(2) of the Criminal Damage Act 1971. Conspiracy to commit this offence requires proof of an intention to damage property, and to do so recklessly indifferent to whether this would endanger life.

[5] An intention to do a prohibited act is within the scope of s 1(1) even if the intention is expressed to be conditional on the happening, or non-happening,

of some particular event. The question always is whether the agreed course of conduct, if carried out in accordance with the parties' intentions, would necessarily involve an offence. A conspiracy to rob a bank tomorrow if the coast is clear when the conspirators reach the bank is not, by reason of this qualification, any less a conspiracy to rob. In the nature of things, every agreement to do something in the future is hedged about with conditions, implicit if not explicit. In theory if not in practice, the condition could be so far-fetched that it would cast doubt on the genuineness of a conspirator's expressed intention to do an unlawful act. If I agree to commit an offence should I succeed in climbing Mount Everest without the use of oxygen, plainly I have no intention to commit the offence at all. Fanciful cases apart, the conditional nature of the agreement is insufficient to take the conspiracy outside s 1(1).

[6] Section 1(2) qualifies the scope of the offence created by s 1(1). This subsection is more difficult. Its essential purpose is to ensure that strict liability and recklessness have no place in the offence of conspiracy. The subsection provides:

> 'Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.'

[7] Under this subsection conspiracy involves a third mental element: intention or knowledge that a fact or circumstances necessary for the commission of the substantive offence will exist. Take the offence of handling stolen goods. One of its ingredients is that the goods must have been stolen. That is a fact necessary for the commission of the offence. Section 1(2) requires that the conspirator must intend or know that this fact will exist when the conduct constituting the offence takes place.

[8] It follows from this requirement of intention or knowledge that proof of the mental element needed for the commission of a substantive offence will not always suffice on a charge of conspiracy to commit that offence. In respect of a material fact or circumstance conspiracy has its own mental element. In conspiracy this mental element is set as high as 'intend or know'. This subsumes any lesser mental element, such as suspicion, required by the substantive offence in respect of a material fact or circumstances. In this respect the mental element of conspiracy is distinct from and supersedes the mental element in the substantive offence. When this is so, the lesser mental element in the substantive offence becomes otiose on a charge of conspiracy. It is an immaterial averment. To include it in the particulars of the offence of conspiracy is potentially confusing and should be avoided.

[9] The phrase 'fact or circumstance necessary for the commission of the offence' is opaque. Difficulties have sometimes arisen in its application. The key seems to lie in the distinction apparent in the subsection between 'intend or know' on the one hand and any particular 'fact or circumstance necessary for the commission of the offence' on the other hand. The latter is directed at an element of the actus reus of the offence. A mental element of the offence is not itself a 'fact or circumstance' for the purposes of the subsection.

[10] This contrast can be illustrated by the offence of entering into an arrangement whereby the retention by another person (A) of A's proceeds of crime is facilitated, knowing or suspecting A has been engaged in crime: s 93A of the Criminal Justice Act 1988, now repealed. The requirement that the defendant must know or suspect A's criminal history is an element of the offence, but it is a mental element. The need for the defendant to have this state of mind is not a fact or circumstance within s 1(2). Another ingredient of the offence is that the property involved must be the proceeds of crime. That is a fact necessary for the commission of the offence and s 1(2) applies to that fact. The contrary analysis in *R v Sakavickas* [2004] EWCA Crim 2686 at [17], [2005] 1 WLR 857 at [17], was erroneous.

[11] The genesis of this feature of the legislation lies in the ingredients of the common law offence of conspiracy as enunciated by your Lordships' House in *Churchill v Walton* [1967] 1 All ER 497, [1967] 2 AC 224. There the defendant was charged with the common law offence of conspiracy to commit a statutory offence. The statutory offence was an offence of strict liability. The House held that the conspirator was not guilty of the offence of conspiracy if on the facts known to him the act he agreed to do was lawful.

[12] This principle was accepted by the Law Commission in its subsequent *Report on Conspiracy and Criminal Law Reform* (Law Com no 76) p 17 (para 1.39):

> 'What the prosecution ought to have to prove is that the defendant agreed with another person that a course of conduct should be pursued which would result, if completed, in the commission of a criminal offence, and further that they both knew any facts they would need to know to make them aware that the agreed course of conduct would result in the commission of the offence.'

This report led to the enactment of the 1977 Act.

[13] The rationale underlying this approach is that conspiracy imposes criminal liability on the basis of a person's intention. This is a different harm from the commission of the substantive offence. So it is right that the intention which is being criminalised in the offence of conspiracy should itself be blameworthy. This should be so, irrespective of the provisions of the substantive offence in that regard.

[14] Against that background I turn to some issues concerning the scope and effect of s 1(2). The starting point is to note that this relieving provision is not confined to substantive offences attracting strict liability. The subsection does not so provide. Nor would such an interpretation of the subsection make sense. It would make no sense for s 1(2) to apply, and require proof of intention or knowledge, where liability for the substantive offence is absolute but not where the substantive offence has built into it a mental ingredient less than knowledge, such as suspicion.

[15] So much is clear. A more difficult question arises where an ingredient of the substantive offence is that the defendant must *know* of a material fact or circumstance. On its face s 1(2) does not apply in this case. The opening words of s 1(2), on their face, limit the scope of the subsection to cases where a person may commit an offence *without* knowledge of a material fact or circumstance.

[16] Plainly Parliament did not intend that a person would be liable for conspiracy where he lacks the knowledge required to commit the substantive offence. That could not be right. Parliament could not have intended such an absurd result. Rather, the assumption underlying s 1(2) is that,

where knowledge of a material fact is an ingredient of a substantive offence, knowledge of that fact is also an ingredient of the crime of conspiring to commit the substantive offence.

[17] There are two ways this result might be achieved. One is simply to treat s 1(2) as inapplicable in this type of case. This would mean that the knowledge requirement in the substantive offence would survive as a requirement which must also be satisfied in respect of a conspiracy. In the same way as a conspirator must intend to do the prohibited act with any specific intent required by the substantive offence, so he must intend to do the prohibited act having the knowledge required by the substantive offence. Accordingly, on this analysis, where knowledge of a fact is an ingredient of the substantive offence, s 1(2) is not needed.

[18] The other route is to adopt the interpretation of s 1(2) suggested by Sir John Smith. The suggestion is that s 1(2) applies in such a case despite the opening words of the subsection. Section 1(2) is to be read as applicable *even* 'where liability for an offence may be incurred without knowledge [etc]'. It is difficult to see what other function the word 'nevertheless' has in the subsection. This may seem a slender peg on which to hang a conclusion of any substance, but it is enough: see 'Mens Rea in Statutory Conspiracy, (3) Some Answers' [1978] Crim LR 210.

[19] The first route accords more easily with the language of s 1(2), but I prefer the second route for the following reason. A conspiracy is looking to the future. It is an agreement about future conduct. When the agreement is made the 'particular fact or circumstance necessary for the commission' of the substantive offence may not have happened. So the conspirator cannot be said to *know* of that fact or circumstance at that time. Nor, if the happening of the fact or circumstance is beyond his control, can it be said that the conspirator *will* know of that fact or circumstance.

[20] Section 1(2) expressly caters for this situation. The conspirator must 'intend or know' that this fact or circumstance 'shall or will exist' when the conspiracy is carried into effect. Although not the happiest choice of language, 'intend' is descriptive of a state of mind which is looking to the future. This is to be contrasted with the language of substantive offences. Generally, references to 'knowingly' or the like in substantive offences are references to a past state of affairs. No doubt this language could be moulded appropriately where the offence charged is conspiracy. But the more direct and satisfactory route is to regard s 1(2) as performing in relation to a conspiracy the function which words such as 'knowingly' perform in relation to the substantive offence. That approach accords better with what must be taken to have been the Parliamentary intention on how the phrase 'intend or know' in s 1(2) would operate in this type of case. Thus on a charge of conspiracy to handle stolen property where the property has not been identified when the agreement is made, the prosecution must prove that the conspirator *intended* that the property which was the subject of the conspiracy *would* be stolen property.

[21] In my view, therefore, the preferable interpretation of s 1(2) is that the subsection applies to all offences. It applies whenever an ingredient of an offence is the existence of a particular fact or circumstance. The subsection applies to that ingredient.

SECTION 93C OF THE CRIMINAL JUSTICE ACT 1988

[22] I must now take this a step further and confront another difficulty. I can do this most readily by reference to the substantive offence relevant in the present case: s 93C of the 1988 Act. This section was inserted into the 1988 Act by s 31 of the Criminal Justice Act 1993. It has now been superseded. Section 93C(2) provided:

> 'A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he—(a) conceals or disguises that property; or (b) converts or transfers that property or removes it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.'

[23] The acts prohibited by this offence are listed in paras (a) and (b): concealing or disguising the property, or converting or transferring the property or taking it abroad. Thus a conspiracy to commit this offence involves an agreement to do one or more of these acts. Further, the agreement must be an agreement to do one or more of these acts for one or more of the stated purposes. Another ingredient of the substantive offence is that the property in question must emanate from a crime: *R v Montila* [2004] UKHL 50, [2005] 1 All ER 113, [2004] 1 WLR 3141. The criminal provenance of the property is a fact necessary for the commission of the offence. This fact falls within s 1(2). So, applying s 1(2) to that fact, the prosecution must prove the conspirator intended or knew that fact would exist when the conspiracy was carried out. Hence, where the property has *not* been identified when the conspiracy agreement is reached, the prosecution must prove the conspirator *intended* that the property would be the proceeds of criminal conduct.

[24] If these ingredients are established the offence of conspiracy is made out. In this type of case, namely, where the conspiracy related to unidentified property, there is no question of having to prove that the property *was* the proceeds of criminal conduct. In this type of case that is not possible. It is not possible because the property which was the subject of the conspiracy had not been identified when the conspiracy was entered into. Despite this, the crime of conspiracy will be committed. It will be committed even if the property never materialises or never exists. The observation in [147] in the court's judgment in *R v Ali* [2005] EWCA Crim 87, [2006] QB 322, [2006] 2 WLR 316, should not be read as applying *in this type of case*.

[25] What, however, if the property to which the conspiracy relates *was* specifically identified when the conspirators made their agreement? In that event the prosecution must prove the conspirators 'knew' the property was the proceeds of crime. This is the next point of difficulty in the interpretation of s 1(2). Does 'know' in this context have the meaning attributed to it in *R v Montila* when considering the substantive offence? If it does, the identified property to which the conspiracy related must actually be or represent the proceeds of crime, and the conspirator must be aware of this. Or does 'know' in this context mean 'believe', as seems to be suggested in *R v Ali* (at [98])? On the ordinary use of language a person cannot 'know' whether property is the proceeds of crime unless he participated in the crime. He can only believe this is so, on the basis of what he has been told. Adopting this approach would mean that, so far as s 93C is concerned, equating knowledge with belief in

the case of identified property would achieve a measure of symmetry with the requirement of intention in the case of unidentified property. It would mean that in both cases what matters is the conspirator's state of mind: the actual provenance of the property would not be material.

[26] I do not think the latter approach can be accepted. The phrase under consideration ('intend or know') in s 1(2) is a provision of general application to all conspiracies. In this context the word 'know' should be interpreted strictly and not watered down. In this context knowledge means true belief. Whether it covers wilful blindness is not an issue arising on this appeal. As applied to s 93C(2) it means that, in the case of identified property, a conspirator must be aware the property was in fact the proceeds of crime. The prosecution must prove the conspirator knew the property was the proceeds of criminal conduct.

THE APPELLANT'S PLEA

[27] The offence with which this appellant was charged was 'conspiracy to convert the proceeds of drug trafficking and/or criminal conduct contrary to s 1(1) of the Criminal Law Act 1977'. The essence of the particulars of the offence was that the appellant and others—

> 'conspired together ... to convert ... banknotes, for the purpose of assisting another to avoid prosecution for ... a criminal offence ... knowing or having reasonable grounds to suspect that such property ... represented another person's proceeds of ... criminal conduct.'

[28] These particulars were drafted before the decision of the House in *R v Montila*. Post-*Montila*, these particulars are not happily framed. They are misleading in two respects. They ignore the effect of s 1(2) of the 1977 Act. And by reproducing all the ingredients of the offence created by s 93C(2), in particular by incorporating the phrase 'knowing or having reasonable grounds to suspect', these particulars might be taken to suggest that for the purpose of the conspiracy charge 'having reasonable grounds to suspect' was an alternative to proving knowledge. This is not so. The effect of s 1(2) was that the prosecution had to prove intention or knowledge.

[29] This formulation of the particulars may well have contributed to the qualified form in which the appellant entered his plea of guilty. He pleaded guilty 'on the basis of laundering money which he suspected was the proceeds of crime'. One surmises this plea was intended to be a plea in mitigation, not a denial of having committed any offence. Be that as it may, this plea was accepted by the prosecution, and on this basis the appellant was convicted.

[30] From what has been said above, it is evident that this conviction for conspiracy cannot stand. Suspicion is not sufficient in respect of a fact to which s 1(2) applies. Knowledge or intention regarding the provenance of the property must be proved or admitted. I agree with the conclusion expressed by Hooper LJ in *R v Ali* [2006] QB 322 at [148].

[31] Mr Peters QC struggled valiantly but vainly to overcome this difficulty. Suspicion, he said, means that the appellant was aware the banknotes might be the proceeds of crime. The appellant intended to convert the banknotes even if they were the proceeds of crime. Thus his intention was akin to a conditional intention: he would convert banknotes representing criminal proceeds if they were presented to him. That was a sufficient intention to satisfy both s 1(1) and s 1(2) of the 1977 Act.

[32] I am unable to accept this submission. Suspicion, as a state of mind, is not properly to be analysed and dissected as counsel sought to do. In ordinary usage, and time and again in statutes, a distinction is drawn between suspicion and knowledge. The former is not to be equated with the latter. Section 1(2) explicitly requires a conspirator to 'intend or know' that the relevant fact 'shall or will' exist. That is not the state of mind of a conspirator who agrees to launder money he only suspects may be criminal proceeds. He does not 'intend' the money will be the proceeds of crime, conditionally or otherwise. He simply suspects this may be so, and goes ahead regardless. A decision to deal with money suspected to be the proceeds of crime is not the same as a conscious decision to deal with the proceeds of crime.

[33] The distinction thus drawn is not altogether satisfactory in terms of blameworthiness. But this does not entitle the House to erode the distinction clearly drawn by Parliament in s 1(2) between (a) intending or knowing that a relevant fact shall or will exist, and (b) lesser states of mind, such as recklessness or suspicion, regarding the existence of a relevant fact. Parliament intended that in conspiracy cases proof of recklessness or suspicion would not suffice. In conspiracy cases the prosecution must go further. The unattractive outcome in the present case derives from the impact, post-*Montila*, of the way the particulars of the offence were framed and the acceptance of the appellant's qualified plea. But the desire to avoid an unattractive outcome in the present case cannot justify a distorted interpretation of s 1(2). It is not for the courts to extend the net of criminal conspiracy beyond the reach set by Parliament.

[34] Counsel further submitted that by pleading guilty the appellant accepted he had the requisite purpose. By his plea he accepted all the ingredients of the charged offence with the one exception of knowledge. Thus he accepted that he intended to convert the banknotes for the purpose of assisting another to avoid prosecution for a criminal offence etc. That state of mind, it was submitted, is consistent only with the appellant knowing the money represented the proceeds of crime.

[35] Again I cannot agree. I readily accept that, evidentially and inferentially, it is a short step from proof that the defendant's purpose was to assist someone to avoid prosecution to a conclusion that the defendant was aware the property had an illicit provenance. But that is an evidential inference. That step cannot properly be taken on the basis of a qualified plea which expressly proceeds on the footing of suspicion only.

[36] In the present case the Court of Appeal ([2004] EWCA Crim 2936, [2004] All ER (D) 383 (Nov)), comprising Scott Baker LJ, Dame Heather Steele and Judge Roberts QC, expressed their conclusion as follows (at [67]):

> '... if two people ... agree that property shall be converted or transferred, and each of them knows or suspects that the property represents the proceeds of criminal conduct and realises that the purpose of the conversion or transfer is to assist someone to avoid prosecution for the criminal conduct which they know or suspect has been committed, that is sufficient to make each of them guilty of conspiracy to contravene s 93C(2). There is nothing in s 1(2) of the 1977 Act which in any way affects this conclusion.'

[37] This decision was given before the decision of your Lordships' House in *R v Montila*. At that time the provenance of the property was not understood to be an ingredient of the substantive offence. It was not a fact necessary for

the commission of the offence. That is no longer the law. For the reasons set out above this reasoning of the Court of Appeal cannot now stand. I would allow the appeal and set aside the appellant's conviction. I would answer 'no' to the first certified question. I would answer the second certified question in the sense set out in the speech of my noble and learned friend Lord Hope of Craighead. In an endeavour to avoid unnecessary complexity I have deliberately refrained from commenting on each of the recent reported authorities in this field. I mean no disrespect thereby to the experienced judges who decided these cases. I cannot conclude without recording my indebtedness to Professor Ormerod's article 'Making Sense of *Mens Rea* in Statutory Conspiracies', Current Legal Problems (2006). I have taken the liberty of drawing freely on this valuable survey of a notoriously difficult subject.

LORD STEYN.

[38] My Lords, I have found the legal analysis set out in the opinion of my noble and learned friend Lord Nicholls of Birkenhead compelling. For the reasons Lord Nicholls has given I would also allow the appeal and set aside the appellant's conviction.

LORD HOPE OF CRAIGHEAD.

[39] My Lords, this case raises an important and difficult issue about what the prosecution must prove where the defendant is alleged to have been engaged with others in a continuing course of conduct which involves the commission of the offence of money laundering. It has become the practice in cases of this kind, in order to avoid the problem of duplicity which arises where a defendant is charged on one count with having committed two or more separate offences, to charge the defendant on a single count of conspiracy. In 1977, on the recommendation of the Law Commission, the common law offence of conspiracy was abolished, with only a few exceptions. It was replaced by the general statutory offence which is set out in s 1 of the Criminal Law Act 1977. Money laundering has never been a common law offence. Various statutory offences have been created to deal with it. Some relate to the proceeds of drug trafficking. Others relate to the proceeds of crime generally.

[40] A prosecutor who wishes to take criminal proceedings for conspiracy against a defendant who is alleged to have engaged in a continuing course of money laundering has to face up to the consequences of this statutory framework when he is considering whether he has a case that can go to trial. They are to be found in the answers that must be given to two questions. What are the essential elements of the substantive statutory offence of money laundering? And are these elements compatible with the statutory offence of conspiracy?

[41] His problems are not made easier by the fact that, while the statutory offence of conspiracy was conceived as an inchoate crime, the essence of what he seeks to prove in these cases is not that the defendant was conspiring with others to commit an offence in the future. What he seeks to prove is that the defendant has got beyond that stage and has acted in pursuance of the conspiracy by actually engaging in money laundering. Dealing with a series of completed criminal acts by charging the defendant with conspiracy is a device. Its aim is to ensure that the entire course of conduct is brought under scrutiny in one count and that, when it comes to sentence, the defendant is

punished for the totality of his criminal activity. This is as it should be, of course. But the statutory offence of conspiracy was not designed for use in this way. The prosecutor is trying to fit a square peg into a round hole. That is not always possible.

THE CASE AGAINST THE DEFENDANT

[42] The appellant was charged with conspiracy to launder money which was the proceeds of drug trafficking or other criminal activity. He pleaded guilty to this offence in the Crown Court at Kingston upon Thames on 18 October 2002. On 22 October 2002 he was sentenced by Judge Binning to seven years' imprisonment. On 12 December 2003 the Court of Appeal granted him leave to appeal against his conviction. He also applied for leave to appeal against his sentence, and that application was heard together with his appeal against conviction. On 24 November 2004 the Court of Appeal ([2004] EWCA Crim 2936, [2004] All ER (D) 383 (Nov); Scott Baker LJ, Dame Heather Steele DBE and Judge Roberts QC) allowed the appeal against sentence. The sentence of seven years was quashed and replaced with one of five and half years' imprisonment. But his appeal against conviction was dismissed. It is his conviction that is the subject of this appeal.

[43] The offence with which the appellant was charged was set out in these terms in count 3 of the indictment: 'Conspiracy to convert the proceeds of drug trafficking and/or criminal conduct contrary to sec 1(1) of the Criminal Law Act 1977.' Several other defendants were charged on the same indictment with drug trafficking and other money laundering conspiracies. The particulars relating to count 3 were designed to give notice of how the conspiracy offence was to be linked to the substantive offence of money laundering. Some of the wording was taken from s 93C(2) of the Criminal Justice Act 1988 in which the elements of the substantive offence were set out. The particulars of the offence were in these terms:

> '[The appellant and two other defendants named German Lemos and John J Ruiz] between the 1st day of May 2001 and the 1st day of March 2002 conspired together and with persons unknown to convert property, namely banknotes, for the purpose of assisting another to avoid prosecution for a drug trafficking offence and/or a criminal offence or avoiding the making of or the enforcement of a confiscation order, knowing or having reasonable grounds to suspect that such property in whole or in part, directly or indirectly, represented another person's proceeds of drug trafficking and/or criminal conduct.'

[44] The appellant operated a currency exchange office. The prosecution case was that in the course of that business and between the dates referred to he converted a substantial quantity of pounds sterling provided by other defendants in the form of cash into foreign currency, and that the cash was or represented the proceeds of drug trafficking or other criminal activity. As Viscount Simon observed in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] 1 All ER 142 at 146, [1942] AC 435 at 439, conspiracy when regarded as a crime is an agreement between two or more persons to effect any criminal purpose and it is complete if there is such agreement, even though nothing is done to give effect to it. In this case however the allegation was that the conspiracy was put into effect by engaging in a course of criminal conduct between the dates mentioned in the particulars.

[45] When the appellant pleaded guilty to count 3 he did so in accordance with a written basis of plea which was drawn on his behalf by leading counsel, signed by him and accepted by the prosecution. So far as material to his appeal against conviction it was in these terms:

> '1. The defendant Saik pleads guilty on the basis of laundering money which he suspected was the proceeds of crime.
> 2. He only became suspicious from about December 2001, when the number of transactions became more voluminous.'

The defendant Lemos pleaded guilty to count 3 on the basis that he knew that the money was the proceeds of drug trafficking. The defendant Ruiz also pleaded guilty to count 3. He did so on the basis that he was acting under the direction of Lemos.

[46] In the Court of Appeal the appeal against conviction was argued on two distinct grounds. The first was that the conviction was unsafe as a matter of law. The second was that the plea of guilty was the result of erroneous advice that the appellant had received from his legal advisers. On 26 May 2005 the Court of Appeal, having rejected both arguments, certified that the following points of law of general public importance were involved in the first ground only. These points were the following:

> '1. Can a defendant be convicted of a statutory conspiracy to contravene s 93C(2) of the Criminal Justice Act 1988 if he enters into an agreement to convert property in respect of which he had reasonable grounds to suspect and did in fact suspect but did not actually know was the proceeds of crime?
> 2. Is the objective requirement that a defendant can be convicted of an offence under s 93C(2) of the Criminal Justice Act 1988 if he had reasonable grounds to suspect that the property converted etc was the proceeds of crime (without having actual knowledge or suspicion) incompatible with the subjective requirement that the activity of the defendant must be for the specified purpose of assisting another to avoid prosecution for a criminal offence or avoiding the making or enforcement of a confiscation order?'

THE STATUTORY PROVISIONS

[47] To put flesh on the bones of what is set out in the preceding paragraphs I must now set out the statutory provisions on which count 3 of the indictment was based. They are to be found in s 1 of the 1977 Act and in s 93C(2) of the 1988 Act. Section 93C(2) was repealed when the Drug Trafficking Act 1994, the 1988 Act and the corresponding legislation in Scotland and Northern Ireland were replaced by the Proceeds of Crime Act 2002.

[48] Section 1 of the 1977 Act creates the statutory offence of conspiracy. The relevant subsections are sub-s (1), as substituted by s 5 of the Criminal Attempts Act 1981, and sub-s (2), which provide:

> '(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or (b) would do so but for the existence of facts which

render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question.

(2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of the conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.'

[49] The conspiracy referred to in count 3 was to engage in a course of conduct contrary to s 93C(2) of the 1988 Act. This was one of a series of money laundering and other offences inserted by ss 29–32 of the Criminal Justice Act 1993 into Pt VI of the 1988 Act, which introduced the power to make confiscation orders. Section 93C of the 1988 Act, which was inserted by s 31 of the 1993 Act, dealt with concealing or transferring the proceeds of criminal conduct. Subsection (2) of this section provided:

'A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he—(a) conceals or disguises that property; or (b) converts or transfers that property or removes it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.'

The offences to which that Part of the Act applied included any indictable offence other than a drug trafficking offence: s 71(9)(c) of the 1988 Act. Sections 29–32 of the 1993 Act extended not to England and Wales only but to Great Britain: s 79(3). This is relevant to something that I shall say later about how a continuing course of conduct contrary to s 93C(2) of the 1988 Act would have been prosecuted in Scotland.

[50] The issue to which most of the argument in this appeal was directed is that raised by the first of the two certified questions. It raises some difficult questions about the interaction between the offence created by s 93C(2) of the 1988 Act and the offence of conspiracy as defined by s 1 of the 1977 Act. The second question raises a different and more straightforward issue about how a contravention of s 93C(2) can be proved. I should like to deal briefly with the second question first before addressing myself to the problem about s 1 of the 1977 Act which is raised by the first question. I do not think that application of s 1 to a conspiracy to commit a statutory offence (the principal offence) can be understood without a clear understanding of the mens rea that is required for the commission of the substantive offence.

SECTION 93C(2) OF THE 1988 ACT

[51] Section 93C(2) requires proof of what the defendant knew or had reasonable grounds to suspect on the one hand, and of the purpose for which he engaged in the activities that the subsection prescribes on the other. The appellant submits that there is an incompatibility between these two requirements. This is because proof that the defendant had reasonable grounds to suspect is an objective requirement—it does not require proof of an actual suspicion on his part—while proof that his purpose was to assist another to avoid prosecution or the making of a confiscation order is a subjective one.

How, Mr Krolick asked, can a person who did not know that the property was another person's proceeds of criminal conduct, and of whom all that can be said is that he had reasonable grounds to suspect that this was so, be held to be guilty of engaging in the prescribed activities for the purpose which the subsection describes? He said that the two propositions were incompatible. The prosecution could never establish that the defendant had the required purpose if all that it could establish was that he had reasonable grounds to suspect, but did not actually suspect, that the property was the proceeds of criminal conduct.

[52] I think that the apparent mismatch between these two requirements is based on a misunderstanding of what the first proposition involves. The test as to whether a person has reasonable grounds to suspect is familiar in other contexts, such as where a power of arrest or of search is given by statute to a police officer. In those contexts the assumption is that the person has a suspicion, otherwise he would not be thinking of doing what the statute contemplates. The objective test is introduced in the interests of fairness, to ensure that the suspicion has a reasonable basis for it. The subjective test—actual suspicion—is not enough. The objective test—that there were reasonable grounds for it—must be satisfied too. In *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 1 All ER 129, [1997] AC 286, where the issue related to the test in s 12(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984 which gave power to a constable to arrest a person without warrant if he had reasonable grounds for suspecting that he was concerned in acts of terrorism, I said:

> 'In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed.' (See [1997] 1 All ER 129 at 138–139, [1997] AC 286 at 298.)

[53] The words used in s 93C(2) can, in my opinion, be analysed in the same way. By requiring proof of knowledge or of reasonable grounds to suspect that the property was criminal proceeds, the subsection directs attention in the case of each of these two alternatives to what was in the mind of the defendant when he engaged in the prohibited activity. Proof that he had reasonable grounds to suspect the origin of the property is treated in the same way as proof of knowledge. The subsection assumes that a person who is proved to have had reasonable grounds to suspect that the property had a criminal origin did in fact suspect that this was so when he proceeded to deal with it. A person who has reasonable grounds to suspect is on notice that he is at the same risk of being prosecuted under the subsection as someone who knows. It is not necessary to prove actual knowledge, which is a subjective requirement. The prosecutor can rely instead on suspicion. But if this alternative is adopted, proof of suspicion is not enough. It must be proved that there were reasonable grounds for the suspicion. In other words, the first requirement contains both a subjective part—that the person suspects—and an objective part—that there are reasonable grounds for the suspicion.

[54] The second requirement, as to what the purpose was, is where the essence of the mens rea of the offence is to be found. It must be proved that the defendant's purpose was to launder the proceeds of another person's criminal conduct. If he knows the criminal origin of the property, his knowledge is linked to his purpose in engaging in the activity. If he had reasonable grounds to suspect that it had a criminal origin, his suspicion is linked to his purpose in the same way. Proof of what his purpose was will usually have to be found by drawing inferences. Evidence that the defendant knew or had reasonable grounds to suspect will usually be sufficient to show what his purpose was when, knowing or suspecting what the origin of the property was, he actually engaged in the prescribed activity.

[55] The appellant tendered his plea of guilty to laundering money on the basis that he suspected that the money was the proceeds of crime. In my opinion this plea was based on a correct understanding of the offence created by s 93C(2). He was entitled to qualify his plea by referring to what the substantive offence requires for its commission. So qualified, the plea implied an acceptance on his part that, when he laundered the money, he suspected that it was the proceeds of crime and that he had reasonable grounds for doing so. It is to be noted that the plea does not mention the word conspiracy. The appellant was seeking to mitigate his part in the affair by making it clear that, when he committed the substantive offences, his role was a subsidiary one. He suspected but did not know. The question to which I now turn is whether what he pleaded guilty to was a contravention of the offence that he was actually charged with, which was conspiracy.

SECTION 1 OF THE 1977 ACT

[56] The statutory offence of conspiracy is committed by a person who agrees with any other person to engage in a course of conduct which will amount to or involve the commission of a crime. The essential elements of the offence are set out in s 1(1). The defendant and at least one other person must have entered into an agreement that a course of conduct will be pursued. And the course of conduct must be one which, if the agreement is carried out in accordance with their intentions, will necessarily amount to or involve the commission of an offence by one or more of the parties to the agreement. If the link between the offence and the intended consequences of the agreement is established, the defendant will be guilty of conspiracy to commit that offence.

[57] In *Churchill v Walton* [1967] 1 All ER 497, [1967] 2 AC 224 it was held that if on the facts known to them at the time of their agreement what the parties agreed to was lawful, they were not rendered guilty of conspiracy to commit an offence by the existence of other facts not known to them which gave a different and criminal quality to the act or course of conduct that they had agreed on: Viscount Dilhorne ([1967] 1 All ER 497 at 503, [1967] 2 AC 224 at 237). The offence that was in issue in that case was an offence of strict liability. Section 1(2) codifies this principle. It does so in language which was designed to make it clear that, while ignorance of the law was no excuse, full knowledge of the consequences of the agreement was required: see the Law Commission's *Report on Conspiracy and Criminal Law Reform* (Law Com no 76 (1976)) p 17 (paras 1.39–1.41). It was designed also to exclude recklessness as to the consequences. In para 1.41 the Law Commission recognised that the mental element which their proposals required was a stringent one, adding this explanation:

'However, we think that the stringency we recommend is fully justified by the fact that conspiracy is essentially an inchoate offence which is committed before any prohibited event has in fact taken place.'

[58] A provision to give effect to this proposal was included in cl 1(3) of the draft Bill appended to the report. Section 1(2) does not follow its language precisely, but the requirement that the defendant and at least one other party to the agreement must 'intend or know' that the fact or circumstance 'shall or will exist' at the time when the conduct constituting the offence is to take place was taken directly from the draft Bill. There is no doubt that the requirement was designed to eliminate the risk that someone could be guilty of conspiracy just because he was reckless as to the existence or otherwise of the circumstances that would make the conduct criminal. In his commentary on this subsection in *Current Law Statutes*, Professor Edward Griew of Leicester University, noted that offences that might be committed without knowledge of the facts that gave the act a criminal quality are not confined to offences of strict liability. They include offences where recklessness as to some fact was a minimum but sufficient requirement:

'There are many offences, for example, which require knowledge or recklessness as to the falsity of some statement. But only knowledge of the falsity will ground liability for conspiracy to commit such an offence. All this is as the Law Commission intended: Law Com. Report, paras. 1.39 *et seq.*'

A PRELIMINARY ANALYSIS

[59] The concepts on which s 1(1) and 1(2) were based are easy to state but not nearly so easy to apply in practice. This has been the subject of a vigorous debate ever since. It began with two articles by Professor JC Smith: 'Conspiracy under the Criminal Law Act 1977 (1)' [1977] Crim LR 598; 'Conspiracy under the Criminal Law Act 1977 (2)' [1977] Crim LR 638. In his first article (p 603) Professor Smith said that the purpose of s 1(2) was to ensure that strict liability and recklessness had no place in conspiracy, even if the agreement was to commit a crime which might be committed recklessly or a crime of strict liability. In his second article (p 641, fn 32), he observed that most of the difficulties of construction of these two subsections were due to the lengths to which the Law Commission had gone to exclude recklessness, flowing from the use of the words 'necessarily' in sub-s (1) and 'intend or know' in sub-s (2). He pointed out that *Churchill v Walton* did not decide whether recklessness was a sufficient mens rea on a charge of conspiracy at common law. In the law of attempts, while there must be an intention to bring about the consequences of the crime alleged to be attempted, it was possible that recklessness as to the circumstances which were the ingredients of the offence would suffice. He said (p 642):

'The question remains open; but probably the better view is that intention in the strict sense as to consequences is necessary, whereas recklessness as to circumstances may be enough.'

[60] These articles were soon followed by an article by Professor Glanville Williams, 'The New Statutory Offence of Conspiracy—I' (1977) 127 New LJ 1164, and comments by Professor DW Elliott and Adrian Lynch on 'Mens Rea in Statutory Conspiracy' [1978] Crim LR 202 to which Professor Smith replied

in a further comment (p 210) entitled 'Some Answers'. Dealing with recklessness as to circumstances, Professor Glanville Williams disagreed with Professor Smith. He said (p 1166) that it was probable that at common law recklessness as to circumstances was sufficient to found liability for conspiracy where it was enough for the substantive crime. He gave as an example an agreement to make a statement which all the parties to the agreement knew might or might not be true to get money as a result of which, if they got the money, they would be guilty of obtaining property by deception. But he did not accept that recklessness would be enough in the case of the statutory offence:

> 'Section 1(2) appears to insist upon knowledge for conspiracy in these circumstances, so that, in the example given, the parties must know that facts exist that are the contradictory of what they say, notwithstanding that this knowledge is not required for the consummated offence. It is difficult to see any solid reason for restricting the offence of conspiracy in this way, and the law may well be different for attempt and incitement. A fortiori, there can be no conspiracy by recklessness as to *future* circumstances. To be guilty of conspiracy, the plotters must believe that the required future circumstances *will* exist, not *may* exist.'

[61] The mens rea of the offence which s 93C(2) creates is of a kind that was not discussed, and which may not even have been foreseen, by the Law Commission in 1976. Suspicion was not among the various problems that were mentioned by those who criticised the legislation in 1977. This offence can be committed without knowledge that the property is another person's proceeds of criminal conduct. But it is not an offence of strict liability. Nor is it an offence whose mens rea includes recklessness. The minimum requirement is that, when he entered into the agreement to launder the money that was to be handed over to him, the defendant suspected that the property was criminal proceeds and that he had reasonable grounds for doing so. The problem is that suspicion falls short of knowledge.

[62] The margin between knowledge and suspicion is perhaps not all that great where the person has reasonable grounds for his suspicion. Failure to ask or to obtain an answer to the obvious question may be described as wilful blindness. In *R v Griffiths* (1974) 60 Cr App Rep 14 at 18, James LJ said that to direct a jury that, in common sense and in law, they may find that the defendant knew or believed goods to have been stolen because he deliberately closed his eyes to the circumstances was a perfectly proper direction. That no doubt is why, for the purposes of the substantive offence of laundering the proceeds of criminal conduct, knowledge and suspicion for which the person has reasonable grounds are treated by the statute in the same way. It is immaterial, for the purposes of this offence, into which of these two categories the defendant falls. In either case he will have the necessary mens rea if he does any of the acts that the subsection refers to for the purpose of assisting any person to avoid prosecution for an offence or the making or enforcement of a confiscation order.

[63] But the appellant in this case was charged with conspiracy. It is not easy to see how a case where the mens rea for the substantive offence is based on suspicion for which there are reasonable grounds can be fitted into the language of s 1(1) and 1(2). The problem has not been assisted by the practice of prosecuting several acts of money laundering which have taken place over a

period under the umbrella of the statutory offence of conspiracy. Concepts which were designed to fit with the idea that conspiracy is an inchoate offence are being applied to cases where the only proof that there was a conspiracy is provided by evidence of the course of conduct, from which inferences as to the state of mind of the participants are then drawn. The problem is made all the more acute in this case because the appellant pleaded guilty before any evidence was led. All we have is his plea and the statement that explains the basis for it.

THE DEVELOPING CASE LAW

[64] Your Lordships were referred to a series of cases where the courts have attempted, with varying degrees of success, to make sense of this way of prosecuting offences of money laundering. I do not think that anything is to be gained by examining all of them. The important stages in the development of the law are indicated by the following.

[65] In *R v Singh* [2003] EWCA Crim 3712, [2003] All ER (D) 358 (Dec) the appellant was convicted on three counts of conspiracy to launder money. The prosecution case was that he and his co-accused engaged in money laundering between June 1999 and March 2000. The particulars on each count contained an allegation that he and his co-conspirators engaged in transactions which were prohibited by s 49(2)(b) of the Drug Trafficking Act 1994 and s 93C(2)(b) of the 1988 Act, 'knowing or having reasonable grounds to suspect that certain property, namely banknotes, was, or in whole or in part directly or indirectly represented, another person's proceeds of drugs trafficking and/or criminal conduct'. It was submitted for the appellant that the words 'knowing or having reasonable grounds to suspect', whilst apt for an allegation of the principal offences, were not sufficient to describe what had to be proved for guilt of the statutory conspiracy. For the prosecution it was submitted that an averment of intent as an alternative to knowledge was not necessary in a charge of conspiracy. The intent was inherent in the unlawful agreement alleged.

[66] Rejecting the appellant's argument, Auld LJ said (at [34]):

> 'If two or more people intend and agree to commit an act that they know to be unlawful, then knowledge or mistake as to a fact critical to the success of the conspiracy is immaterial to its proof; the intention is proxy for, or more correctly an alternative to, knowledge of such a fact. And, it follows, gradations of knowledge, such as "reasonable grounds to suspect" it, are irrelevant.'

He added that the inclusion of words such as 'knowing or having reasonable grounds to suspect' taken from the substantive offences was an immaterial averment. Summing up (at [35]), he said that there was no point of substance in the appellant's complaint that something short of knowledge was alleged in the indictment when, given the thrust of the prosecution case, knowledge of the precise provenance of the banknotes was not at the heart of the conspiracy but intention to launder illicitly obtained money was.

[67] I find it hard to accept that an averment taken from the substantive offences is an immaterial averment where the defendant is charged with conspiracy to commit those offences when it would be an essential averment if the substantive offences themselves were the subject of the charge. Proof of an intention to commit the substantive offence, it seems to me, is an essential part of proving the offence of any conspiracy. It must be proved that the activity

that the parties to the conspiracy were intending to engage in would amount to or involve the commission of a crime. As a general rule all the elements that require to be established for the commission of that crime must be explained to the jury, because they cannot find the defendant guilty of conspiracy unless they are sure that the activity that he and the others were proposing to engage in was itself criminal. The solution which the Court of Appeal adopted in *R v Singh* is no doubt correct, because it is faithful to the wording of the state of mind that requires to be established for a conspiracy. But it is open to the objection that it shifts attention away from the wording of s 93C(2) to the words of s 1(2). It works in favour of the defendant in a way that was not anticipated by Parliament when it enacted s 93C(2). It raises the threshold from that required to establish the state of mind described in s 93C(2) to that required to establish the state of mind described in s 1(2).

[68] In *R v Sakavickas* [2004] EWCA Crim 2686, [2005] 1 WLR 857, the appellants were convicted of a conspiracy to assist another to retain the benefit of criminal conduct. The substantive offence was in s 93A of the 1988 Act, which makes this an offence where the accused knew or suspected that the other person had engaged in or benefited from criminal conduct. The issue on appeal was whether a person was guilty of a conspiracy to commit that offence if he had a mere suspicion of the criminal character of the person with whom the arrangement was entered into. It was submitted for the appellants that s 1(2) of the 1977 Act applied and that, in order to be guilty of conspiracy, the alleged offender and at least one other person had to intend or know that the money to be laundered was or was to be the proceeds of another person's crime when the offence contrary to s 93A was taking place. Dismissing the appeal, the court held that s 1(2) did not apply to an offence contrary to s 93A of the 1988 Act. In its view, the fact or circumstance necessary for the commission of the offence was the suspicion of the defendant. Establishing suspicion also established knowledge of that suspicion. The defendant must inevitably have knowledge of his own state of mind ([17]).

[69] Here too the solution adopted by the Court of Appeal is open to the objection that it avoids, rather than solves, the problem. As Professor David Ormerod points out in his commentary on this case ([2005] Crim LR 293, p 296), no one would suggest that a defendant who was charged with the substantive offence must be shown to have both a reasonable suspicion that the money was criminal proceeds and knowledge of the fact that his own state of mind was that suspicion. As the language of s 93C(2) itself shows, that is not the way it is intended to work. Why should it work in a different way where the defendant is charged with conspiracy? Various examples can be envisaged where it would make no sense for this double test to be an essential part of proving a conspiracy. The Court of Appeal failed to address the real problem that s 1(2) raises when it is read with s 93C(2). The knowledge which s 1(2) requires is knowledge of the facts and circumstances that must be proved as part of the actus reus of the substantive offence.

[70] The decisions of the Court of Appeal in *R v Singh* and *R v Sakavickas* preceded the decision of this House in *R v Montila* [2004] UKHL 50, [2005] 1 All ER 113, [2004] 1 WLR 3141. In that case the appellants were not charged as parties to a conspiracy. The case against them was directed instead to the substantive offences of money laundering in s 49(2) of the 1994 Act and s 93C(2) of the 1988 Act. It was held that the offences described in these sections proceeded on the basis that the property in question in fact had its origins in

criminal conduct, and that this was an essential part of the actus reus of the offences. As the appellate committee said in its report (at [27]):

> 'A person cannot know that something is A when in fact it is B. The proposition that a person knows that something is A is based on the premise that it is true that it is A. The fact that the property is A provides the starting point. Then there is the question whether the person knows that the property is A.'

In [30] it said that it would make no sense to say that a defendant was guilty of an offence of money laundering simply because he had reasonable grounds to suspect that the property had a criminal origin, when he was in a position to prove that it was not property of that kind at all.

[71] In *R* v *Harmer* [2005] EWCA Crim 1, [2005] 2 Cr App Rep 23, which was decided after *R v Montila*, the appellant and a co-defendant were charged with conspiracy to launder property which they had reasonable grounds to suspect was the proceeds of drug trafficking or other criminal conduct. The prosecution accepted that they could not establish that the property was the proceeds of crime, and it was not alleged that the defendants knew that it had a criminal origin. The case went to trial before the decision of this House in *R v Montila*. The trial judge did not direct the jury that it was necessary for the prosecution to prove that the money was in fact the proceeds of drug trafficking or other criminal conduct, and he was convicted.

[72] Allowing the appeal, May LJ, giving the judgment of the court, accepted (at [23]) the appellants' interpretation of s 1(1)(a):

> 'Mr Kane's central submission is that the statutory definition of conspiracy comprising s. 1(1)(a) of the 1977 Act embraces an agreement whereby the conspirators intend and agree to commit "an offence or offences". *Montila* decides that converting or transferring property which a defendant has reasonable grounds to suspect represents another person's proceeds of crime is not an offence, unless the Crown also prove that the property is the proceeds of crime. The Crown, therefore, did not establish in the present case that the appellant was guilty of conspiracy under s. 1(1)(a), since they did not establish that the object of the agreement was an offence. In our judgment, this is clearly a correct construction of the sub-section.'

He said (at [25]) that there was a further answer to the Crown's submission. As he explained (at [26]), this was the requirement in s 1(2) that, where the substantive charge was that the defendant had reasonable grounds to suspect (but did not know) that the money was the proceeds of crime, he was not to be guilty of conspiracy unless he and at least one other party to the agreement intended or knew that the money would be the proceeds of crime when the agreed conduct took place:

> 'This intention or knowledge is precisely what the prosecution in the present case accepted they could not prove when the words "knew or" were omitted from the particulars of count 2. If the prosecution cannot prove that the money was the proceeds of crime, they cannot prove that the appellant knew that it was. So s. 1(2) of the 1977 Act applies and is not satisfied.'

This decision does, at last, address the real issues that arise in this kind of case, although in his commentary on the following case, *R v Ali, R v Bhatti* [2005] EWCA Crim 87, [2006] QB 322, [2006] 2 WLR 316, Professor Ormerod said that the court was right to cast doubt on what was said in *R v Harmer* about s 1(1)(a) ([2005] Crim LR 864, p 867). Referring to the Court of Appeal's judgment in *R v Singh*, May LJ said that it did not in the court's view survive *R v Montila*. I agree.

[73] In *R v Ali* the appellants were convicted on two counts of conspiracy to contravene s 49(2) of the 1994 Act. It was submitted for the appellants that the effect of the decision in *R v Montila*, taken together with s 1(1) and 1(2) of the 1977 Act, was that a person could not be guilty of a conspiracy to commit an offence against s 49(2) or s 93C(2) unless he and another person knew at the time of the agreement that the property was the proceeds of drug trafficking or of other criminal conduct. So a count of conspiracy to commit either of these offences which included the words 'reasonable grounds to suspect' or even the word 'suspect' was bad in law under s 1(1)(a) of the 1977 Act in the light of *R v Montila*. And a count in these terms fell foul also of s 1(2) of the 1977 Act in the light of *R v Montila*, as that subsection required the defendant and another co-conspirator to intend or know at the time of the agreement that the property was in fact the proceeds of drug trafficking or other criminal conduct.

[74] Allowing the appeal, Hooper LJ, giving the judgment of the court, said at [111] that, as the jury were directed to convict only if they were sure that at least part of the money was in fact the proceeds of drug trafficking, s 1(1)(a) of the 1977 Act was satisfied. But at [139] he said that, following *R v Montila*, the substantive offences under s 49(2) and s 93C(2) required proof that the defendant was in fact dealing with the proceeds of drug trafficking or other criminal conduct. Section 1(2) of the 1977 Act came in at this stage, and the jury could only convict of conspiracy if the defendant knew that he was dealing with such proceeds. At [147] he said that it seemed to the court that *R v Singh* could not survive *R v Montila*. An intention to launder illicitly-obtained money was not enough. The money must be proved to have been the proceeds of drug trafficking or other criminal conduct and, as he put it, 'On to that requirement, section 1(2) of the 1977 Act bites'. Hooper LJ recognised that the decision which he felt compelled to reach was unsatisfactory. At [151] he said that its consequence was that, if it was right, the prosecution had a heavier burden to discharge than it would have in order to prove the substantive offence. But, as he observed at [150], the prosecution accepted that it would not have been open to it to charge each delivery of money separately, given the rule against duplicity in r 4(2) of the Indictment Rules 1971, SI 1971/1253. In my opinion the Court of Appeal reached the right decision in *R v Ali*, and there is much in its reasoning with which I agree.

THE MEANING OF THE WORDS USED

[75] I must now return to the words of the statute. It seems to me that the best way to discover the meaning of the words used in s 1 to define the statutory offence of conspiracy is to assume that one is dealing, as the Law Commission intended, with an allegation of an inchoate crime. A conspiracy is complete when the agreement to enter into is formed, even if nothing is done to implement it. Implementation gives effect to the conspiracy, but it does not alter its essential elements. The statutory language adopts this approach. It assumes that implementation of the agreement lies in the future.

The question whether its requirements are fulfilled is directed to the stage when the agreement is formed, not to the stage when it is implemented.

[76] First there is s 1(1). It refers to (i) an agreement, (ii) a course of conduct to be pursued under that agreement and (iii) the fact that, if the agreement is carried out as intended, it 'will necessarily' amount to or involve the commission of an offence by one or more of the parties to the agreement. Let us assume that there are two parties to the agreement: parties X and Y. X is in possession of cash which he knows is the proceeds of crime A. Y does not know the cash is A, which it is. But he suspects that it is A, and he has reasonable grounds for his suspicion. The agreement is that X will hand over the cash to Y, and that Y will immediately convert it into a different currency. If the agreement is carried out as they intend, the cash will be converted. The conversion of cash which is A by someone who knows that it is A is an offence contrary to s 93C(2). X knows that the cash is A So the carrying out of the agreement between X and Y in accordance with their intentions will necessarily amount to the commission of an offence by X. This is enough to satisfy s 1(1)(a). But the carrying out of the agreement will also necessarily amount to the commission of an offence by Y. The cash will be A, because that is the fact known to X. And the conversion of cash which is in fact A by someone who has reasonable grounds to suspect that it is A is an offence under s 93C(2).

[77] In the present case, exiguous though the facts are in the light of the appellant's plea, they must be understood in the light of what is averred in the particulars. We can assume therefore that the conspiracy took the form of an agreement between the appellant and Lemos that the banknotes which Lemos was to hand over to the appellant were to be converted into foreign currency. Lemos pleaded guilty to knowing that the banknotes were the proceeds of crime. That can be taken to be the fact, as he could not know that the banknotes were the proceeds of crime when they were not. I think that it follows that the carrying out of the agreement according to their intentions would necessarily amount to the commission of an offence by Lemos. The same is true of the appellant even though he only suspected, but did not know, that the cash was the proceeds of crime. I would hold that the requirements of s 1(1)(a) are satisfied in this case.

[78] But there remains s 1(2). It is necessary to address this question too, because Y can incur liability for an offence under s 93C(2) without knowledge of a fact necessary for the commission of the offence—that the cash is A. Section 1(2) tells us that a person shall not be guilty of the conspiracy to commit that offence by virtue of sub-s (1) unless he and at least one other party to the agreement 'intend or know' that the fact necessary for the commission of the offence—that the cash is A—'shall or will exist' at the time when the cash is converted into a different currency. There is no problem about X, of course. He knows that the cash which he will hand over to Y is A. He knows that it will be A when the conduct takes place—when it is converted into a different currency. But what about Y? He suspects that the cash is A. But he does not know that it is, or that it will be when it is handed over to him and he converts it. Can it be said that he intends that it should be A, when he does not know what he will be dealing with? Solving this problem is not easy because the word 'intend' in s 1(2) refers to the existence of a fact or a circumstance, not to the consequences of giving effect to the agreement. But the words 'shall or will' indicate that nothing short of intention or knowledge as to its existence will do.

[79] I think that the answer to this question will depend on the facts. It could be said of Y that he knows enough about the purpose of the transaction because of the grounds for his suspicion for it not to matter whether he will be able to tell by looking at the cash that it is in fact the proceeds of crime. It may be open to the Crown to prove that Y knew very well what the purpose of the agreement was—that he knew that the cash was to be converted to assist someone to avoid prosecution for an offence or the making or enforcement of a confiscation order, which is what s 93C(2) refers to. It might be going too far to say that he knew that the cash would be A when he came to deal with it. But it could be inferred that he intended that the cash would be A, because he knew that that was the only purpose of the transaction.

[80] But in this case all we know is that the appellant suspected that the money 'was' the proceeds of crime. The appellant must be dealt with according to the terms of his plea. We cannot say that he was wilfully blind as to the purpose of the agreement, because that is not what he admits to. He suspected that he was being asked to convert the proceeds of criminal conduct. But he did not know that this was the origin of the money that was actually being given to him. He was prepared to go ahead and convert the money without knowing that it was in fact the proceeds of crime. It would not be quite right to say that he was reckless. All he was to do was simply to convert money from one currency into another—an everyday transaction which involves no risk to anyone. But he was willing to go ahead with this without troubling to find out whether or not what he was proposing to do was criminal. A person who is in that state of mind cannot be said to intend that the fact or circumstance that makes his act criminal should exist. That being the position I would hold that, although he was suspicious, the appellant cannot be said to have intended that the money should be the proceeds of crime when he came to deal with it.

CONCLUSION

[81] Given the terms of his plea, I see no escape from the conclusion that the appellant's case is caught by s 1(2) of the 1977 Act. He cannot be said to be guilty of the conspiracy to commit the substantive offence under s 93C(2) because he did not know, and therefore did not intend, that the money which he agreed to convert would be the proceeds of crime when at some future date he came to perform his part of the agreement. I would allow the appeal and set aside the conviction.

A POSTSCRIPT

[82] As Hooper LJ observed in *R v Ali* [2006] QB 322 at [151], the consequence of the approach to the meaning of s 1(2) of the 1977 Act which I favour is that the prosecution has a heavier burden to discharge in suspicion cases which are charged as a conspiracy than it would have to prove the substantive offence. He made some suggestions, which I would respectfully endorse, as to how this problem might be addressed. I think however that it may be worth adding these further comments.

[83] In my opinion the position that has now been reached compares unfavourably with the way in which the same course of criminal conduct would have been dealt with by the Crown in Scotland, to which s 93C(2) of the 1988 Act also extends: see s 79(3) of the Criminal Justice Act 1993. Conspiracy is still a common law crime in Scotland. But it is not the practice to resort to a

conspiracy charge in cases where the substantive offence is a statutory one. The reason is that the Crown does not need to do this in order to obtain a conviction for engaging in a continuing course of criminal conduct.

[84] It is, of course, the law in Scotland too that a person cannot be punished more than once for the same offence. And Lord Bingham of Cornhill CJ's statement in *R v Kidd, R v Canavan, R v Shaw* [1998] 1 All ER 42 at 44, [1998] 1 WLR 604 at 607 that a person cannot be lawfully punished for offences for which he has not been indicted and which he has denied or declined to admit and have not been proved against him is as true for Scotland as it is for England and Wales. But it has always been open to the prosecutor in Scotland to allege by way of a single charge (or count, as it would be called in England) that the accused engaged in a continuing course of criminal conduct which involved the commission of a series of identical criminal acts. This practice is resorted to in a wide variety of cases, including sexual offences against children and crimes of dishonesty such as fraud or embezzlement, where the acts tend to be repeated many times before they are detected. It may be resorted to also in cases involving the statutory offences of money laundering.

[85] If this had been done in *R v Ali*, each act of money laundering within the period specified in the indictment would have been treated not as a separate offence but as part of the same continuing course of criminal conduct. If the accused had been found guilty, a single sentence would have been imposed on him, not for each act of money laundering taken separately but for engaging in a course of criminal conduct that was made up of all of the acts that were proved against him. In that way the objection that he was at risk of being charged in one count for two or more separate offences would have been avoided.

[86] On 10 March 2006, for example, Zohaib Assad and Mohammad Ahmad were found guilty after trial in the High Court of Justiciary at Glasgow on three charges of money laundering, contrary to ss 327(1)(d) and (e), 329(1)(c) and 330(1) of the Proceeds of Crime Act 2002. The charges of which they were convicted narrated that they had engaged in this conduct 'between 23 February 2003 and 26 September 2003, both dates inclusive'. Their acts in possessing the money, transferring it overseas and failing to disclose what they were doing were treated as separate activities and hence as separate crimes. In the first charge they were accused of non-disclosure, contrary to s 330(1). In the second charge it was narrated that between these dates they had possession of 'criminal property, namely quantities of cash amounting to £2,827,078·75 of money', contrary to s 329(1)(c). In the third charge it was narrated that between these dates they transferred and removed from Scotland 'criminal property, namely quantities of cash amounting to £2,256,646·00 of money' by paying the cash into a bank and transferring its value to Pakistan, the United Arab Emirates and China, contrary to s 327(1)(d) and (e). The lesser amount in the third charge reflected the fact that not all of the money referred to in the second charge had been removed from Scotland. The accused were convicted on each of these charges on the terms set out in the indictment, except that the amount in the second charge was amended at the close of the Crown case to £2,442,318·75. Assad was sentenced to three years' imprisonment on the first charge, to seven years on the second and to seven years on the third. Ahmad was sentenced to two years' imprisonment on the first charge, to six years on the second and to six years on the third. These sentences were all to be served concurrently.

[87] I understand, of course, that the system of prosecuting crime in Scotland differs in many respects from that in England and Wales and that it is not possible simply to export isolated parts of that system from one jurisdiction to another. The narrative form of charge that is used in Scotland is a significant difference. It is competent at any time before the determination of the case, unless the court sees just cause to the contrary, for the prosecutor to amend the indictment by deletion, alteration or addition to cure any variation between it and the evidence: see s 96(2) of the Criminal Procedure (Scotland) Act 1995. This enables an accused who wishes to plead guilty to identify precisely, word by word, the parts of the narrative in any charge that he pleads guilty to and the parts that fall outside the scope of his plea. The narrative can also be amended by the jury when it returns its verdict in the light of the evidence. An attempt was made, following recommendations by the Law Commission (*The Effective Prosecution of Multiple Offending* (Law Com no 277)), in s 17 of the Domestic Violence, Crime and Victims Act 2004 to devise a system which was suitable for use in England and Wales which would overcome the problem caused by the duplicity rule. But strong opposition was expressed to that section as not being in the interests of justice, and it has not yet been brought into force. A further study of how these matters are handled in Scotland might point the way forward. In any event, something must be done soon if offences of the kind enacted by s 93C(2) of the 1988 Act which are now to be found in Pt 7 of the Proceeds of Crime Act 2002 are not to be impossible of prosecution, or at least more difficult to prosecute than the wording used to describe those offences contemplates, because of the duplicity rule.

BARONESS HALE OF RICHMOND.

[88] My Lords, A and B agree that A will bring money into B's bureau de change and that B will change it into another currency. A knows that the money he intends to bring in is the proceeds of crime. B does not know this but he has thought about it. He suspects that the money will be the proceeds of crime and intends to exchange it even if this is so. Is either of them guilty of the crime of conspiracy?

[89] Section 1 of the Criminal Law Act 1977 defines the statutory offence of conspiracy:

> '(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—(a) will necessarily amount to or involve the commission of any offence or offences *by one or more* of the parties to the agreement, or (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question . . .
>
> (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless *he and at least one other party* to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.' (My emphasis.)

[90] This offence was created as a result of the Law Commission's recommendations in their *Report on Conspiracy and Criminal Law Reform* (Law Com no 76 (1976)). This was part of the Commission's programme of codification of the criminal law. The eventual aim was to abolish all the remaining common law offences and replace them, where appropriate, with offences precisely defined by statute. The common law offences were seen as unacceptably vague and open to development by the courts in ways which might offend the principle of certainty. There was an additional problem that it could be a criminal conspiracy at common law to engage in conduct which was not in itself a criminal offence: see Law Com no 76, p 5 (para 1.7). This was a major mischief at which the 1977 Act was aimed, although it retained (as a temporary measure) the convenient concept of a common law conspiracy to defraud: see Law Com No 76, pp 8, 10 (paras 1.9 and 1.16). Henceforward it would only be an offence to agree to engage in a course of conduct which was itself a criminal offence.

[91] The substantive criminal offence in issue here is that which used to be contained in s 93C(2) of the Criminal Justice Act 1988 (as inserted by the Criminal Justice Act 1993 and now replaced by Pt 7 of the Proceeds of Crime Act 2002):

> 'A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he—(a) conceals or disguises that property; or (b) converts or transfers that property or removes it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.'

[92] Difficulties have arisen in the application of statutory conspiracy to this offence (among others). The tendency of courts and prosecutors has been to ask themselves, has the substantive offence been committed? If so, was it the result of an agreement or collaboration between two or more people? Did it happen more than once, over a period of time, with different combinations of perpetrators? If so, would it not be a great deal more convenient, and easier to explain to a jury, if we charge it as a single conspiracy rather than as a series of separate substantive offences?

[93] Yet it is absolutely plain that the offence of conspiracy consists in the agreement, not its carrying out. The offence can be committed whether or not the plot is ever put into effect or the substantive offence committed. Thus it is *not* an essential ingredient of the crime of conspiracy to launder the proceeds of crime that the money in the conspirators' contemplation actually be such proceeds, whereas this is an essential ingredient of the substantive offence: see *R v Montila* [2004] UKHL 50, [2005] 1 All ER 113, [2004] 1 WLR 3141. This makes conspiracy a harsh and controversial crime. Equally, it is plain that the mere fact that the substantive offence has been committed does not necessarily mean that the individuals guilty of it are also guilty of conspiracy. Perhaps some of the difficulties have arisen because of an understandable tendency to conclude that if the substantive offence has been committed then those who were 'in it together' must be guilty of conspiracy.

[94] Thus, in the example given above, it is clear that both A and B are guilty of the s 93C(2) offence. One transfers and one converts. One knows and one suspects (with reasonable cause) that it is the proceeds of crime. One has the

prescribed purpose and the other must have it if, as he suspects, the money is the proceeds of crime. The money is, in fact, the proceeds of crime. It is scarcely surprising, therefore, that they pleaded guilty to the conspiracy and the court accepted their plea.

[95] But it does not follow that they *are* guilty of conspiracy. As conspiracy is a 'thought crime', which may be committed without any overt acts other than those manifesting the agreement, the state of mind required for the conspiracy may be different from, and more exacting than, the state of mind required for the substantive offence. It all depends upon the application of s 1(1) and (2) of the 1977 Act to the facts.

[96] In this example, I believe that we are all agreed that the requirements of s 1(1) have been met. A and B agreed to engage in a course of conduct. That course of conduct, if carried out in accordance with their intentions, will necessarily involve the commission of the s 93C(2) offence by A. That is enough to meet s 1(1). B is a conspirator even if what is agreed upon will not involve him in the commission of any substantive offence.

[97] I believe that we are also agreed that, at this stage of the inquiry, their intentions may be conditional. There are many different kinds of conditional intent. There may be factual circumstances necessary to the carrying out of the purpose: we will blow up the Palace of Westminster if the King comes to open Parliament. Or there may be pre-conditions which the conspirators have set themselves: we will use our bombs if the IRA ceasefire ends. No substantive crime will be committed unless the condition materialises, but it is now generally accepted that they are guilty of a conspiracy to commit that crime. Or there may be provision for contingencies which could arise in a necessarily uncertain future: we will shoot if we have to in order to accomplish our purpose; or we will assist a suicide if we think it appropriate.

[98] In all those examples, both parties are involved in the guilty intention. They need not know that what they intend is a crime, but they know all they need to know in order to discover that it would be a crime were they to ask a lawyer about it. In our example, however, A knows everything but B only suspects. His intention is not to convert the money *only if* it is the proceeds of crime but to convert the money *even if* it is the proceeds of crime. He may be guilty of the substantive offence of converting the money without actually knowing the fact necessary for the commission of the offence, that the money is in fact the proceeds of crime. Thus s 1(2) applies to him. We do not need to consider Professor Elliott's 'scandalous paradox' (though we may share his views) ('Mens Rea in Statutory Conspiracy, (1) A Comment' [1978] Crim LR 202, p 205).

[99] Therefore B is not guilty of conspiracy unless both he and A 'intend or know' that the money is the proceeds of crime. A knows that it is. B does not. But does he *intend* that it will be? Is a conditional intent of the 'even if' kind sufficient for the purpose of s 1(2) as many think that it is for the purpose of s 1(1)? My Lords, I cannot see why it should be sufficient for the one but not for the other. The main objection in both cases is that it could be seen as 'a recklessness formula in disguise', a phrase taken from Professor David Ormerod's most helpful Current Legal Problems lecture, 'Making Sense of *Mens Rea* in Statutory Conspiracies' (2006) CLP forthcoming, to which I am much indebted. Even the late Professor JC Smith seems to have regretted that the Law Commission, in their determination to exclude recklessness, might have 'thrown out the baby, conditional intention, with the bathwater,

recklessness' (see 'Mens Rea in Statutory Conspiracy, (3) Some Answers' [1978] Crim LR 210, p 212). My Lords, I do not think that they did. The dividing line between them may be narrow, but it is discernible. Once again, it is important to distinguish between what happens when the substantive offence is committed—when the men have intercourse with the woman whether or not she consents—and what happens when they agree to do so. When they agree, they have thought about the possibility that she may not consent. They have agreed that they will go ahead *even if at the time when they go ahead they know that she is not consenting*. If so, that will not be recklessness; that will be intent to rape. Hence they are guilty of conspiracy to rape.

[100] So if, in our example, the conspirator agrees to launder the money even if at the time he does so he is told that it is in fact the proceeds of crime, then he does indeed intend that fact to be the case when he does the deed. The fact that he is equally happy to convert the money even if it is not the proceeds of crime makes no difference. So perhaps the real question for the jury is, 'what would he have done if, when the money came in, someone had let him know the truth?' Would he have said, 'take it away'? Or would he have said 'hand it over'?

[101] In my view, this provides an entirely principled and sensible way of making sense of the language of s 1(1) and (2) of the 1977 Act. It can also make sense of the appellant's plea. He would have converted the money even if he had known that it was the proceeds of crime. But he did not know, so he hoped for a more lenient sentence as a result of persuading the prosecution to accept a plea on that basis. Much ink has been spilled, in and out of the courts, on this knotty problem, and I could spill some more; but as I understand that your Lordships take a different view from mine, there is little to be gained by my saying any more than that I agree with Professor Ormerod's views on this matter.

[102] In common with all of your Lordships, I agree that the substantive offence requires that the accused *actually* suspects that the money is the proceeds of crime. Without that actual suspicion, he cannot act with the purpose required. I would therefore have answered the second certified question accordingly. But in respectful disagreement with your Lordships, I would have answered the first certified question as follows: 'yes, provided that he intended to put the agreement into effect even if the property was in fact the proceeds of crime'.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[103] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Hope of Craighead. I agree with him that the appeal must be allowed and the appellant's conviction set aside. Because of the obvious importance of the case, however, and because for my part I have found it a difficult one, I wish to express my own reasoning. I can do so comparatively briefly: all the relevant facts and law are helpfully set out in Lord Hope's speech and I shall repeat only the most essential matters.

[104] The two questions certified by the Court of Appeal ([2004] EWCA Crim 2936, [2004] All ER (D) 383 (Nov)) for your Lordships' determination are these:

> '(1) Can a defendant be convicted of a statutory conspiracy to contravene s 93C(2) of the Criminal Justice Act 1988 if he enters into an agreement to convert property . . . which he had reasonable grounds to

suspect was the proceeds of crime and did in fact suspect but did not actually know was the proceeds of crime?

(2) Is the objective requirement that a defendant can be convicted of an offence under s 93C(2) of the Criminal Law Act 1988 if he had reasonable grounds to suspect that the property converted etc was the proceeds of crime (without having actual knowledge or suspicion) incompatible with the subjective requirement that the activity of the defendant must be for the specified purpose of assisting another to avoid prosecution for a criminal offence or avoiding the making or enforcement of a confiscation order?'

[105] It is convenient to start with the second question since this goes directly to the substantive offence under s 93C(2) and arises, therefore, before one comes to consider the crime of conspiracy (the subject of the first question).

[106] Section 93C(2) provides:

'A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he—(a) conceals or disguises that property; or (b) converts or transfers that property or removes it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.'

[107] For simplicity's sake I shall hereafter refer to (i) 'property [which] is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct' as 'hot property' (the equivalent of Lord Hope's description at [76], above, of cash being 'A'); (ii) any treatment of such hot property described in para (a) and (b) of the subsection as its 'laundering'; and (iii) the purpose of assisting someone to avoid prosecution or confiscation as 'an illicit purpose'.

[108] If indeed the section contemplated that the defendant (D) might be guilty of the offence merely because 'he had reasonable grounds to suspect' that the property was hot (ie merely because objectively grounds existed which would make a reasonable person suspect that the property was hot), then certainly I would regard that as incompatible with the requirement that D also be proved to have laundered the hot property for an illicit purpose. Plainly he could not have that illicit purpose unless subjectively he also either actually knew or at the very least suspected the property to be hot. It is, therefore, I readily accept, necessarily implicit in the section that not only must D have reasonable grounds to suspect that the property is hot but also that he *does* suspect it. That requirement, of course, presents no problem whatever in the present case: the appellant *did* suspect that the money he had laundered was the proceeds of crime and, indeed, he pleaded guilty (to the conspiracy count) on that explicit basis.

[109] I should perhaps add that I can see an argument for suggesting that not even actual suspicion that the property is hot is a sufficient basis for inferring that when laundering it D had the necessary illicit purpose: if all D knows is that the property may be hot and he suspects it is, it is not immediately obvious that any dealing with it is then for an illicit purpose. Again, however, it seems to me necessarily implicit in the section that it is. The section would otherwise

be unworkable. The illicit purpose requirement must be regarded as satisfied whenever property is laundered by someone suspecting it to be hot. He has at least that contingent purpose.

[110] None of these difficulties, it should be noted, arise under the legislation in its present form: Pt 7 of the Proceeds of Crime Act 2002. Section 328(1) provides—

> 'A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.'

—and s 340(3) states:

> 'Property is criminal property if—(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.'

[111] I pass to the altogether more difficult question arising on the appeal, the scope for a conspiracy charge in the context of s 93C(2) offences. Section 1 of the Criminal Law Act 1977 as amended provides:

> '(1) Subject to the following provisions of this part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question.
>
> (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of the conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.'

[112] As Lord Hope observes at [75], above, a conspiracy is complete when the agreement to enter into it is formed, even if nothing is done to implement it, and the statutory language itself assumes that implementation of the agreement lies in the future: 'The question whether its requirements are fulfilled is directed to the stage when the agreement is formed, not to the stage when it is implemented.'

[113] True it is, as observed by the Law Commission in their *Report on Conspiracy and Criminal Law Reform* (Law Com no 76 (1976)) p 12 (para 1.22) that not all the parties to the agreement need to have evinced their consent at the same time or on the same occasion, nor indeed need each have been in communication with every other or be aware of each other's identity. But each conspirator must entertain a common purpose in relation to the specific offence or offences which are its object. As the Court of Appeal said in *R v Ardalan* [1972] 2 All ER 257 at 261, [1972] 1 WLR 463 at 469–470:

a 'The essential point in dealing with this type of conspiracy charge [i e "cartwheel" or "chain" conspiracies], where the prosecution have brought one, and only one, charge against the alleged conspirators, is to bring home to the minds of the jury that before they can convict anybody on that conspiracy charge, they have got to be convinced in relation to each person charged that that person has conspired with another guilty b person in relation to that single conspiracy . . . there must not be wrapped up in one conspiracy charge what is, in fact, a charge involving two or more conspiracies.'

[114] I pause at this juncture to wonder how easily the conspiracy count in the present case, set out together with its particulars at [43], above, of c Lord Hope's opinion, fits with that approach. When precisely, one may ask, did the appellant enter into this conspiracy? The conspiracy is alleged to have taken place over a ten-month period between 1 May 2001 and 1 March 2002 during which the appellant for his part 'only became suspicious from about December 2001'. Put that possible difficulty aside, however, and consider the d case on the simple factual basis summarised by Lord Hope at [77], above: Lemos, one of the appellant's alleged co-conspirators, knew that the property which he handed over to the appellant for laundering was hot; the appellant himself merely suspected it to be so. Their agreement was simply that Lemos would hand it over to the appellant and the appellant would in turn then launder it. e

[115] But for *R v Montila* [2004] UKHL 50, [2005] 1 All ER 113, [2004] 1 WLR 3141, the substantive offence under s 93C (2) would be committed by anyone who laundered property (with the illicit purpose) suspecting it to be hot, irrespective of whether in fact it was. (It is in no way to criticise *R v Montila* to point out that it would be perfectly rational to criminalise such conduct f without more—as indeed it now seems to have been criminalised by the 2002 Act.) On that basis, a conspiracy charge under s 1(1) of the 1977 Act would present no difficulty: the laundering of the money (the carrying out of the agreement between Lemos and the appellant in accordance with their intentions) would 'necessarily amount to or involve the commission of [an] g offence' under s 93C(2). And s 1(2) would simply have no application.

[116] If, of course, Lemos had known (or even merely suspected) that the property was hot but the appellant himself had no thought whatever of that, then the appellant would have needed to rely on s 1(2) to escape liability for conspiracy. Lemos himself would still have committed a substantive offence h under s 93C(2) but only he would have intended or known that a 'particular fact or circumstance necessary for the commission of the offence' would exist, namely knowledge or suspicion on the part of one of those agreeing to its laundering that the property was hot.

[117] *R v Montila*, however, changes the position entirely. For the launderer j now to be liable under s 93C(2) it is not sufficient that he suspects the property to be hot; the prosecution must prove it to be so. If, therefore, as here, one of the conspirators, the appellant, does not know but only suspects that the property is hot, s 1(2) becomes all-important. (Section 1(1) still presents no difficulty for the prosecution where, as here, one of the conspirators, Lemos, actually knows that the property is hot.) How then does s 1(2) apply on the facts of this case?

[118] A 'particular fact or circumstance necessary for the commission of [a s 93C(2)] offence' here is that the property to be laundered shall indeed be hot. Where, as here, the appellant, one of the alleged conspirators, merely suspects but does not know that to be so it follows that 'liability for [the] offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence' so that he is not after all to be found guilty of a conspiracy 'unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place'. Does someone in the appellant's position, suspecting the property they are about to launder to be hot, 'intend or know' that in fact it *is* hot? Clearly they do not 'know' it—at any rate on the facts of this case where the substantive offence expressly differentiates between the two states of mind, knowledge and suspicion, and the guilty plea is tendered and accepted explicitly on the basis of suspicion only. But did the appellant *intend* the property to be hot?

[119] I should say at this stage that the problem arising here is not one that arises in the context of handling offences. Handling is committed by those who know or believe that the goods are stolen. True, the offence is not committed if the goods, albeit believed stolen, in fact prove not to be. But if an agreement is made to handle goods believed to be stolen I for my part would have little difficulty in concluding for the purposes of s 1(2) of the 1977 Act that the conspirators intended or knew that they would be stolen. Section 1(2) looks to the future so that the putative conspirator's state of mind is in any event better described as belief than as knowledge—a point well made by Hooper LJ in *R v Ali* [2005] EWCA Crim 87 at [98], [2006] QB 322 at [98], [2006] 2 WLR 316. One can never be certain that goods that are to come into one's possession at a future time will be stolen but a firm belief can be held and that is sufficient.

[120] The present case, however, is different. To suspect something to be so is by no means to believe it to be so: it is to believe only that it may be so. I repeat, the Crown's principal argument is not that the appellant here *knew* that the property would be hot but rather that, whilst only suspecting it, he nevertheless intended it to be so. The argument is advanced essentially in terms of a conditional intention: the appellant suspected the property would be hot and agreed to launder it irrespective of whether it was or was not. This, it is contended, is a sufficient intent for s 1(2) purposes: it is an agreement to launder hot property (and thus commit an offence) if it proves to be hot; innocent property (and thus no offence) if the property in fact has a lawful provenance.

[121] Your Lordships were shown an abundance of academic writing down the years which treats of the concept of conditional intention in the context of conspiracy law. Many examples have been discussed. If two men agree to burgle a house but only if it is unoccupied or not alarmed they are clearly guilty of conspiracy to burgle notwithstanding that their intention may be thwarted. And if they take a weapon albeit to be used only if strictly necessary they are, the better view suggests, guilty also of conspiracy to wound. Consistently with this approach convictions were upheld (a) of conspiracy to aid and abet suicide where it was agreed that the accused would visit individuals contemplating suicide and either seek to discourage them or actively help them commit suicide depending on his assessment of the appropriate course of action (*R v Reed* [1982] Crim LR 819); (b) of conspiracy to pervert the course of public

justice where three men agreed that a fourth man, under trial for burglary, should be shot in the leg so as to provide him with mitigation in the event he were convicted (*R v Jackson* [1985] Crim LR 442); and (c) of conspiracy to cause explosions where members of the IRA during the IRA ceasefire agreed to make bombs for use only if the ceasefire came to an end (*R v O'Hadhmaill* [1996] Crim LR 509).

[122] The Crown submits that the same approach supports the legitimacy of the appellant's conviction upon his own plea in the present case. True, there was no certainty that the property he agreed to launder would prove to be hot so that the commission of an offence pursuant to the agreement depended on a contingency which might not occur. But that, on the authorities, provides no defence to a conspiracy charge. Beguiling though for a time I confess to have found this argument, I have finally come to reject it. If someone launders property he suspects to be hot, he takes the risk that it *is* hot (and can be proved to be so) and in that event commits the substantive offence under s 93C(2). But he commits it by actually laundering the property and not merely by agreeing to do so. Assume that A and B one morning agree to launder a bundle of £50 notes which C is to bring in that afternoon, suspecting but not knowing the notes will be hot. They are arrested before the money arrives. Are they guilty of conspiracy to launder notwithstanding that, had they received and laundered the money, they might well have had a defence based on *R v Montila*? With, I confess, some reluctance, I would hold not.

[123] As Lord Hope makes plain, the reality here is that the Crown is using the offence of conspiracy purely as a device to circumvent the problems caused in England (although not, it appears, in Scotland) by the duplicity rule. To avoid the need for each substantive offence to be charged separately, thereby absurdly overloading the indictment, the Crown instead charge conspiracy which allows them to roll together into a single charge the events of a continuing course of conduct. There are other advantages too for prosecutors who rely on a conspiracy charge. Small wonder, therefore, that it is often called the 'prosecutor's darling'. But there are limits to these advantages and, given that the mere fact of agreement is sufficient to establish liability for this inchoate crime, it is important that these limits are recognised and not artificially stretched. To uphold this conviction would in my judgment be a bridge too far. I too would allow the appeal.

Appeal allowed.

Kate O'Hanlon Barrister.

R v Da Silva

[2006] EWCA Crim 1654

COURT OF APPEAL, CRIMINAL DIVISION

LONGMORE LJ, GLOSTER J AND JUDGE DIEHL QC

19 MAY, 11 JULY 2006

Criminal law – Proceeds of crime – Criminal conduct – Facilitating retention or control by or on behalf of another of proceeds of criminal conduct knowing or suspecting other person engaged in criminal conduct – Meaning of 'suspecting' – Criminal Justice Act 1988, s 93A(1)(a).

The defendant had been convicted of assisting another person to retain the benefit of criminal conduct, knowing or suspecting that the other person was or had been engaged in criminal conduct, contrary to s 93A(1)(a)[a] of the Criminal Justice Act 1988. She had been acquitted on ten counts which had charged her jointly with her co-accused husband of obtaining money transfers by deception. The judge had observed to the jury that if they concluded that the defendant had known that her husband had engaged in criminal conduct or had benefited from it they would convict her as a participant in the principal offence, but that if they acquitted her of the ten counts he only needed to direct them about the question whether the prosecution had proved that the defendant had suspected that her husband had been engaged in criminal conduct or had benefited from it. He had then said '"suspecting" ... is a very different state of mind to knowing. To suspect something, you have a state of mind that is well short of knowing that the matter that you suspect is true. It is an ordinary English word ... if the Crown can show that the defendant said to herself, "I suspect that this money is the proceeds of criminal conduct, but it may be, on the other hand, that it is not", that would fall within the definition of "suspicion". The dictionary definition ... of "suspicion" [is] "an act of suspecting, the imagining of something without evidence or on slender evidence, inkling, mistrust". Therefore, any inkling or fleeting thought that the money being paid into her account ... might be the proceeds of criminal conduct will suffice for the offence against her to be proved'. The defendant appealed on the ground that the judge should not have given the jury a dictionary definition of the word 'suspecting' and then added a further gloss to that definition.

Held – (1) For the purpose of a conviction under s 93A(1)(a) of the 1988 Act the prosecution had to prove that the defendant's acts of facilitating another person's retention or control of the proceeds of criminal conduct were done by a defendant who thought that there was a possibility, which was more than fanciful, that the other person was or had been engaged in or had benefited from criminal conduct. If a judge felt it to be appropriate to assist the jury with the word 'suspecting', a direction along such lines would be adequate and accurate. In a case where there was reason to suppose that a defendant had entertained a suspicion in that sense but on further thought had honestly dismissed it from her or his mind as being unworthy or as contrary to such evidence as existed or as

a Section 93A, so far as material, is set out at [3], below

being outweighed by other considerations the jury should also be directed that the suspicion had to be of a settled nature (see [16], [17], below); *Hussien v Chong Fook Kam* [1969] 3 All ER 1626, *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] 1 All ER 743 and *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 All ER 333 considered.

(2) In the instant case the judge's direction by reference to the dictionary meaning of suspicion with the addition of the phrase 'a fleeting thought' had constituted a misdirection. Using words such as 'inkling' or 'fleeting thought' was liable to mislead. However, the misdirection had been of a technical kind and there was no doubt as to the safety of the conviction. Accordingly, the appeal would be dismissed (see [18]–[20], below).

Notes

Section 93A of the Criminal Justice Act 1988 was repealed by the Proceeds of Crime Act 2002, ss 456, 457, Sch 11, paras 1, 17(1), (2)(a), Sch 12, with effect from 24 February 2003.

Cases referred to in judgment

Barlow Clowes International Ltd v Eurotrust International Ltd [2005] UKPC 37, [2006] 1 All ER 333.

Brutus v Cozens [1972] 2 All ER 1297, [1973] AC 854, [1972] 3 WLR 521, HL.

Holtham v Comr of Police of the Metropolis (1987) Times, 28 November, CA.

Hussien v Chong Fook Kam [1969] 3 All ER 1626, [1970] AC 942, [1970] 2 WLR 441, PC.

K Ltd v National Westminster Bank plc [2006] EWCA Civ 1039, [2006] 4 All ER 907.

Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd [2001] UKHL 1, [2001] 1 All ER 743, [2003] 1 AC 469, [2001] 2 WLR 170.

R v Gillard (1988) 87 Cr App Rep 189, CA.

R v Saik [2006] UKHL 18, [2006] 4 All ER 866, [2006] 2 WLR 993.

Appeal

The defendant Hilda Gondwe Da Silva appealed to the Court of Appeal with leave of the full court from her conviction, on 2 March 2005 in the Crown Court at the Middlesex Guildhall after a trial before Judge Martineau and a jury, of assisting another person to retain the benefit of criminal conduct knowing or suspecting that that other person was or had been engaged in criminal conduct contrary to s 93A(1)(a) of the Criminal Justice Act 1988. The facts are set out in the judgment of the court.

Rossano Cifonelli (assigned by the *Registrar of Criminal Appeals*) for the appellant.

Richard Milne (instructed by the *Crown Prosecution Service*) for the Crown.

Cur adv vult

11 July 2006. The following judgment of the court was delivered.

LONGMORE LJ.

[1] On 2 March 2005 in the Crown Court at the Middlesex Guildhall, the appellant, Hilda Gondwe Da Silva, was convicted of assisting another person to retain the benefit of criminal conduct knowing or suspecting that that other person was or had been engaged in criminal conduct contrary to s 93A(1)(a) of the Criminal Justice Act 1988 (counts 14 and 15 on the indictment). She was

acquitted on counts 1 to 10 which charged her jointly with her co-accused husband of obtaining money transfers by deception. Her husband, Mario Da Silva, was convicted of obtaining money transfers by deception (counts 1 to 13). She appeals on one ground only with the leave of the full court, namely whether the judge should have given to the jury (as he did) a dictionary definition of the word 'suspecting' and then (as he did) have added a further gloss to that definition.

[2] In summary the facts were these. AMT is a company which runs coffee-bars. The coffee-bars at King's Cross railway station were managed by the co-accused who was responsible for submitting employee time sheets to head office upon which employee wage payments were based. Between 7 June 2001 and 21 July 2003, on ten occasions, sums of money representing the wages of three different people, 'ghost workers', were transferred directly into one of two bank accounts operated by the appellant at the Halifax. The Crown alleged that three individuals, two of them sisters, had been employees of the company but at the material times had not worked at all. It was further alleged that the appellant had given encouragement and assistance to the co-accused knowing that the wages were being received dishonestly.

[3] As an alternative against the appellant, count 14 alleged that between 11 November 2001 and 2 September 2003 knowing or suspecting that her husband was or had been engaged in criminal conduct or had benefited from it, she entered into or was otherwise concerned in an arrangement which involved the deposit and withdrawal of sums into and from her bank account facilitating his retention or control of proceeds of his criminal conduct. The sums of money covered by count 14 related to the wages of the sisters. Count 15 was a similar offence in respect of a second bank account for the period June 2001 to September 2003. The sums of money here related to one Daniella Mateus. These two counts charged offences, as we have said, against s 93A(1)(a) of the 1988 Act. That subsection provides:

> '... if a person enters into or is otherwise concerned in an arrangement whereby—(a) the retention or control by or on behalf of another ("A") of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise) ... knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, he is guilty of an offence.'

[4] The judge observed to the jury that if they concluded the appellant knew her co-accused husband had engaged in criminal conduct or had benefited from it, they would convict her as a participant in the principal offence. If they acquitted her, however, of the first ten counts of the indictment and moved on to consider counts 14 and 15 of the indictment, he only needed to direct them about the question whether the Crown had proved that she suspected her husband was engaged in criminal conduct or had benefited from it.

[5] He then said this:

> 'So, probably, "knowing" will not arise and what will arise instead is "suspecting", which is a very different state of mind to knowing. To suspect something, you have a state of mind that is well short of knowing that the matter that you suspect is true. It is an ordinary English word. Members of the jury, if the Crown can show that the defendant said to herself, "I suspect that this money is the proceeds of criminal conduct, but it may be, on the

a other hand, that it is not", that would fall within the definition of "suspicion". The dictionary definition, which I direct you is relevant, to the meaning of the word, is this. The dictionary definition of "suspicion": "an act of suspecting, the imagining of something without evidence or on slender evidence, inkling, mistrust". Therefore, any inkling or fleeting thought that the money being paid into her account 9950 might be the proceeds of b criminal conduct will suffice for the offence against her to be proved.'

[6] The passage to which exception is taken, and in relation to which leave to appeal has been given, is the passage where the judge referred to the (*Chambers*) dictionary definition which he directed the jury was relevant and then added the concept 'fleeting thought' to the word 'inkling'. The full court, granting leave, c thought that it was arguable that the judge should not have given that dictionary definition to the jury and that in so doing he introduced a gloss or qualification to the ordinary English word of suspecting or suspicion which was uncalled for and indeed potentially misleading. The court added that it might be the case that, whatever view the court hearing the appeal took about the direction that was given, they would nevertheless conclude that the evidence against the applicant d was sufficiently strong for there not to be any doubts about the safety of her convictions on counts 14 and 15. That however is another matter.

[7] Mr Cifonelli, who appeared for the appellant, sought to extend the ground on which he was given leave to appeal by arguing that the word 'reasonably' ought to be read before the word 'suspecting' in the statutory wording or (which e comes to the same thing) the words 'on reasonable grounds' ought to be read in after the word 'suspecting'. He submitted that it was impossible to suppose that Parliament intended that a facilitator should be guilty of an offence if he or she suspected that the relevant other person was or had been engaged in criminal conduct but had no reasonable grounds for that suspicion.

[8] We regard this as an impossible argument. This court could not, even if it f wished to, imply a word such as 'reasonable' into this statutory provision. To do so would be to make a material change in the statutory provision for which there is no warrant. This is all the more the case when one sees that the draftsman is aware of the difference between 'suspecting' and 'having reasonable grounds to suspect' and on occasion uses the latter phrase in preference to the former word. g Thus in s 93C which deals with 'concealing or transferring proceeds of criminal conduct', we see sub-s (2) which provides:

> 'A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is ... another person's proceeds of criminal conduct, he (a) conceals or disguises that property; or (b) converts or h transfers that property ...'

In the light of this express reference to 'reasonable grounds' for suspicion in s 93C of the 1988 Act, it is impossible, in our judgment, to read in similar words in s 93A(1) when the words are just not there.

[9] Mr Cifonelli sought to explain the distinction between the two sections j historically by saying that s 93A of the 1988 Act (originally inserted into the 1988 Act by the Criminal Justice Act 1993) was modelled on s 24 of the Drug Trafficking Act 1986, whereas s 93C (likewise inserted by the Criminal Justice Act 1993) was modelled on s 14 of the Criminal Justice (International Cooperation) Act 1990 (which was later re-enacted in the Drug Trafficking Act 1994). The argument appeared to be that Parliament had not thought about the matter carefully enough at the first stage of the confiscatory legislation in 1986

but by 1990 had come to realise that suspicion on its own was inappropriate and therefore provided for such suspicion to have reasonable grounds. The court should therefore interpret the provisions deriving from the 1986 Act in a similar way. Ingenious as the argument may be, that is not an appropriate approach to statutory construction. Whatever the ultimate derivations of the various provisions of the 1998 Act may be, they must be construed as a whole and it is impossible to ignore the fact that one section provides for reasonable grounds for suspicion whereas the section with which this case is concerned (s 93A) does not. It seems, to us, that these considerations are also supported by the speeches in *R v Saik* [2006] UKHL 18, [2006] 4 All ER 866, [2006] 2 WLR 993.

[10] Finally on this point we would observe: (1) the Proceeds of Crime Act 2002, which is now the governing statute, likewise sometimes uses the word 'suspects' as in eg s 328(1) (the equivalent of s 93A), s 330(2)(a) and s 331(2)(a) and, at other times, the phrase 'reasonable grounds for suspecting' in eg ss 330(2)(b) and 331(2)(b); (2) Mr Cifonelli's concern about inappropriate convictions is unlikely to arise in practice since, if a potential defendant in fact has no reasonable grounds to suspect that the facilitated person is or has been engaged in criminal activity, it is unlikely that a prosecution will be taking place and, if it does, extremely unlikely that a jury will decide that a defendant has a suspicion when no reasonable ground exists for entertaining such a suspicion.

[11] We turn then to the ground on which leave was granted. This raises three questions. (1) Was the judge entitled to assist the jury by giving any definition and in particular a dictionary definition of the ordinary English word 'suspect' or 'suspicion'? (2) Is the dictionary definition given by the judge the correct way to interpret the word 'suspecting' in s 93A? (3) Did the judge's introduction of the concept 'fleeting thought' (not part of the dictionary definition cited by the judge) constitute a misdirection?

[12] The judge could not, in our judgment, have been criticised if he had declined to define the word 'suspecting' further than by saying it was an ordinary English word and the jury should apply their own understanding of it. Of course, the danger with saying nothing is that the jury might actually ask for assistance about its meaning and, if they did, the judge would have to assist as best he can. This judge, however, volunteered to assist the jury in relation to the word 'suspecting' and we certainly do not consider that he can be criticised for doing so. The mere fact that a word is an 'ordinary English word' within *Brutus v Cozens* [1972] 2 All ER 1297, [1973] AC 854 does not prevent a judge assisting a jury with its meaning, see *R v Gillard* (1988) 87 Cr App Rep 189 at 194. If he does so assist the jury, it needs hardly be added, he must do so correctly.

[13] If a judge justifiably decides to assist the jury about the meaning of a word, the dictionary definition is, in the absence of judicial authority, likely to be a sensible starting place. There is no English authority in a criminal context to which we were referred on the meaning of 'suspect' or 'suspicion'; definitions given in civil cases are sometimes in the context of 'reasonable suspicion' of eg the police in relation to the commission of an offence, rather than in the context of simple 'suspicion'. Thus in *Hussien v Chong Fook Kam* [1969] 3 All ER 1626, [1970] AC 942, in which the Privy Council decided that reasonable suspicion was not the same as prima facie proof, Lord Devlin said ([1969] 3 All ER 1626 at 1630, [1970] AC 942 at 948): 'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove." Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.'

[14] This dictum was followed in a similar context by the Court of Appeal in *Holtham v Comr of Police of the Metropolis* (1987) Times, 28 November. This definition would not have been particularly helpful to the jury in the present case since the appellant was not, of course, making any investigation but the first part which refers to a 'state of conjecture or surmise' gives a general indication of the general meaning of 'suspicion'.

[15] In the civil context of blind eye knowledge, and dishonest accessory liability for breaches of trust, the authorities indicate that the suspicion has to be 'clear' or 'firmly grounded'. They show that, in civil cases of this type, there is a requirement that the suspicion must be of a certain strength. Thus in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1, [2001] 1 All ER 743, [2003] 1 AC 469, a case of alleged blind eye knowledge of unseaworthiness, Lord Scott of Foscote stated the following (at [116]):

> 'In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity.'

In other words, a vague feeling of unease was not sufficient, nor was gross negligence; see also [25] per Lord Hobhouse of Woodborough. The suspicion had to be firmly grounded and targeted on specific facts Likewise, in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333, a case against an alleged money launderer based upon the defendant's dishonest assistance in a breach of trust, the Judicial Committee stated that it was sufficient, on the facts of that case, that the defendant 'entertained a clear suspicion' that there had been a misappropriat[ion] of monies; see [28], and also [19], where the rubric 'solid grounds for suspicion' was approved.

[16] What then does the word 'suspecting' mean in its particular context in the 1988 Act? It seems to us that the essential element in the word 'suspect' and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts', or based upon 'reasonable grounds'. To require the prosecution to satisfy such criteria as to the strength of the suspicion would, in our view, be putting a gloss on the section. We consider therefore that, for the purpose of a conviction under s 93A(1)(a) of the 1988 Act, the prosecution must prove that the defendant's acts of facilitating another person's retention or control of the proceeds of criminal conduct were done by a defendant who thought that there was a possibility, which was more than fanciful, that the other person was or had been engaged in or had benefited from criminal conduct. We consider that, if a judge feels it appropriate to assist the jury with the word 'suspecting', a direction along these lines will be adequate and accurate.

[17] The only possible qualification to this conclusion, is whether, in an appropriate case, a jury should also be directed that the suspicion must be of a settled nature; a case might, for example, arise in which a defendant did entertain a suspicion in the above sense but, on further thought, honestly dismissed it from his or her mind as being unworthy or as contrary to such evidence as existed or as being outweighed by other considerations. In such a case a careful direction to the jury might be required. But, in our view, before such a direction was necessary there would have to be some reason to suppose that the defendant went through some such thought process as set [out] above. The present case was not a case where any such direction could be thought to be necessary.

[18] That leaves the question whether the judge's direction by reference to the meaning of the *Chambers'* dictionary meaning of suspicion with the addition of the phrase 'fleeting thought' constituted a misdirection. Neither counsel could tell us the source of the judge's direction but it is noteworthy that Judge Martineau adopted exactly the same approach as the leading work on the topic. In *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime* (3rd edn, 2002) one finds that the authors say (at para 9.022), referring to s 50 of the Drug Trafficking Act 1994 (the drugs equivalent to s 93A): 'Since suspicion is a word of ordinary English, it may be helpful to consider the dictionary definition of suspicion.' They then cite the 7th edition of *Chambers* and continue:

> 'Suspicion is a word in daily usage, it should be given its ordinary meaning. Thus any inkling or fleeting thought that the property might be the proceeds of drug trafficking will suffice for this section. This wide, all-encompassing section emphasises, yet again, the draconian effect of the legislation.'

[19] It is difficult to criticise the judge for giving a direction authorised by the leading textbook but we think, with respect, that using words such as 'inkling' or 'fleeting thought' is liable to mislead. If they are to be used, it would normally be advisable to add the qualification we have mentioned in [17], above. Most cases can be more conveniently dealt with solely by reference to the suggested direction in [16], above. We are, therefore, driven to the conclusion that there was here, through no fault of the judge, a misdirection of a technical kind. It is not, however, a misdirection which causes us to have any doubt as to the safety of the conviction.

[20] The Crown had a good prima facie case. The appellant chose to remain silent when she was interviewed about her joint participation with her husband in relation to counts 1–10 of the indictment. Her case at trial (as was that of her husband) was that her husband told her that he had had an instruction from his area manager that he should make a bank account available for staff workers who could not obtain a bank account of their own. There was no evidence of that apart from that of the co-accused husband (whom the jury disbelieved). The appellant did not herself give evidence. We are satisfied that the convictions are safe and the appeal will be dismissed.

[21] We regret the delay in issuing this judgment but the court wished to assimilate the arguments made to the Civil Division of this court in *K Ltd v National Westminster Bank plc* [2006] EWCA Civ 1039, [2006] 4 All ER 907 in which the judgment will be delivered shortly.

Appeal dismissed.

Vanessa Higgins Barrister.

K Ltd v National Westminster Bank plc (Revenue and Customs Commissioners and another intervening)

[2006] EWCA Civ 1039

COURT OF APPEAL, CIVIL DIVISION
WARD, LAWS AND LONGMORE LJJ
7 JUNE, 19 JULY 2006

Proceeds of crime – Criminal property – Knowledge or suspicion of arrangement facilitating acquisition, retention, use or control of criminal property – Bank forming relevant suspicion in relation to customer's account – Bank refusing to carry out customer's instructions – Whether customer entitled to mandatory injunction – Meaning of 'suspect' – Whether evidence of suspicion required to be adduced – Proceeds of Crime Act 2002, ss 328(1), 333(2)(c), (3)(b).

The claimant had a business account with the defendant bank. The claimant made a contract to purchase a consignment of mobile telephones, and a contract to sell the same telephones to a Swiss company. The Swiss company paid an amount into the claimant's account from an offshore account and on the same day the claimant instructed the bank to make a payment. The following day the bank wrote to inform the claimant that it could not currently comply with its instructions and could not enter into any further discussion of the matter. The customer applied for an interim injunction requiring the bank to comply with its instructions. The bank caused a letter to be sent to the court by its solicitors to the effect that it had made an authorised disclosure to the Revenue and Customs under the Proceeds of Crime Act 2002. Section 328(1)[a] of the 2002 Act provided that a person committed an offence if he entered into or became concerned in an arrangement which he knew or suspected facilitated the acquisition, retention, use or control of criminal property by or on behalf of another person and sub-s (2) provided that a person did not commit such an offence if, inter alia, he made an authorised disclosure. As an authorised disclosure had been made the tipping-off provision in s 333[b] of the 2002 Act came into effect. That section provided that a person committed an offence if he knew or suspected that an authorised disclosure had been made and he made a disclosure which was likely to prejudice any investigation. But sub-ss (2)(c) and (3)(b) together provided an exception for a professional legal adviser making a disclosure to any person in connection with legal proceedings. The judge refused the application for an injunction on the basis that Parliament had laid down a statutory scheme to prevent money laundering and, once the bank had stated that it suspected money in the claimant's account was criminal property, that was the end of the matter. The claimant appealed, submitting, inter alia, (i) that by refusing to honour its instructions, the bank was acting in breach of the contract of mandate; and (ii) that it could not be enough merely for the bank to say that it suspected that processing a cheque would facilitate the use or control of criminal property. The court considered the meaning of 'suspect' in that context and the

a Section 328, so far as material, is set out at [1], below
b Section 333, so far as material, is set out at [18], below

question of how, in a civil case, evidence of suspicion was to be adduced and whether it could be cross-examined. a

Held – (1) A banker committed an offence under s 328 of the 2002 Act if he knew or suspected that money in a customer's account was criminal property and, without making disclosure or without authorised consent (if disclosure were made) he processed a customer's cheque in such a way as to transfer that money b into the account of another person as he was facilitating the use or control of that criminal property. As it was a criminal offence to honour the customer's mandate in such circumstances there could be no breach of contract for the bank to refuse to honour its mandate and there could, equally, be no invasion (or threat of an invasion) of a legal right on the part of the bank such as was required before a claimant could apply for an injunction. There would be no issue to be c tried in any later legal proceedings and any application for an interlocutory mandatory injunction would have to be dismissed. Accordingly, in the instant case, the claim for an injunction would fail unless the claimant could attack the factual foundation on the basis of which the criminal liability would arise (see [9], [10], [27], [28], below).

(2) The word 'suspect' in civil cases, as in criminal cases concerning knowing or suspecting another person was engaged in criminal conduct, meant that the d person must think that there was a possibility, which was more than fanciful, that the relevant facts existed, subject, in an appropriate case, to the further requirement that the suspicion so formed should be of a settled nature (see [16], [27], [28], below); *R v Da Silva* [2006] 4 All ER 900 followed. e

(3) Where a professional legal adviser had made a disclosure to a person in connection with legal proceedings under s 333(2)(c), (3)(b) of the 2002 Act, as had been made in the instant case by the bank's solicitor to the court, it would be a fruitless exercise to cross-examine the solicitor about the existence of the bank's suspicion. Moreover, there was no mechanism whereby any officer of the bank f could be required to attend for cross-examination since there was no provision enabling the relevant person to give evidence of his suspicion. The existence of suspicion was a subjective fact. There was no legal requirement that there should be reasonable ground for the suspicion and the provisions of the 2002 Act permitting only the bank's legal adviser to make a disclosure on its behalf and then only for the purpose of court proceedings could not be side-stepped. g Accordingly, the bank had lawfully and properly complied with the relevant procedure. The appeal would therefore be dismissed (see [19], [21], [26]–[28], below).

Notes

For principal money laundering offences: arrangements, appropriate consent and for the offence of tipping off see 11(2) *Halsbury's Laws* (4th edn) (2006 reissue) paras 792, 794, 803. h

For the Proceeds of Crime Act 2002, ss 328, 333, see 12(2) *Halsbury's Statutes* (4th edn) (2005 reissue) 981, 989.

Cases referred to in judgments j

Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit [2003] EWHC 703 (Comm), [2003] 4 All ER 1225, [2003] 1 WLR 2711.

Ashingdane v UK (1985) 7 EHRR 528, [1985] ECHR 8225/78, ECt HR.

Governor and Co of the Bank of Scotland v A Ltd [2001] EWCA Civ 52, [2001] 3 All ER 58, [2001] 1 WLR 751.

New Bridge Holdings Ltd v Barclays Bank plc (10 February 2006, unreported).
R v Da Silva [2006] EWCA Crim 1654, [2006] 4 All ER 900.

Appeal

The claimant, K Ltd, a customer of National Westminster Bank plc, appealed from the decision of Judge Gilliland QC sitting in the Manchester District Registry: Mercantile Court on 9 September 2005 dismissing its claim for an interim injunction requiring the bank to comply with a payment request made by K Ltd on 22 August 2005. With permission of the court the Revenue and Customs Commissioners and the Serious Organised Crime Agency (SOCA) intervened in the appeal. The facts are set out in the judgment of Longmore LJ.

Barbara Dohmann QC, David Berkley QC and *Pépin Aslett* (instructed by *Blacks Solicitors LLP*) for the customer.

Richard Lissack QC and *Paul Downes* (instructed by *DLA Piper Rudnick Gray Cary LLP*) for the bank.

Andrew Mitchell QC and *Peter de Verneuil Smith* (instructed by the *Revenue and Customs Prosecutions Office* and the *Serious Organised Crime Agency*) for the Revenue and Customs Commissioners and for SOCA.

Cur adv vult

19 July 2006. The following judgments were delivered.

LONGMORE LJ.

INTRODUCTION

[1] This appeal raises questions of construction in relation to the money laundering provisions in Pt 7 of the Proceeds of Crime Act 2002. Section 328 of that Act provides:

> '*Arrangements.*—(1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.
>
> (2) But a person does not commit such an offence if—(a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent . . .'

[2] In the present case the defendant bank asserts that to comply with a payment request made on 22 August 2005 by its customer to pay money out of its account would mean that it would become concerned in an arrangement which it suspected would facilitate the use of criminal property by its customer. In order to avoid committing a criminal offence it had therefore to make an authorised disclosure and obtain the appropriate consent.

[3] Appropriate consent is defined in s 335 of the Act:

> '(1) The appropriate consent is . . . (b) the consent of a constable to do a prohibited act if an authorised disclosure is made to a constable; (c) the consent of a customs officer to do a prohibited act if an authorised disclosure is made to a customs officer.

(2) A person must be treated as having the appropriate consent if—(a) he makes an authorised disclosure to a constable or a customs officer, and (b) the condition in subsection (3) or the condition in subsection (4) is satisfied.

(3) The condition is that before the end of the notice period he does not receive notice from a constable or customs officer that consent to the doing of the act is refused.

(4) The condition is that—(a) before the end of the notice period he receives notice from a constable or customs officer that consent to the doing of the act is refused, and (b) the moratorium period has expired.

(5) The notice period is the period of seven working days starting with the first working day after the person makes the disclosure.

(6) The moratorium period is the period of 31 days starting with the day on which the person receives notice that consent to the doing of the act is refused.'

In the present case HM Revenue and Customs refused consent within the notice period of seven working days but they granted consent before the moratorium period of 31 days expired.

[4] The customer (as I shall call the claimant) made a claim for an interim injunction requiring the bank to comply with the customer's instructions. That application was refused by Judge Gilliland on 9 September 2005. Since consent was granted on 15 September and the transaction was therefore performed, the appeal itself has been rendered redundant. Nevertheless costs are still in issue and this application gives rise to important questions under the 2002 Act.

THE FACTS

[5] The customer had a business account since July 2001. On 18 August 2005 it made two transactions: (1) a contract to purchase a consignment of mobile telephones from Fones Centre Ltd (Fones) for £200,000 plus VAT (viz £235,000 in all); (2) a contract to sell the same telephones to a Swiss company for £215,200. The VAT paid on the purchase would be reclaimable since the purchase was made for export. That meant that the customer would make a profit of £20,000 on the transaction. About the same time the customer's director, Mr H explained to the manager (Mr Gibson) who was responsible for his account that he would need to make a substantial payment to Fones. On 22 August the Swiss purchaser paid £215,200 into the customer's account at the bank from an account in the Netherlands Antilles and on the same day Mr H instructed the bank by fax to pay Fones £235,000. On 23 August Mr Gibson wrote to Mr H saying that the bank could not currently comply with his instructions and could not enter into any further discussion of the matter. The customer immediately put the matter in the hands of its solicitors who, after letters before action, applied to the court for an injunction on 6 September. The court adjourned the application until 9 September and a formal notice of application was issued by the customer on the following day. Meanwhile the bank (after consultation with Revenue and Customs) caused a letter of 6 September to be sent by its solicitors to the effect that it had made a disclosure to the Customs. On 9 September the judge refused the application on the basis that Parliament had laid down a statutory scheme to prevent money laundering and, once the bank stated that it suspected money in the customer's account was criminal property, that was an end of the matter.

THE SUBMISSIONS

[6] Ms Barbara Dohmann QC appeared to argue the appeal for the customer. She submitted: (1) the bank by refusing to honour its customer's instructions, was acting in breach of the contract of mandate whereby the bank had agreed to honour its customer's instructions; (2) that the judge should have restrained the bank from continuing to act in breach of contract and should have granted the injunction sought; (3) that if the bank was going to rely on any suspicion that the money in the customer's account was criminal property, it should have given admissible evidence to the court of any such suspicion. A solicitor's letter which baldly stated that the bank had made a disclosure was insufficient because (a) it did not identify the fact that the bank entertained any suspicion on the matter; (b) it did not identify who in the bank had had any such suspicion; (4) if there had been admissible evidence before the court, the maker of the statement could be cross-examined on the question whether he did actually entertain a suspicion and (perhaps) whether there were any grounds for such suspicion. Otherwise, a customer's account could be effectively frozen even if a suspicion had not been entertained; the court's guidance was sought on what in law could constitute suspicion; (5) if the judge was right that the court was powerless to question whether the bank did have any suspicion, the customer was deprived of access to a court which was his right under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) or deprived of his possessions under art 1 of the First Protocol of the convention and therefore the statutory provision should be interpreted (or read down) to avoid such a result.

[7] Mr Richard Lissack QC for the bank submitted: (1) it had been agreed that the solicitors' letter of 6 September could be treated as evidence; (2) on that basis it was clear that the bank did entertain a relevant suspicion; (3) once the bank did entertain such a suspicion, it would be a criminal offence for them to perform the required transaction; no court should grant an injunction which required a defendant to act illegally; (4) it was not contemplated by Parliament that a banker (or anyone else) should be cross-examined as to whether a suspicion was entertained; suspicion was an ordinary English word on which no guidance was needed from the court; in any event a moratorium of seven working days plus 31 ordinary days (40 days in all) was too short a time for any meaningful investigation to take place; (5) the convention had no part to play.

[8] By permission of the court, HM Revenue and Customs (Revenue and Customs) and the Serious Organised Crime Agency (SOCA) intervened in the appeal. Mr Andrew Mitchell QC on their behalf supported the bank's submissions and informed the court that institutions to which the money laundering provisions in the 2002 Act applied would normally have nominated officers pursuant to ss 330 and 331 of the 2002 Act and it was those officers who would be in contact with the SOCA or the investigating authority to whom the SOCA would have referred the disclosure, would be making any authorised disclosure to the SOCA or any other relevant authority and would be seeking the relevant consent from them to process any transactions. It would also be such persons who would be making disclosure to the court for the purpose of the tipping off provisions of the 2002 Act whereby no disclosure could be made to the customer save for the purpose of legal proceedings pursuant to s 333(2)(c) and (3)(b) of the 2002 Act. It would scarcely be feasible to cross-examine any such person since he or she would not be the person who originally entertained the suspicion.

THE CRIMINAL LAW

[9] There can be no doubt that, if a banker knows or suspects that money in a customer's account is criminal property and, without making disclosure or without authorised consent (if disclosure is made), he processes a customer's cheque in such a way as to transfer that money into the account of another person, he facilitates the use or control of that criminal property and thus commits an offence under s 328 of the 2002 Act. It would be no defence to a charge under that section that the bank was contractually obliged to obey its customer's instructions.

[10] If the law of the land makes it a criminal offence to honour the customer's mandate in these circumstances there can, in my judgment, be no breach of contract for the bank to refuse to honour its mandate and there can, equally, be no invasion (or threat of an invasion) of a legal right on the part of the bank such as is required before a claimant can apply for an injunction. If that is right, there would be no issue to be tried in any later legal proceedings and any application for an interlocutory mandatory injunction has to be dismissed.

[11] It could be said that this puts the matter over-legalistically or over-dramatically in the sense that it is not usually a defence to a claim for a breach of contract that the contract-breaker would, by performing the contract, be in breach of the criminal law. That is not, however, correct. The conventional view is that, if a statute renders the performance of a contract illegal, the contract is frustrated and both sides are discharged from further performance. In a case, however, where a statute makes it temporarily illegal to perform the contract, the contract will only be suspended until the illegality is removed. That still means that, during the suspension, no legal right exists on which any claim to an injunction must depend.

[12] Even if, for any reason, the above analysis is open to objection, the fact still remains that during the seven-working-day or 31-day period, as the case may be, the bank would be acting illegally by processing the cheque. It would be entirely inappropriate for the court, interlocutorily or otherwise, to require the performance of an act which would render the performer of the act criminally liable. As a matter of discretion any injunction should be refused.

[13] On any view, therefore, a claim for an injunction in the present case must fail, unless the customer can in some way attack the factual foundation on the basis of which the criminal liability will arise. Here it is 'suspicion' on the part of the bank. If the bank asserts it is suspicious, can that be controverted in any way?

'SUSPICION'

[14] The customer forcefully submits that it cannot be enough merely for the bank to say that it suspects that processing a cheque will facilitate the use or control of criminal property. It must say so in a properly admissible form, stating who in the bank has formed the suspicion, and be prepared to be cross-examined on that question. The fact that the bank's solicitors letter was agreed to be received in the evidence in the present case does not conclude this question since the letter did not identify the person in the bank who had the relevant suspicion and was not in a form amenable to render any bank official liable to be cross-examined as to whether he had the relevant suspicion or not. It is in this context that the definition of 'suspicion' or 'suspect' arises because, in the absence of any legal definition, it is unclear whether a bank official had a true suspicion or not.

[15] Mr Lissack and Mr Mitchell urged us not to yield to the blandishments of Ms Dohmann's request to the court to give some guidance for the future as to the meaning of 'suspect'. Any definition of what was an ordinary English word was, they said, likely to be unhelpful and only put a gloss on the statute. That is all very well but the problem has arisen in the Criminal Division of this court in appeals in cases where judges have tried to assist juries on the meaning of the concept of suspicion and it is important that both divisions of this court speak, so far as possible, with one voice. The problem is not made easier by the fact that Mr Mitchell, who in an authorial capacity has co-written the leading work on the topic, *Mitchell, Taylor & Talbot on Confiscation and the Proceeds of Crime* (3rd edn, 2005), in his capacity as leading counsel for the intervening parties before us expressed unease at the definition used in his important work which cites the *Chambers' Dictionary* definition of the word suspicion and adds 'Thus any inkling or fleeting thought that the property might be [criminal property] will suffice' (see vol II, section VIII, paras 008–009).

[16] In *R v Da Silva* [2006] EWCA Crim 1654, [2006] 4 All ER 900 this court has said that for a defendant to be convicted of an offence under s 93A(1)(a) of the Criminal Justice Act 1988 (the earlier equivalent of s 328 of the 2002 Act), he or she must think that there is a possibility, which is more than fanciful, that the relevant facts exist. This is subject, in an appropriate case, to the further requirement that the suspicion so formed should be of a settled nature. If that definition is sufficient for criminal cases, so also should it be for civil cases.

[17] That still leaves the question of how, in a civil case, evidence of suspicion is to be adduced and whether it can be cross-examined. This is an anxious and difficult matter.

EVIDENCE OF SUSPICION

[18] A disclosure by a banker to the authorities that he suspects he is being asked to facilitate the use or control of criminal property is an authorised disclosure pursuant to s 338 of the 2002 Act. Thereafter the tipping-off provision contained in s 333 of that Act comes into effect. That section provides:

> '(1) A person commits an offence if—(a) he knows or suspects that a disclosure falling within section . . . 338 has been made, and (b) he makes a disclosure which is likely to prejudice any investigation which might be conducted following the disclosure referred to in paragraph (a).
>
> (2) But a person does not commit an offence under subsection (1) if—(a) he did not know or suspect that the disclosure was likely to be prejudicial as mentioned in subsection (1); (b) the disclosure is made in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct; (c) he is a professional legal adviser and the disclosure falls within subsection (3).
>
> (3) A disclosure falls within this subsection if it is a disclosure—(a) to (or to a representative of) a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client, or (b) to any person in connection with legal proceedings or contemplated legal proceedings.
>
> (4) But a disclosure does not fall within subsection (3) if it is made with the intention of furthering a criminal purpose.'

This section makes it clear that a banker who makes a disclosure which he knows or suspects is likely to prejudice any investigation commits a criminal offence. The only sure way in which such an offence can be avoided is if the banker avails himself of sub-s (2)(c) and procures his professional legal adviser to make the relevant disclosure and then only to a person in connection with legal proceedings pursuant to sub-s (3)(b). The bank in the present case correctly followed this statutory route of disclosure and procured its solicitors to make the relevant disclosure to the court by the letter of 6 September 2005, when they were sued by the claimant for an injunction.

[19] It cannot be of any consequence whether the bank's solicitor made the disclosure to the court by way of letter or by way of formal witness statement since the solicitor will not himself have any suspicion; he will only be reporting the suspicion of the bank's officers, whether that be the nominated officer of the bank or the manager of the account who may have been the first person to entertain the relevant suspicion. It would be a fruitless exercise to cross-examine the solicitor about the existence of the bank's suspicion. There is, moreover, no mechanism whereby any officer of the bank can be required to attend for cross-examination since there is no provision enabling the relevant person to give evidence of his suspicion.

[20] This is not surprising. It may well have been the intention of the statute to protect those having a suspicion and reporting that suspicion to the authorities from being identified, since it is notorious that those concerned in money laundering are no respecters of persons who report them to the authorities. This conclusion is bolstered by the further consideration that any cross-examination of a bank employee would, in fact, be almost as pointless as cross-examination of a bank's solicitor. Once the employee confirmed that he had a suspicion, any judge would be highly likely to find that he did indeed have that suspicion. Any cross-examination would be bound to decline into an argument whether what the employee thought could amount in law to a suspicion, which is not a proper matter for cross-examination at all.

[21] Ms Dohmann submitted that, if this was the position, it would be all too easy for banks to assert a suspicion which was in fact groundless. She instanced this very case, saying that the only reasons for the transaction to be suspect was that it concerned mobile telephones and that the payment by the Swiss purchaser came from an off shore account. That she said was just not enough to amount to a proper suspicion in law. The answer to this submission is two-fold: (1) The existence of suspicion is a subjective fact. There is no legal requirement that there should be reasonable grounds for the suspicion. The relevant bank employee either suspects or he does not. If he does suspect, he must (either himself or through the bank's nominated officer) inform the authorities. (2) The provisions of the statute permitting only the bank's professional legal adviser to make a disclosure on its behalf and then only for the purpose of court proceedings cannot be side-stepped.

[22] The truth is that Parliament has struck a precise and workable balance of conflicting interests in the 2002 Act. It is, of course, true that to intervene between a banker and his customer in the performance of the contract of mandate is a serious interference with the free flow of trade. But Parliament has considered that a limited interference is to be tolerated in preference to allowing the undoubted evil of money laundering to run rife in the commercial community. The fact that the interference lasts only for seven working days in what we were told were the majority of cases and a further 31 days only,

unless the relevant authority goes to the length of applying to the court for a restraint order when all cards will have to be on the table in any event, shows that the interference with freedom of trade is limited. Many people would think that a reasonable balance has been struck. That reasonable balance avoids the difficulties, raised by the previous statutory provisions (contained in ss 93A–93D of the 1988 Act where no time limits were incorporated) and discussed in *Governor and Co of the Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 3 All ER 58, [2001] 1 WLR 751 and *Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit* [2003] EWHC 703 (Comm), [2003] 4 All ER 1225, [2003] 1 WLR 2711.

[23] Even so the terms of the 2002 Act have, not surprisingly, given rise to concern. Judge Norris QC in *New Bridge Holdings Ltd v Barclays Bank plc* (10 February 2006, unreported) has suggested (at para 26) that one way forward might be—

> 'to provide for some procedure whereby the arbitrary and capricious exercise of power should be prevented by the court being told, in confidence by the relevant authority, whether or not an investigation is in progress and the general nature of that investigation, so that the court could form a view—a view as to the likely success of the applicant at trial in obtaining the relief he seeks or the bank committing an offence if it makes the transfer without the relevant consent.'

I fear that I do not think it would be satisfactory or acceptable for the SOCA to communicate privately to the court without the court being able to communicate to the claimant. That would not be open justice. In so far as Judge Norris was concerned about arbitrary or capricious exercise of power by the SOCA (or any other relevant authority) that can be catered for by judicial review. I did not understand Mr Mitchell to assert that the SOCA (or any other authority) were not amenable to judicial review on ordinary principles. That is not a matter with which this court is concerned on this application. The only matter with which this court is presently dealing is whether the bank had a suspicion that the money in its customer's account was criminal property. But again for the bank to communicate its suspicion to a judge in private would not be right either. Quite apart from the elementary principle of open justice, the court might be put in a position where its own view was that the bank did not hold a suspicion (perhaps because it thought that any suspicion could not reasonably be held) but the SOCA took a contrary view. An expression of view by the court in the absence of the SOCA could not bind them; it would also be a misuse of resources for them to have to instruct counsel in every case in order that they could be bound by the result. For all these reasons I do not think it right for the judge to be drawn into dealing with these matters in the absence of the claimant. It is quite unlike debates about privileged documents when the judge sometimes sees the documents and makes up his own mind whether privilege is rightly claimed. In such cases the litigation is well developed and the issues can be debated, at any rate in outline, with all parties present.

THE CONVENTION

[24] Quite correctly Ms Dohmann did not press her arguments on the convention very hard in the course of oral argument. In relation to art 6 she relied on *Ashingdane v UK* (1985) 7 EHRR 528 at 546–547 (para 57) for the uncontroversial proposition that, while national courts are entitled to regulate

the right of access to their courts, such regulation must not impair the essence of that right and must pursue a legitimate aim in a proportionate manner. However, the limited interference with the claimant's common law rights to require its banker to perform its contract (which is constituted by the 2002 Act) does not in my view impair the right of access to the courts in anything more than a short suspensory manner and, for the reasons given at [22], above, is in any event, a legitimate aim pursued in a proportionate manner.

[25] As far as art 1 of the First Protocol is concerned, it must be doubtful whether a right to have a contract of mandate performed is the kind of possession which art 1 contemplates will be peacefully enjoyed. It is not as if the debt constituted by the account with the bank has been cancelled or otherwise done away with. All that has happened is that performance of the mandate contract has been deferred by a number of days (seven or 38 as the case may be). But in any event for the reasons I have attempted to give, any such interference with peaceful enjoyment as there may have been was in the public interest and subject to the conditions provided for in the 2002 Act. There is therefore no breach of art 1 of the Protocol.

CONCLUSION

[26] For these reasons I would hold with Judge Gilliland QC that Parliament has laid down the relevant procedure with which the bank has lawfully and properly complied and I would dismiss this appeal.

LAWS LJ.

[27] I agree.

WARD LJ.

[28] I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

R (on the application of Conville) v Richmond upon Thames London Borough Council

[2006] EWCA Civ 718

COURT OF APPEAL, CIVIL DIVISION
PILL, KEENE AND GAGE LJJ
11 APRIL, 8 JUNE 2006

Housing – Homeless person – Duty of housing authority to provide accommodation – Person becoming homeless intentionally – Person having priority need – Duty to provide accommodation for such period as authority considering would give him reasonable opportunity of securing accommodation for his occupation – Whether authority entitled to have regard to considerations other than individual situation in determining what amounted to reasonable opportunity of securing accommodation for occupation – Housing Act 1996, s 190(2)(a).

The claimant applied to the defendant local housing authority for assistance with housing. She was provided with temporary accommodation pending an assessment. On 22 February 2005, the authority informed the claimant that although it was satisfied that she was homeless and had a priority need, she had become homeless intentionally. She was accordingly given 28 days' notice to leave the temporary accommodation. An extension was granted but the claimant was later informed that the provision of temporary accommodation would end on 3 June. It was accepted that the claimant had made genuine attempts to find accommodation, but she was unable to finance the deposit of one month's rent and the further month's rent in advance required by the landlords she had approached. She applied for judicial review, seeking mandatory relief against the authority, including an order requiring it to provide accommodation for her. The application was dismissed, the judge holding, inter alia, that the words '[the local authority] shall . . . secure that accommodation is available for his occupation for such period as they consider will give him a reasonable opportunity of securing accommodation' in s 190(2)(a)[a] of the Housing Act 1996 involved consideration by the authority both of the claimant's individual situation and that of the authority itself, including such things as the resources available to the authority, the demand for housing in the area, and the demand from those who were not intentionally homeless. The claimant appealed, submitting that s 190(2)(a) did not refer to the average or reasonable applicant and made no reference to the resources of the authority.

Held – The duty with respect to accommodation imposed by s 190(2)(a) was that it be made available for such period as an authority considered would give a claimant a 'reasonable opportunity of securing accommodation for his occupation'. That was something conferred on the claimant; a right he acquired coterminous with the extent of the duty. While the authority could decide, subject to the supervision of the court under ordinary principles, what amounted to a reasonable opportunity, the expression did not permit it, in doing so, to have

a Section 190 is set out at [7], below

regard to considerations peculiar to it, such as the extent of its resources and other demands upon it. It was what was reasonable from the applicant's standpoint, having regard to his circumstances and in the context of the accommodation potentially available. What amounted to a reasonable opportunity would depend on the particular circumstances but it was an assessment the authority was capable of making without converting it into a duty to meet the claimant's needs. In the particular statutory context, a distinction was maintainable between giving a reasonable opportunity and giving such opportunity as would succeed in obtaining accommodation. The duty to provide a reasonable opportunity fell short of a duty to provide long term accommodation. It followed that the judge had erred in his construction of s 190(2)(a) and accordingly the appeal would be allowed (see [36]–[40], [42], below).

R (on the application of G) v Barnet London BC, R (on the application of W) v Lambeth London BC, R (on the application of A) v Lambeth London BC [2004] 1 All ER 97 distinguished.

Notes

For the interim duty of a local housing authority to accommodate a homeless person in case of apparent priority need, see 22 *Halsbury's Laws* (4th edn) (2006 reissue) para 286.

For the Housing Act 1996, s 190, see 21 *Halsbury's Statutes* (4th edn) (2005 reissue) 1097.

Cases referred to in judgments

R v Inner London Education Authority, ex p Ali [1990] 2 Admin LR 822, DC.

R (on the application of G) v Barnet London BC, R (on the application of W) v Lambeth London BC, R (on the application of A) v Lambeth London BC [2003] UKHL 57, [2004] 1 All ER 97, [2004] 2 AC 208, [2003] 3 WLR 1194.

Appeal

Therese Conville appealed, with permission of Waller LJ against the decision of Goldring J of 5 July 2005 ([2005] EWHC 1430 (Admin), [2006] HLR 1) to dismiss her application for judicial review of the decision of Richmond upon Thames London Borough Council to end the provision to her of temporary accommodation, after having concluded that she had become homeless intentionally. The facts are set out in the judgment of Pill LJ.

Jan Luba QC and *Liz Davies* (instructed by *Anthony Gold*) for the claimant.

Matthew Hutchings (instructed by *Richard Mellor*, Richmond upon Thames London BC) for the authority.

Cur adv vult

8 June 2006. The following judgments were delivered.

PILL LJ.

[1] This is an appeal against a judgment of Goldring J dated 5 July 2005 ([2005] EWHC 1430 (Admin), [2006] HLR 1). Ms Therese Conville, the appellant, challenges the judge's construction of s 190(2)(a) of the Housing Act 1996 (as amended by the Homelessness Act 2002). In her claim form, the appellant sought mandatory relief against the London Borough of

Richmond upon Thames (the council), including an order requiring the council to provide accommodation for her.

[2] On the day before judgment was delivered, the appellant found her own accommodation and mandatory relief was no longer sought. Permission to appeal to this court was given by Waller LJ, on the basis that the judge's construction of the statute, which might otherwise be relied on in other cases, should be considered by the Court of Appeal.

[3] In those circumstances, the facts can be stated briefly. The appellant is a single mother of one son, aged 13 years. Having lost her accommodation in November 2004, the appellant applied to the council on 22 November 2004 for assistance with housing. She and her son were provided with temporary bed and breakfast accommodation pending an assessment.

[4] By letter of 22 February 2005, the council wrote to the appellant informing her of their decision that, in the terms of the 1996 Act, they were satisfied that the appellant was homeless, had a priority need (as she had a dependent child) but also that she had become homeless intentionally. She was given 28 days' notice to leave the temporary accommodation. An extension was granted but the appellant was told by letter received on 11 or 12 May that the provision of temporary accommodation would end on 3 June 2005, that is about three weeks from the receipt of the letter.

[5] It was accepted that the appellant had made genuine attempts to find accommodation. Her problem was that she was unable to finance the deposit of one month's rent and the further month's rent in advance required by the landlords she approached. The possibility of her borrowing money from a friend or relative had been raised by the council, as had the possibility of financial assistance from the council. The council operated a rent deposit scheme under which the homeless could be assisted with deposits and advances of rent but the appellant was told she was not eligible.

[6] A further short extension was granted and, before it expired, the proceedings were issued. The appellant obtained an interim injunction requiring the council to provide accommodation until further order.

THE 1996 ACT AND THE JUDGMENT OF GOLDRING J

[7] Section 190 of the 1996 Act provides:

> '(1) This section applies where the local housing authority are satisfied that an applicant is homeless and is eligible for assistance but are also satisfied that he became homeless intentionally.
>
> (2) If the authority are satisfied that the applicant has a priority need, they shall—(a) secure that accommodation is available for his occupation for such period as they consider will give him a reasonable opportunity of securing accommodation for his occupation, and (b) provide him with (or secure that he is provided with) advice and assistance in any attempts he may make to secure that accommodation becomes available for his occupation.
>
> (3) If they are not satisfied that he has a priority need, they shall provide him with (or secure that he is provided with) advice and assistance in any attempts he may make to secure that accommodation becomes available for his occupation.
>
> (4) The applicant's housing needs shall be assessed before advice and assistance is provided under subsection (2)(b) or (3).
>
> (5) The advice and assistance provided under subsection (2)(b) or (3) must include information about the likely availability in the authority's district of

types of accommodation appropriate to the applicant's housing needs (including, in particular, the location and sources of such types of accommodation).' a

[8] By virtue of s 182(1) of the 1996 Act, the council are required to have regard, in the exercise of their functions relating to homelessness and the prevention of homelessness, to the Homelessness Code of Guidance for Local Authorities. Paragraph 9.30 of the current code provides: b

'[H]ousing authorities will need to consider each case on its merits. In particular, housing authorities will need to take account of the housing circumstances in the local area, including how readily other accommodation is available in the district, and have regard to the particular circumstances of the applicant, including the resources available to him or her to provide rent in advance or a rent deposit where this may be required by private landlords.' c

[9] The appeal turns on the construction of s 190(2)(a). The judge found:

'[62] In my view, words "reasonable opportunity of securing accommodation" involve consideration by the local authority both of the d applicant's individual situation and that of the authority itself. In this case, that would involve consideration of the claimant's financial difficulties, but not to the exclusion of all else. It seems to me quite plain that Parliament intended that the local authority should exercise its judgment having regard to those factors it reasonably considered relevant. Those must include such e things as the resources available to the authority, the demand for housing in the area, the demand from those who are not intentionally homeless and so on. If Miss Davies [counsel for the appellant] is right, on facts such as the present, such would be the obligation on the local authority that any distinction between the intentionally and unintentionally homeless person would to all intents and purposes disappear. For the practical effect of her f submissions would be a virtually open ended obligation upon the authority to provide accommodation until such time as the claimant has obtained sufficient funding to rent property. That does not seem to me to have been Parliament's intention.'

The parties are at odds as to whether the appellant's case was put as the judge g understood it to have been put but the appeal will not turn on that issue. The judge found that the council had adequately discharged their duty under the section and had sufficiently expressed their reasons.

[10] The judge also found that the council were entitled not to provide financial assistance to the claimant under s 190(2)(b). The judge stated: h

'[87] While in its earlier approach there was an over emphasis by the defendant upon eligibility under its scheme, it seems to me that by June 9, 2005 it was approaching the question of financial assistance in a way it was entitled to. It had regard to all the material aspects of the claimant's position. It was aware of its power to give financial assistance in terms of its j obligations under s 190(2)(b). It placed such reliance on the terms of its scheme as it was entitled to. It was entitled to approach the claimant's application in the way it did. It was entitled to reject it. As to the reasons provided, they seem to be adequate. No doubt they could be expressed at greater length and in more detail. However, it is not appropriate in my view to subject the reasons expressed for a decision lawfully reached to over

legalistic, textual analysis. As in all such situations the practical realities need always to be born in mind. No doubt those with responsibility for homelessness in an authority such as the defendant have difficult decisions to take and explain, often under considerable pressure.'

The decision not to provide financial assistance is not now challenged.

THE SUBMISSIONS

[11] On behalf of the appellant, it is submitted that the language of s 190(2)(a) imposes a duty to secure accommodation for such period as the council consider will give the particular homeless applicant a reasonable opportunity of securing accommodation for his particular household. It does not refer to the average or to the reasonable applicant and makes no reference to the resources of the council. Read with other statutory provisions, the paragraph requires the council to give assistance based on the individual needs, abilities and other relevant characteristics of each applicant. He must be given a reasonable opportunity to meet his particular needs. What is a 'reasonable opportunity' is a simple factual question involving a matrix of facts including the applicant's financial and other resources and the availability of accommodation in the district and elsewhere. The opportunity must be an effective one.

[12] Since the council were not prepared to provide financial assistance for the appellant, it was necessary, in assessing what time was required to give the appellant a reasonable opportunity, to consider the prospects of her obtaining financial assistance from elsewhere and the prospect of finding a landlord who would accept her as a tenant without requiring a deposit and a month's rent in advance.

[13] The council were not entitled to take into account the extent of their own financial resources, it is submitted. The wording of the paragraph does not permit that interpretation. Had Parliament intended to permit consideration of the council's resources, it would have done so expressly, as it has in other parts of the statute.

[14] For the appellant, Mr Luba QC describes Pt VII of the 1996 Act, headed 'Homelessness', as providing a safety net for the homeless, as distinct from Pt VI which is concerned with the allocation of social housing. Because the whole of Pt VII of the 1996 Act constitutes a safety net, the provision of housing always being temporary and a route to long-term provision under Pt VI, resources should not be an issue.

[15] The highest duty in Pt VII, under s 193, is to persons with priority need who are not homeless intentionally. Subject to the exit routes provided in the section itself, the local housing authority (the authority) are under a duty to 'secure that accommodation is available for occupation by the applicant'. Because the appellant was found to have become homeless intentionally, that duty did not arise in her case.

[16] The lowest duty, under s 192, is to persons not in priority need who are not homeless intentionally. Though there is a power to secure that accommodation is available for occupation by the applicant (sub-s (3)), the duty is confined to providing the applicant with advice and assistance.

[17] The duty under s 190 was owed to the appellant as a homeless person with a priority need. Section 190 is drafted so as to adopt, subject to the temporal limitation, the duty to secure that accommodation is available from the wording of s 193 (s 190(2)(a)) and the duty to provide advice and assistance from s 192 (s 190(2)(b)).

[18] In his analysis of s 190, Mr Luba submits that what clearly emerges from the wording of s 190(2)(a) is, first, that the decision is in the hands of the authority, secondly, that giving the person a reasonable opportunity is not the same as enabling that person to secure accommodation, thirdly, that the expression 'give him' makes the opportunity 'person centred' and, fourthly, that there is no express reference in the paragraph to the resources of the authority.

[19] The duty of inquiry into cases of homelessness or threatened homelessness arises by virtue of s 184(1). The authority are required to satisfy themselves whether a person is eligible for assistance and, if so, whether any duty, and if so what duty, is owed to him under Pt VII. It is common ground that the duty in s 190(2)(a) arises when, and only when, the decisions required by s 190(1), following those inquiries, have been made by the authority.

[20] Mr Luba refers to the requirement under s 182, already cited, for the authority to have regard to such guidance as may from time to time be given by the Secretary of State. The relevant guidance makes no reference to the resources of the authority. It is also submitted that s 190(2)(a) imposes a continuing and not a once-and-for-all duty. The assessment of what is reasonable must have regard to any change of circumstances during the relevant period.

[21] In submitting that s 190(2)(a) is 'resource free', Mr Luba relies not only on the absence of any reference to the resources of the authority, or to other authority-sensitive criteria in the paragraph, but to the fact that the context requires that there has been a prior assessment of the housing needs of the particular person which, by virtue of s 176, includes his household, a word used as shorthand for the categories defined in the section. Part VII of the 1996 Act provides a safety net of last resort, subject to the duty to children under the Children Act 1989. If the resources of the authority are taken into account, any scheme is likely to be inconsistent as between applicants, the manner of discharge of the duty depending on the authority involved and the stage of the financial year, it is submitted. It is the hard-pressed authorities, where homelessness is likely to be a greater problem, where a lesser opportunity is likely to be given.

[22] Mr Luba submits that where, in Pt VII, wider considerations are intended to be taken into account, specific provision is made. For example, when deciding whether it is reasonable for a person to continue to occupy accommodation, under s 177(2), regard may be had to the general circumstances prevailing in relation to housing in the relevant district. That is a concept which permits having regard to the resources of the authority. In considering out-of-area placements, under s 208, the authority's duty to secure that accommodation is available in its district applies '[s]o far as reasonably practicable'.

[23] For the council, Mr Hutchings accepts that a period of time provided must be favourable to an applicant to a reasonable extent and that what is a reasonable opportunity is not to be judged solely by objective criteria but must have regard to circumstances of the applicant. The particular circumstances of the particular applicant are relevant. It does not follow, he submits, that the resources of the authority are not a relevant factor. The authority may take into account the resources available to them for social housing and it is for the authority to evaluate the importance of cost as a factor.

[24] By way of background, Mr Hutchings submits that Pt VII is not a final safety net because there are remaining duties to children under the 1989 Act and to adults under s 21 of the National Assistance Act 1948. He submits, and this is not in issue, that the period need not be long enough for the person actually to obtain accommodation and that 'reasonable' opportunity does not necessarily

mean an opportunity which leads to success. He submits that an opportunity may be reasonable within the meaning of the paragraph, even if one during which the applicant probably will not achieve success. A wide discretion is conferred on the authority.

[25] Counsel's central submission is that cost is inevitably a factor because the authority are meeting the cost of the temporary accommodation provided during the period of the reasonable opportunity. The cost factor is inescapably present and it follows that the resources of the authority are relevant to their decision.

R (ON THE APPLICATION OF G) v BARNET LONDON BC AND FURTHER SUBMISSIONS

[26] Mr Hutchings relies on the decision in and the statement of general principle by Lord Nicholls of Birkenhead in *R (on the application of G) v Barnet London BC, R (on the application of W) v Lambeth London BC, R (on the application of A) v Lambeth London BC* [2003] UKHL 57, [2004] 1 All ER 97, [2004] 2 AC 208. The issue was as to the nature and extent of the duty imposed on local authorities by s 17(1) of the 1989 Act which imposes a 'general duty' on local authorities with respect to children in need. The duty includes a duty 'to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs'.

[27] Lord Nicholls stated:

> '[13] The extent to which a duty precludes a local authority from ordering its expenditure priorities for itself varies from one duty to another. The governing consideration is the proper interpretation of the statute in question. But identifying the precise content of a statutory duty in this respect is not always easy. This is perhaps especially so in the field of social welfare, where local authorities are required to provide services for those who need them. As a general proposition, the more specific and precise the duty the more readily the statute may be interpreted as imposing an obligation of an absolute character. Conversely, the broader and more general the terms of the duty, the more readily the statute may be construed as affording scope for a local authority to take into account matters such as cost when deciding how best to perform the duty in its own area. In such cases the local authority may have a wide measure of freedom over what steps to take in pursuance of its duty.
>
> [14] Towards one edge of this spectrum are instances such as s 23(1) of the 1989 Act. Under this subsection it is the duty of a local authority looking after a child to provide accommodation for him while he is in the authority's care. This is a duty of an absolute character. An example of the opposite edge of the spectrum, taken from the field of education, is the broad duty imposed on a local education authority by s 8 of the Education Act 1944, now s 14 of the Education Act 1996, "to secure that there shall be available for their area sufficient schools . . . for providing primary education". In *R v Inner London Education Authority, ex p Ali* [1990] 2 Admin LR 822 at 828, Woolf LJ described this as a "target duty".'

[28] Having considered the submissions of the parties and the provisions in the 1989 Act, Lord Nicholls concluded:

> '[30] Thus far I am broadly in agreement with the interpretation urged by the claimants. But I stop short of the conclusion submitted by them. In my view s 17(1) does not impose an absolute, or near absolute, duty on local authorities to meet the specific needs of every child who is in need, whatever

those needs may be. There is no place for absolutes in such a wide-ranging duty regarding the welfare of children. Nor would that be consistent with the qualified nature of some of the specific duties imposed in Pt I of Sch 2. The "needs" of a child for services is itself an inherently imprecise concept. "Needs" are open-ended. Some limit can be placed on what are to be regarded as the needs of a child for the purposes of this legislation if the legislation is read, as it should be, as a reference to reasonable needs. Even so, this leaves much scope for differing views. Questions of degree will often arise. Likewise, the statutory obligation to provide a range and level of services "appropriate" to the needs of children in need gives a local authority considerable latitude in determining what is "appropriate" in an individual case in all the circumstances. In some cases the type and level of service provided may properly fall short of meeting all the child's needs as assessed. The extent of the latitude in each case depends upon the circumstances, prominent among which are the nature of the service in question and the nature and extent of the needs of the child. Cost is also an element which may properly be taken into account in deciding what is "appropriate" in a particular case. The extent to which cost, and hence the resources of a local authority, may be taken into account depends upon all the circumstances including how basic is the assessed need, the ease or difficulty with which it may be met, and the consequences of not meeting it. In a word, despite this latitude the council must act reasonably.'

[29] Lord Hope of Craighead (at [92]) stated that s 17(1) was—

'broadly expressed, with a view to giving the greatest possible scope to the local social services authority as to what it chooses to do in the provision of these services.'

Lord Scott of Foscote (at [119]) stated:

'[I]t would be odd to find that the s 17(1) general duty had imposed on a local authority a mandatory obligation to take some specific step in relation to the child irrespective of the local authority's financial resources and of the cost of the step in question.'

[30] Mr Hutchings submits that, as with s 17(1) of the 1989 Act, s 190(2)(a) of the 1996 Act is not drafted in a form which makes costs and resources obviously immaterial. Given a wide discretion, the extent of the duty must be considered proportionately and that involves taking the authority's resources into account.

[31] In response to the submission that some people to whom the s 190 duty is owed, for example disabled people, will have extreme difficulty in finding accommodation so that, if the appellant's construction of reasonable opportunity is correct, a duty clearly intended to be temporary duty is converted into a permanent duty, Mr Luba submits that in practice this is unlikely to occur in any event because such people will be propelled to the top of the housing allocation list for Pt VI purposes. Mr Hutchings submits that this is not an answer; the appellant's case converts a Pt VII duty into a Pt VI duty. To prevent that, it is necessary to have regard, under s 190, to the authority's resources.

THE SECOND GROUND

[32] That is the issue on which the case has been permitted to come to this court. The second ground of appeal is that the council did not in any event ask itself the correct question or consider sufficiently the issues raised by the

appellant as to what period would give a reasonable opportunity. In the absence of actual facts upon which a decision is required, it would not be helpful in this appeal to state what, in a particular case, would amount to a reasonable opportunity. The judge, having found for the council on the first issue, stated:

> '[64] It seems to me that reflects a sufficient consideration of the issues raised in this case by s 190(2)(a). It seems to me the defendant was entitled to come to the decision expressed in that letter whether the starting date was February 22 or May 11.
>
> [65] It is not necessary to analyse the earlier decision letters or make any findings regarding them. By June 8, 2005 the defendant had adequately discharged its duty under s 190(2)(a) for reasons sufficiently expressed.'

[33] The judge referred (at [63]) to the council's letter of 8 June 2005, in which a further night of accommodation was refused:

> '. . . Having taken into account the scarcity of housing in the locality for people who are on benefits, your client's circumstances including the fact that she does not have a deposit or advance rent, and the difficulties this poses for her, and the other points raised in your letter of [31] May 2005, the Council is satisfied that, regardless of whether the relevant period of time started on 22 February 2005 or 11 May 2005, the period during which accommodation has been provided has been sufficient to give your client a reasonable opportunity of securing accommodation.'

[34] In her witness statement, Miss Harper, a senior assessor in the council's housing needs department stated:

> '28. I was satisfied that regardless of whether the relevant period started on 22 February 2005 or 11 May 2005, the period during which accommodation was provided was sufficient to give the Claimant a reasonable opportunity of securing accommodation. In coming to this view, I had taken into account the following: (a) the scarcity of housing in the locality for people who are on benefits (b) the Claimant's circumstances including the fact that she does not have a deposit or rent in advance and the considerable difficulties this poses for her and (c) the other points raised in the pre-action letter (d) the limited resources of the Council and the needs of other homelessness applicants . . .'

[35] The appellant submits that fuller consideration of the particular circumstances of the appellant was in any event required; the possibility of a further application to the Department of Work and Pensions for a Social Fund Loan, the prospect (which later accrued) of finding a landlord who did not require an advance payment, and the prospect of a successful search for accommodation over a wider location.

CONCLUSIONS

[36] This is not a case in which it is difficult to identify the statutory duty. The duty with respect to accommodation is that it be made available for such period as the authority consider will give the applicant a 'reasonable opportunity of securing accommodation for his occupation'. That is something conferred on the applicant; a right he acquires coterminous with the extent of the duty. While the authority can decide, subject to the supervision of the court under ordinary principles, what amounts to a reasonable opportunity, the expression does not

permit them, in doing so, to have regard to considerations peculiar to them, such as the extent of their resources and other demands upon them. It is what is reasonable from the applicant's standpoint, having regard to his circumstances and in the context of the accommodation potentially available.

[37] In G's case, Lord Scott considered (at [118]) the role of the word 'reasonable' in provisions in the 1989 Act. In paragraphs in Pt I of Sch 2 to that Act, requirements are placed on the local authority to 'take reasonable steps'; to 'make such provision as they consider appropriate'; and to 'take such steps as are reasonably practicable'; to achieve certain ends. Lord Scott stated:

> '. . . It is plain, in my opinion, that in relation to each of these specific duties the local authority can take into account among other things, its overall financial resources and, in particular, the cost of taking a specific step that, if taken, would benefit the child and meet some need. Whether the taking of a particular step is "reasonable" or "reasonably practicable" cannot be divorced from the financial implications of taking the step.'

An example of the use of the word 'reasonable' in that sense also appears in s 208 of the 1996 Act, cited at [22], above. I cite the paragraph from Lord Scott's speech to make the distinction between the effect of the word reasonable in those paragraphs and its different effect in s 190(2)(a). In deciding whether a step by the authority is reasonable, regard may be had to its own resources. In s 190(2)(a), however, it is the opportunity given to the appellant which must be reasonable and not what is reasonable from the authority's standpoint.

[38] I accept that what is reasonable in the present context is to be assessed by reference to the particular needs and circumstances of the applicant. It should have regard to the possibilities open to the applicant, some of which have been described in this judgment. If the applicant is not making reasonable efforts to pursue the possibilities open to him, that will be a strong indication that he should not be given more time. Moreover, the word opportunity connotes something temporary, something that may lapse if not taken up, or if taken without achieving the result desired. A moment will normally be reached when, in spite of reasonable efforts, time will expire if possibilities have not come to fruition. It may be borne in mind that what is contemplated in Pt VII is temporary provision for homeless people and not, as in Pt VI, long-term allocation of housing.

[39] That approach appears to me to accord with the statutory background and purpose of the 1996 Act. While it has been helpful to consider, in some detail, the statutory background, the appeal turns primarily, in my judgment on the ordinary meaning of what amounts to giving a reasonable opportunity.

[40] With respect to the judge, I do not accept that the construction of s 190(2)(a) I prefer creates a 'virtually open ended obligation upon the authority to provide accommodation until such time as the claimant has obtained sufficient funding to rent property'. What amounts to a reasonable opportunity will depend on the particular circumstances but it is an assessment the authority are capable of making without converting it into a duty to meet the appellant's needs. In this statutory context, a distinction is maintainable between giving a reasonable opportunity and giving such opportunity as will succeed in obtaining accommodation. The duty to provide a reasonable opportunity falls short of a duty to provide long-term accommodation.

[41] As to the second ground, provided the correct factors, and only the correct factors, have been taken into account, and the actual circumstances fully

considered, the reasons for the authority's decision may often be stated briefly. The point does not in the event require decision but I am doubtful whether Miss Harper's analysis, at para 28, of her witness statement (reproduced at [34], above) was sufficiently comprehensive in the circumstances.

[42] I would allow this appeal.

KEENE LJ.

[43] I agree.

GAGE LJ.

[44] I also agree.

Appeal allowed.

Kate O'Hanlon Barrister.

10 October 2006. The Appeal Committee of the House of Lords refused permission to appeal.

Practice Note (Anonymisation in asylum and immigration cases in the Court of Appeal)

COURT OF APPEAL, CIVIL DIVISION
SIR ANTHONY CLARKE MR, BROOKE AND NEUBERGER LJJ
31 JULY 2006

Court of appeal – Practice – Civil division – Asylum and immigration cases – Anonymisation of judgments – Form of anonymisation.

SIR ANTHONY CLARKE MR gave the following direction.

The Court of Appeal has decided to follow the universal practice observed by other European jurisdictions and to anonymise its judgments in cases involving asylum seekers. It is satisfied that the publication of the names of appellants may create avoidable risks for them in the countries from which they have come.

It would be impractical to introduce internal arrangements within the Civil Appeals Office which made any distinction between asylum seekers and those seeking other relief under the immigration laws when these cases are received in the Office from the Asylum and Immigration Tribunal or from the Administrative Court.

All applications and appeals raising asylum and immigration issues which are lodged on or after 2 October 2006 will therefore be anonymised in the court's internal records by assigning two initials and the country of origin [AB (Turkey), for instance] unless a judge gives a specific direction to contrary effect.

Such cases will then be listed and referred to solely by reference to this 'name' and the reference number allocated to them in the Civil Appeals Office (for example, AB (Turkey), Case No C5/2006/1234).

Hearings will continue to take place in open court (unless the court otherwise directs). If judgment is given in an asylum appeal (or a permission to appeal application, where the judgment is released from the usual restriction on citation), there will be a presumption that the asylum seeker's anonymity will be preserved unless the court gives a direction to contrary effect. On the other hand, there will be a presumption that judgments in immigration appeals will identify the name of the person seeking relief under the immigration laws unless the court gives a direction requiring anonymity.

If more than one judgment is issued by the Court of Appeal in a single year under the same name, the later judgments will be numbered. Thus AB (Turkey) [2006] EWCA Civ 1; AB (Turkey) (No 2) [2006] EWCA Civ 1235; AB (Turkey) (No 3) [2006] EWCA 2045 etc.

Kate O'Hanlon Barrister.

M v Secretary of State for Work and Pensions

[2006] UKHL 11

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD WALKER OF GESTINGTHORPE, BARONESS HALE OF RICHMOND AND LORD MANCE

5, 6 DECEMBER, 8 MARCH 2006

Child – Maintenance – Child Support – Non-resident parent – Right to respect for private and family life – Protection of property – Prohibition of discrimination – Liability for child support payments of non-resident parent with same sex partner greater than her liability would have been with male partner – Whether discrimination on ground of sex – Whether within ambit of right to respect for private and family life or right to protection of property – Child Support Act 1991 – Human Rights Act 1998, Sch 1, Pt I, arts 8, 14, Pt II, art 1 – Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815.

M was the mother of two children. She was divorced from their father. She was a non-resident parent for the purposes of the Child Support Act 1991. She lived with her same sex partner (who also had children from a previous marriage) in their jointly-owned house. M's children lived with her for two days each week. The effect of the 1991 Act and the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 was that M's child maintenance payments would have been calculated differently had her partner been male, and would have resulted in her liability being lower. She considered that her situation fell within the ambit of the right to respect for private and family life in art 8[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) or within the ambit of the right to the protection of property under art 1[b] of the First Protocol to the convention and that she was accordingly entitled to complain that her enjoyment of those rights had been the subject of adverse discrimination on the ground of sex in violation of art 14[c] of the convention. The appeal tribunal decided in her favour. The Secretary of State appealed, unsuccessfully, to the Child Support Commissioner and to the Court of Appeal. He then appealed to the House of Lords. M submitted, inter alia, that as the concept of respect for private and family life was so wide and multifaceted, any alleged act of discrimination would be within the ambit of art 8 when a complaint under art 14 was being considered. In December 2005 the Civil Partnership Act 2004 came into effect. It amended the 1992 regulations such that the alleged discrimination no longer existed.

Held – The appeal would be allowed (Baroness Hale of Richmond dissenting) for the following reasons.

a Article 8 is set out at [49], below
b Article 1 is set out at [49], below
c Article 14 is set out at [49], below

(1) (Per Lord Bingham of Cornhill, Lord Walker of Gestingthorpe and Lord Mance) A tenuous link with another provision of the convention was not sufficient to bring art 14 into play (see [4], [60], [124], below); *Logan v UK* (1996) 22 EHRR CD 178, *Petrovic v Austria* (1998) 4 BHRC 232, *Estevez v Spain* App No 56501/00 (10 May 2001, unreported), *Fretté v France* [2003] 2 FCR 39 and *Ghaidan v Mendoza* [2004] 3 All ER 411 considered.

(2) (Per Lord Bingham, Lord Walker and Lord Mance) The method of calculation of M's maintenance assessment under the 1991 Act and 1992 regulations did not fall within the ambit of the right to respect for the family relationship between M and her two children. Her art 14 complaint had nothing to do with respect for her relationship with her children (see [1], [5], [85], [125], below).

(3) (Per Lord Bingham, Lord Walker and Lord Mance) There had been no improper intrusion on M's private life. The link between the calculation by the state of her liability to contribute to her children's maintenance on a formula which was different from that which would have been used if she had been in a heterosexual relationship and her right to respect for her private life was very tenuous indeed (see [5], [88], [157], below).

(4) (Per Lord Bingham, Lord Nicholls of Birkenhead, Lord Walker and Lord Mance) Neither the child support regime nor the aspects of it of which M complained had any element of expropriating property so as to fall within art 1 of the First Protocol (see [5], [33], [89], [90], [158], [159], below).

(5) (Per Lord Bingham and Lord Walker) Regarding M, her new partner and their children by their former marriages as a family for the purposes of art 8 did not bring M's case within the ambit of respect for family life under art 8. Although the 1991 Act and the 1992 regulations were intended in a general way to be a positive measure promoting family life, in that they limited the damage inevitably caused by the breakdown of relationships between couples who had had children, that had no more than a tenuous link with respect for family life (see [1], [5], [87], below).

(6) (Per Lord Nicholls and Lord Mance) The Court of Human Rights did not at present recognise that the art 8 guarantee of respect for family life was applicable to the relationship between a same-sex couple and there was no good reason in the instant case for the House to depart from that interpretation (see [26]–[30], [136], [151], [155], [156], below); *Petrovic v Austria* (1998) 4 BHRC 232 and *Estevez v Spain* App No 56501/00 (10 May 2001, unreported) considered.

Notes

For respect for private life, for respect for family life, for what constitutes respect, for the prohibition of discrimination and for the right to property, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 150, 151, 154, 164, 165.

For the Human Rights Act 1998, Sch 1, Pt I, arts 8, 14, Pt II, art 1, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 707, 708, 712.

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Appeal

The Secretary of State for Work and Pensions appealed with permission of the House of Lords Appeal Committee given on 21 February 2005 from the decision of the Court of Appeal (Sedley and Neuberger LJJ, Kennedy LJ dissenting) on 15 October 2004 ([2004] EWCA Civ 1343, [2004] 3 FCR 507) dismissing his appeal from the decision of the Child Support Commissioner (Edward Jacobs) on 1 October 2003 affirming the decision of the unified appeal tribunal (chair: JA Priest) on 11 November 2002 allowing the appeal of M against an assessment made by the Secretary of State of the amount of M's child maintenance payments under the Child Support Act 1991 and the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815. The facts are set out in the opinion of Lord Walker of Gestingthorpe.

Philip Sales and *Daniel Kolinsky* (instructed by the *Office of the Solicitor for the Department for Work and Pensions*) for the Secretary of State.
Karon Monaghan, Ulele Burham and *Gareth Wong* (instructed by Liberty) for Ms M.

Their Lordships took time for consideration.

8 March 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, I have had the great benefit of reading in draft the opinion of my noble and learned friend Lord Walker of Gestingthorpe. I am in complete agreement with it, and would for the reasons which he gives make the order which he proposes. My noble and learned friend's comprehensive summary of the relevant materials and authorities, for which I am greatly indebted to him, enables me to indicate quite briefly (and with no intention to derogate from his reasoning) why I agree with him.

[2] Ms M the respondent, is the mother of two children who spend the greater part of each week with their father, her former husband from whom she is divorced. Under the Child Support Act 1991 she, as the non-resident parent, is required to contribute to the costs of maintaining the children incurred by the father as the parent with care. The amount of her contribution is calculated according to complex rules laid down in regulations made under the 1991 Act, and are in important respects modelled on rules which have for many years obtained in the administration of social security benefits. According to those rules, in assessing a person's entitlement to benefit, some account has until recently been taken of the income and outgoings of a heterosexual partner with whom an applicant is living, but not of those of a homosexual partner. This may, and often does, work to the benefit of an applicant, but may work to the applicant's disadvantage. It does so in the case of Ms M. She now lives with a homosexual partner. As applied to her, on the facts of her case, the rules result in her being required to pay more towards the maintenance of her children than she would have to pay if she were living with a heterosexual partner.

[3] Ms M does not complain that her rights under art 8 of, or art 1 of the First Protocol to, the European Convention for the Protection of Human Rights and

Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) are or have been violated. She claims that her situation falls within the ambit or scope of these provisions and that she is accordingly entitled to complain that her enjoyment of these rights has been the subject of adverse discrimination on the ground of sex, in violation of art 14 in conjunction with either the article or the protocol or both.

[4] It is not difficult, when considering any provision of the convention, including art 8 and art 1 of the First Protocol, to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for. Like my noble and learned friend in [60] below, I cannot accept that even a tenuous link is enough. That would be a recipe for artificiality and legalistic ingenuity of an unacceptable kind.

[5] Like Kennedy LJ in the Court of Appeal (see [2004] EWCA Civ 1343, [2004] 3 FCR 507, [2006] QB 380), I do not think the enhanced contribution required of Ms M impairs in any material way her family life with her children and former husband, or her family life with her children and her current partner, or her private life. No doubt Ms M has less money to spend than if she were required to contribute less (or would do so, but for the discretionary adjustment to which my noble and learned friend refers in [46], below). But this does not impair the love, trust, confidence, mutual dependence and unconstrained social intercourse which are the essence of family life, nor does it invade the sphere of personal and sexual autonomy which are the essence of private life. I regard the application of a rule governing a non-resident parent's liability to contribute to the costs incurred by the parent with care, even if it results in the non-resident parent paying more than she would under a different rule, as altogether remote from the sort of abuse at which art 1 of the First Protocol is directed.

[6] Even if the child support regime is, in the respect complained of, within the ambit of a convention right, Ms M's complaint of discrimination is in my view anachronistic. By that I mean that she is applying the standards of today to criticise a regime which when it was established represented the accepted values of our society, which has now been brought to an end because it no longer does so but which could not, with the support of the public, have been brought to an end very much earlier. Historically, both the law and public opinion withheld their sanction from a relationship between a man and a woman which was not sanctified by marriage or at least regularised by civil ceremony, and homosexual relationships were criminalised or condemned. When extra-marital heterosexual relationships became more generally accepted by the law and public opinion, recognition of homosexual relationships (even of those no longer criminal) was still withheld. Even now there remain bodies of opinion in this country (and much larger bodies of opinion in some other countries) for whom such recognition is still a step too far. But a democratic majority, by enacting the Civil Partnerships Act 2004, has established a new consensus and removed the feature of the old social security and child support regimes of which Ms M complains. If such a regime were to be established today, Ms M could with good reason stigmatise the regime as unjustifiably discriminatory. But it is unrealistic to stigmatise as unjustifiably discriminatory a regime which, given the size of the

overall task and the need to recruit the support of the public, could scarcely have been reformed sooner.

LORD NICHOLLS OF BIRKENHEAD.

[7] My Lords, the Child Support Act 1991 made provision for the payment of maintenance for children whose parents are living apart. The effect of regulations made under the 1991 Act was that in some circumstances the payments due from a non-resident parent living with a person of the opposite sex as husband and wife were less than the amounts due from a corresponding non-resident parent living with a person of the same sex. Hence this claim for unlawful discrimination.

[8] After the proceedings started the impugned regulations were amended by the Civil Partnership Act 2004. This Act came into force on 5 December 2005. The alleged discrimination no longer exists. The question before the House is whether the law in force until 5 December 2005 violated the claimant's convention rights.

ARTICLE 14 AND THE CLAIMANT'S FAMILY LIFE

[9] The primary claim advanced in the proceedings was that the difference in treatment of same-sex couples and heterosexual couples violated the claimant's convention right under art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) taken in conjunction with the protection afforded to family life by art 8. Thus the first question for consideration is whether the facts of this case engage art 14 as claimed.

[10] This question gives rise to a definitional problem. Article 14 does not create a right independently of the other substantive provisions of the convention. That is trite law. Instead, art 14 guarantees that 'enjoyment of the rights and freedoms set forth in this Convention' shall be secured without discrimination on the stated grounds.

[11] The subject matter thus guaranteed contrasts sharply with the subject matter of art 1 of the Twelfth Protocol. This article, not yet operative in this country, guarantees the 'enjoyment of any right set forth by law' without discrimination. The language of art 14, and the contrast with the generality of the language of art 1 of the Twelfth Protocol, might suggest that art 14 is aimed exclusively at the way a state discharges its obligations under the other substantive articles of the convention.

[12] That is not how the European Court of Human Rights has interpreted art 14. Under the Strasbourg jurisprudence it is now well established that art 14 is not so confined. Article 14 has a wider scope than this. This wider interpretation must now be regarded as settled law even though it can give rise to difficulty in identifying the extended boundary of art 14.

[13] The extended boundary identified in the Strasbourg jurisprudence is that, for art 14 to be engaged, the impugned conduct must be within the 'ambit' of a substantive convention right. This term does not greatly assist. In this context 'ambit' is a loose expression, which can itself be interpreted widely or narrowly. It is not a self-defining expression, it is not a legal term of art. Of itself it gives no guidance on how the 'ambit' of a convention article is to be identified. The same is true of comparable expressions such as 'scope' and the need for the impugned measure to be 'linked' to the exercise of a guaranteed right.

[14] The approach of the European Court of Human Rights is to apply these expressions flexibly. Although each of them is capable of extremely wide application, the Strasbourg jurisprudence lends no support to the suggestion that any link, however tenuous, will suffice. Rather, the approach to be distilled from the Strasbourg jurisprudence is that the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article; and vice versa. In other words, the European Court makes in each case what in English law is often called a 'value judgment'.

[15] This approach finds explicit recognition in the context of art 8 in the judgment of the European Court of Human Rights in *Sidabras v Lithuania* [2004] ECHR 55480/00. The applicants were former KGB officers. As such they were subject to wide-ranging employment restrictions. The court held that the possible damage to their leading a normal personal life was a factor to be taken into account 'in determining whether the facts complained of fall within the ambit of art 8 of the Convention' (see para 49).

[16] In one respect the European Court of Human Rights jurisprudence has been more specific. Article 14 is engaged whenever the subject matter of the disadvantage comprises one of the ways a state gives effect to a convention right ('one of the modalities of the exercise of a right guaranteed'). For instance, art 8 does not require a state to grant a parental leave allowance. But if a state chooses to grant a parental leave allowance it thereby demonstrates its respect for family life. The allowance is intended to promote family life. Accordingly the allowance comes within the scope of art 8, and art 14 read with art 8 is engaged (see *Petrovic v Austria* (1998) 4 BHRC 232 at 237 (paras 27–30)).

[17] The latter principle is in point in the present case. The 1991 Act is one of the ways the United Kingdom evinces respect for children and the life of the family of which the child is part. In the present case that means primarily the family life of the claimant's children and their resident parent, that is, their father (the claimant's former husband). But, on this, there is an immediate difficulty confronting the claimant: the impugned regulations have no adverse impact on that family life. The adverse impact of which the claimant complains is the adverse impact the regulations have on her as a partner in her family relationship with her new partner. Her complaint is that she is treated differently, and is worse off financially, than she would be if she were living with a man.

[18] Quite apart from her relationship with her new partner, the claimant herself enjoys family life with her own children. They come and stay with her for two or three days each week. But, again, this does not assist her. The discrimination of which she complains is not discrimination against her as a non-resident parent. It is discrimination against her as a partner in a same-sex relationship. There is no suggestion that the latter discrimination has had any significant adverse impact on her family life with her children.

[19] I turn next to the claimant's relationship with her same-sex partner. The family life of a child and his parents is not the only family life the 1991 Act seeks to protect. The statutory formulae for calculating the amounts payable also have regard to the non-resident parent's life with any new 'partner' he or she may have. For instance, the formulae make allowance for the housing costs of the non-resident parent's new household. Affording protection in this way to the non-resident parent's new family life, that is, the family life of the non-resident parent and his or her new partner, is not a primary purpose of the legislation. None the less, it is a feature built into the statutory scheme. By this means the

United Kingdom demonstrates its respect for the non-resident parent's new family life. As such this feature of the scheme is, in the language of the Strasbourg jurisprudence, one of the 'modalities of the exercise of a right guaranteed'. Subject to what I shall say later regarding the convention meaning of 'family', this feature brings this aspect of the statutory scheme within the ambit of art 8.

[20] This is where discrimination intruded into the pre-amendment regulations. Under these regulations 'partner' was defined in a way which included a heterosexual partner but excluded a same-sex partner. The effect of this was complicated because the statutory formulae are detailed and complex. For present purposes it is sufficient to note that where a non-resident parent is part of a heterosexual couple, whether married or not, a combined approach is taken to the couple as a unit. In contrast, under the pre-amendment scheme where a non-resident parent was part of a same-sex couple a different 'stand alone' approach was adopted. The financial consequence of this was that the claimant's liability for child support payment was assessed at a higher amount than would have been the case if her new relationship were heterosexual. The claimant was liable for child support payments of £46·97 per week. Had she and her partner been treated in the same way as an unmarried heterosexual couple her liability would have been only £13 per week. In this way the regulations afforded a different level of respect to same-sex family life than heterosexual family life.

FAMILY LIFE AND SAME-SEX COUPLES

[21] I must now retrace my steps a little. Thus far I have referred without elaboration to the family life of the claimant and her same-sex partner. I must now consider an important point not yet mentioned: whether a same-sex couple can constitute a 'family' for the purposes of art 8.

[22] On this the starting point scarcely calls for mention: the fundamental change in social attitudes towards same-sex couples in a remarkably short time both in this country and abroad. In this country homosexual offences, some carrying a maximum punishment of imprisonment for life, were re-enacted as recently as 1956. These provisions remained on the statute book until 1967. Today same-sex couples can enter into a form of partnership pursuant to the 2004 Act. The change has gone full circle. What was proscribed and punished is now countenanced and approved by law.

[23] This change in attitudes towards same-sex relationships has been reflected in two recent decisions of your Lordships' House. In *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, [2004] 2 AC 557 the House held that a same-sex partner was capable of being a member of the original tenant's 'family' within the meaning of para 3 of Sch 1 to the Rent Act 1977. *Ghaidan v Mendoza* concerned the statutory right of a surviving spouse to succeed to the original tenant's tenancy of a flat. The House held that the less secure position of a survivor of a same-sex couple, as compared with the survivor of a heterosexual couple, violated art 14 taken in conjunction with the protection afforded by art 8 to respect for the claimant's home. Observations in both those decisions point irresistibly to the conclusion that, depending always on the particular context, under the law of this country as it has now developed a same-sex couple are as much capable of constituting a 'family' as a heterosexual couple.

[24] The context in which this question arises in the present case is art 8 of the convention on human rights reproduced as one of the convention rights in

the 1998 Act. In the convention itself the meaning of 'family life' in art 8 depends upon the proper interpretation of this phrase in the convention. In this context the phrase can have only one proper interpretation. In other words, the concept of family life in art 8 is an 'autonomous' convention concept having the same meaning in all contracting states. According to the established Strasbourg jurisprudence that meaning does not embrace same-sex partners. Under the Strasbourg case law same-sex partners still do not fall within the scope of family life.

[25] This was reiterated by the European Court of Human Rights in *Estevez v Spain* App No 56501/00 (10 May 2001, unreported). The court noted the growing tendency in a number of European states towards the legal and judicial recognition of stable de facto partnerships between homosexuals. The court considered that, despite this, there was still little common ground between the contracting states. This was an area where the contracting states 'still enjoy a wide margin of appreciation'. The court held that, accordingly, the applicant's relationship with his late partner 'does not fall within art 8 in so far as that provision protects the right to respect for family life'.

[26] This ruling by the European Court of Human Rights was unanimous and unequivocal. By the reference to 'margin of appreciation' in this context I do not understand the court to be saying that each contracting state may decide for itself whether the relationship between same-sex couples constitutes family life within the convention. If that were so, the effect would be that, as applied to same-sex couples, family life in art 8 would have a different content from one contracting state to another. That would be surprising. Rather, the court was saying that, in the present state of Strasbourg jurisprudence, contracting states are not required by the convention to accord to the relationship between same-sex couples the respect for family life guaranteed by art 8. For the time being the respect afforded to this relationship is a matter for contracting states.

[27] This means that, as Strasbourg jurisprudence currently stands, the relevant law of the United Kingdom is not subject to scrutiny by the European Court of Human Rights so far as its convention-compatibility is challenged on the basis that the relationship between a same-sex couple constitutes family life within art 8. As confirmed in the *Estevez v Spain* ruling, the European Court of Human Rights does not at present recognise that the convention guarantee of respect for family life is applicable to this relationship.

[28] The decision in *Estevez v Spain* is the most recent pronouncement by the European Court of Human Rights on this subject. The later case of *Karner v Austria* [2004] 2 FCR 563 adds nothing. There the court expressly did not decide whether the applicant's case fell within the scope of 'family life' or 'private life' (see 570 (para 33)). The court thus declined to revisit its earlier decisions on this point. The court decided the case on a different basis.

[29] In its interpretation of convention rights your Lordships' House is not bound to follow decisions of the European Court of Human Rights. The House is bound only to take these decisions into account. But the House will not depart from a decision of the European Court of Human Rights on the interpretation of an article in the convention save for good reason. It goes without saying that it would be highly undesirable for the courts of this country, when giving effect to convention rights, to be out of step with the Strasbourg interpretation of the relevant convention article.

[30] In the present case there is no good reason. The increasingly widespread acceptance in this country that same-sex couples may have a family life just as

much as heterosexual couples is not an adequate reason. Clearly the law in Strasbourg, as much as the domestic law in this country, is in a state of transition. Assuredly the time will come in Strasbourg when a sufficiently developed consensus among contracting states will make it no longer appropriate for contracting states to have a 'margin of appreciation' on this point. Then the *Estevez v Spain* ruling will be overtaken. Clearly also the European Court of Human Rights is the court best placed to judge when that time arrives. It is not for the courts of this country to pre-empt that decision.

ARTICLE 14 AND THE CLAIMANT'S PRIVATE LIFE

[31] The claimant also based her claim on art 14 read in conjunction with the protection art 8 affords to respect for the claimant's private life. I cannot accept this further basis of claim. By adopting the 'single unit' approach with heterosexual couples the statutory formulae set out to respect their family life, not the 'private' life of each of them. The statutory scheme was not one of the 'modalities' of the exercise of the guarantee of the right to respect for private life.

[32] True, by treating heterosexual couples and same-sex couples differently the pre-amendment scheme drew a distinction based on sexual orientation, and sexual orientation is central to every individual's personality. But, here again, the claim cannot succeed. The purpose for which the statutory scheme drew this distinction was to assess the reasonable amount of child maintenance contributions payable by a non-resident parent. I do not think legislation enacted for that purpose lies within the ambit of the protection afforded to the private life of a non-resident parent. The nature of the discrimination involved here, sexual orientation, cannot be regarded as sufficient in itself to bring a case within the ambit of the private life heading of art 8. Otherwise every case of discrimination based on sexual orientation would be within the ambit of art 8. It must always be necessary to look at the wider context, including the consequences of the discrimination and the effect these consequences have on the claimant's private life. In this case it is not suggested that the discrimination had any significant adverse impact on the claimant's lifestyle.

ARTICLE 14 AND PROTECTION OF PROPERTY

[33] Nor is art 14 engaged in this case in conjunction with the protection art 1 of the First Protocol affords to possessions. A non-resident parent is responsible for contributing to the maintenance of his children. The 1991 Act and its attendant regulations quantified the amount of that contribution and provided machinery for its collection. That is far outside the scope of art 1 of the First Protocol. That is very distant from the type of interference at which art 1 is aimed.

Violation

[34] I would hold therefore that art 14 is not engaged in any of the respects claimed. Accordingly it is not necessary to decide whether, had art 14 been engaged, the difference in treatment under the pre-amendment scheme was justified. Had it been necessary to decide this issue I would have agreed with the views expressed on this point by my noble and learned friends Lord Bingham of Cornhill and Lord Walker of Gestingthorpe. I would allow this appeal.

a **LORD WALKER OF GESTINGTHORPE.**

THE RESPONDENT'S LIABILITY UNDER THE CHILD SUPPORT ACT 1991

[35] My Lords, the Child Support Act 1991 established a new system intended to improve the assessment, collection and enforcement of payments for the maintenance of children whose parents are living apart. That system has recently
b been considered by your Lordships' House in *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2005] 4 All ER 905, [2006] 1 AC 42, and it is unnecessary to repeat the detailed description to be found there. The system is administered by the Child Support Agency (the CSA). The CSA is not a separate statutory corporation. It is part of the government department administered by the Secretary of State for Work and Pensions, on whom all the
c relevant duties, powers and discretions are conferred.

[36] As is, sadly, notorious, the CSA has fallen far short of its ambitious aims, and many parents with care of children (such as Mrs Kehoe) have failed to receive, through the CSA, payments which ought to have been made by absent parents. This appeal is concerned with payments which were regularly made to
d the CSA by Ms M in respect of her two children, now aged 14 and 12. Ms M is (in the statutory shorthand) a 'non-resident' (formerly 'absent') parent, although her children do in fact spend two-and-a-half days a week with her. Her ex-husband is regarded as the parent with care, as the children spend the rest of the week with him.

e [37] Since 1998 Ms M has lived with a same-sex partner. Her partner is also a non-resident parent. Since 2001 they have had a jointly-owned house with a mortgage for which they are both responsible. They have a joint bank account. Ms M has complained of a breach of her human rights because in the calculation of her payments under the 1991 Act, and regulations made under that statute, her same-sex partner's contribution to their joint housing costs was treated by the
f Secretary of State as reducing her (Ms M's) deductible housing costs; if she had been living with a man (whether married to him or not) his contribution to the mortgage would have been treated as part of hers, and her weekly payment would (apart from any special discretionary adjustment) have been significantly smaller. There are some further refinements which come into the calculation, as I shall mention later; but the point on housing costs makes the biggest
g practical difference.

[38] I should at once interpose that the position has now changed radically, as a result of the coming into force on 5 December 2005 (as it happens, the first day of the appeal hearing before your Lordships) of the Civil Partnership Act 2004 and subsidiary legislation made under that statute. Your Lordships' decision will not
h therefore have any prospective effect, and (because of s 28ZC of the 1991 Act as inserted by the Social Security Act 1998) it will have little practical effect for the past either, in relation to the limited issue actually raised in the appeal. Nevertheless the appeal raises questions of principle of considerable general importance. I shall have to come back to the significance of the 2004 Act.

j [39] The CSA and the system which it operates are not strictly speaking part of the social security system. The CSA is (as has been explained in *Kehoe*'s case) an official intermediary intended to quantify and enforce a non-resident parent's obligation to support his or her child or children. Nevertheless the CSA system is closely tied in with social security. The parent with care (usually the mother) may be receiving income support or other social security benefits, and in those circumstances the Secretary of State may treat the parent with care as having

applied for a maintenance assessment (and the parent with care is obliged to cooperate in the application). Moreover the complex formulae used to calculate a non-resident parent's liability mesh in with, and to some extent reproduce, provisions in the social security legislation.

[40] The calculations to be made are to be found in s 11 of and Sch 1 to the 1991 Act and in regulations, the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815 as amended by numerous later statutory instruments. These provisions are extremely complex and the complexity is increased by extensive changes made, with effect from 3 March 2003, by the Child Support, Pensions and Social Security Act 2000 (there have also been many other less extensive amendments). The courts below referred to the provisions in force before 3 March 2003, and I shall do the same, treating them (as does the agreed statement of facts and issues) as if they were still in force. The amendments do not affect the principles at issue in this appeal.

[41] The essential point for present purposes was set out very clearly by Sedley LJ in the Court of Appeal ([2004] EWCA Civ 1343 at [9], [2004] 3 FCR 507 at [9], [2005] 2 WLR 740):

> 'The broad effect of the material provisions is to allocate the financial responsibility of separated parents for the maintenance of their children by pooling the absent parent's income and outgoings with those of his or her new partner if, but only if, that partner is of the opposite sex. For same-sex couples this means that the one who is an absent parent is assessed as if living alone, with generally disadvantageous consequences.'

The following paragraphs of his judgment explain why that is so. The 1991 Act and the regulations contain a multiplicity of special definitions: 'assessable income', 'net income', 'exempt income', 'disposable income' and 'protected income'. The non-resident parent's liability depends primarily on his or her assessable income, which is net income less exempt income (see para 5 of Sch 1 to the 1991 Act). There are complex provisions for determining net income (reg 7 of and Schs 1 and 2 to the regulations) and exempt income, which includes an amount in respect of housing costs (regs 9, 14, 15, 16 and 18 of and Sch 3 to the regulations). The higher the exempt income the smaller the maintenance assessment will be in respect of any particular level of assessable income. There is also a further mechanism (described by the child support commissioner as a kind of long stop) securing that the non-resident parent's disposable income does not fall below the level of his or her protected income (see para 6 of Sch 1 to the Act and regs 11 and 12 of the regulations).

[42] I now come to some definitions in reg 1(2) of the regulations which are of central importance to the appeal (all applicable unless the context otherwise requires):

> '"family" means . . . (a) a married or unmarried couple . . . and any child or children living with them for whom at least one member of that couple has day to day care . . .
>
> "married couple" means a man and a woman who are married to each other and are members of the same household.
>
> "partner" means—(a) in relation to a member of a married or unmarried couple who are living together, the other member of that couple . . .
>
> "unmarried couple" means a man and a woman who are not married to each other but are living together as husband and wife.'

These definitions are closely similar to, but not identical with, definitions of the same expressions in s 137(1) of the Social Security Contributions and Benefits Act 1992.

[43] Paragraph 6 of Sch 1 to the 1991 Act provides as follows:

> '. . . (4) The amount which is to be taken for the purposes of this paragraph as an absent parent's disposable income shall be calculated, or estimated, in accordance with regulations made by the Secretary of State.
>
> (5) Regulations made under sub-paragraph (4) may, in particular, provide that, in such circumstances and to such extent as may be prescribed—(a) income of any child who is living in the same household with the absent parent; and (b) where the absent parent is living together in the same household with another adult of the opposite sex (regardless of whether or not they are married), income of that other adult, is to be treated as the absent parent's income for the purposes of calculating his disposable income . . .'

[44] Regulation 11 (made, the child support commissioner observed, under reg 6(5)) deals with protected income. Under reg 11(1)(a) it is material whether or not the non-resident parent has a partner. Under reg 11(1)(b) housing costs come into the calculation of protected income. Under reg 11(1)(g) it is material whether there is a child who is a member of the family non-resident parent.

[45] Regulation 15 is one of the regulations dealing with housing costs. Regulation 15(3), so far as now relevant, provides as follows:

> 'Where a parent has eligible housing costs and another person who is not a member of his family is also liable to make payments in respect of the home, the amount of the parent's housing costs shall be his share of those costs . . .'

Schedule 3 of the regulations also relates to housing costs. Paragraph 4, so far as now relevant, provides as follows:

> '(1) Subject to the following provisions of this paragraph the housing costs referred to in this Schedule shall be included as housing costs only where . . . (b) the parent or, if he is one of a family, he or a member of his family, is responsible for those costs . . .'

[46] It is common ground that if Ms M had been living with a man (whether or not she was married to him) her liability to pay child support maintenance would have been lower, for two reasons. (1) Her exempt income and her protected income would have taken into account the whole of the household's housing costs (instead of only half of those costs). (2) Her disposable income (and hence her protected income) would have been calculated on the basis that she had a partner and (as it appears from para 11 of the child support commissioner's decision, though the facts are not clear) that the partner had a child who was a member of the family. The financial difference for Ms M, in round figures, was as follows (the exact figures are in the agreed statement of facts and issues). Her children's maintenance requirement was assessed at about £105 a week. Her net income was assessed at about £330 a week. From this was deducted exempt income of £180 (including housing costs of about £90) so as to reach an assessable income of about £150 a week. The maintenance payable was assessed at about £47 a week. Had the whole of the housing costs been taken into account, it would have been only about £14 a week. In the event, after Ms M had been successful

in her appeal, her ex-husband applied for a discretionary adjustment under s 29F of the 1991 Act (as inserted by the Child Support Act 1995). The effect of this adjustment was to reduce the disparity to a negligible sum. But the parties agreed that this should be disregarded in order to enable the point of principle to be determined on further appeal.

[47] Mr Sales (for the appellant Secretary of State) produced detailed examples to show that there could be situations in which a non-resident parent who was one of a same-sex couple would do better financially if the couple were treated, not as a family unit, but as two individuals. This was part of his general submission that the CSA system is inextricably bound up with the wider social security system, and that it depends entirely on circumstances, which may vary from time to time, whether two people living together are better or worse off if treated as a single family unit rather than as two individuals. Ms Monaghan (for the respondent Ms M) did not directly challenge the examples but submitted that there was no room for a 'swings and roundabouts' approach if (as she contended) there was a clear case of discrimination offending against the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as incorporated into domestic law by the Human Rights Act 1998.

THE RESPONDENT'S HUMAN RIGHTS ACT 1998 CHALLENGE

[48] The most relevant provisions of the Human Rights Act 1998 are ss 3 and 6, which (so far as now relevant) provide as follows:

> '3.—(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section—(a) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.
>
> 6.—(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions . . .
>
> (6) "An act" includes a failure to act but does not include a failure to—(a) introduce in, or lay before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial order.'

[49] The relevant convention rights are those in arts 8 and 14 of the convention, and art 1 of the First Protocol:

> *'Article 8*
>
> *Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

'Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

'The First Protocol

Article 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

[50] Ms M's primary case was and is that in order to avoid a breach of art 14 in conjunction with art 8, or in conjunction with art 1 of the First Protocol, the definitions in reg 1(2) of the 1992 Regulations should be read and given effect, under s 3 of the 1998 Act, so as to treat her and her same-sex partner as an unmarried couple, and her partner's child as a member of the family. Her secondary case, if she fails on s 3, was and is that she should have a remedy under s 6 of the Human Rights Act 1998 for a breach of her convention rights under the same combination of articles.

THE COURSE OF THE LITIGATION

[51] The relevant assessment was made by the Secretary of State on 12 September 2001, to take effect from 13 August 2001. Ms M asked for a review but the assessment was maintained. She then appealed to the unified appeal tribunal (the tribunal) which held a hearing on 8 November 2002. At the appeal hearing Ms M had assistance both from the Citizens Advice Bureau and from Liberty, and her advisers produced a bundle of authorities including the decision of the Court of Appeal in *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, [2004] 2 AC 557, even though it had been handed down only three days before. The Secretary of State's representative seems to have been less well prepared. The tribunal allowed her appeal, giving brief written reasons on 11 November and extended reasons issued to the parties on 20 December 2002. The tribunal (chairman JA Priest) carefully addressed all the issues and concluded that on a

literal interpretation of the regulations there would be unjustifiable discrimination amounting to a breach under both limbs (that is art 14 in conjunction with art 8 and in conjunction with art 1 of the First Protocol). Relying on s 6 of the Interpretation Act 1978 the tribunal felt able to read the definition of 'unmarried couple' as 'a man or a woman and a woman or a man who are not married to each other but are living together as if they were husband and wife'.

[52] The Secretary of State appealed to the child support commissioner (Mr Edward Jacobs). He held an oral hearing on 11 September 2003 with counsel instructed on both sides (at the same time he heard a housing benefit appeal, brought by Ms Cynthia Langley, which raised a similar point). In a written decision dated 1 October 2003 the commissioner ruled that the decision of the tribunal was not wrong in law. However he did not accept Ms M's argument on art 14 in conjunction with art 1 of the First Protocol. Moreover his preferred route through s 3 of the Human Rights Act 1998 was, not the 1978 Act, but the introductory rubric to reg 1(2), 'unless the context otherwise requires'. He gave leave to appeal to the Court of Appeal both to the Secretary of State and to Ms Langley (who was not successful before him).

[53] The Court of Appeal (Kennedy, Sedley and Neuberger LJJ) heard the two appeals together in July 2004 and handed down a single set of judgments on 15 October 2004 ([2004] EWCA Civ 1343, [2004] 3 FCR 507, [2006] QB 380). The court dismissed the Secretary of State's appeal, but Kennedy LJ dissented and Sedley and Neuberger LJJ differed to some extent in their reasoning. Sedley LJ (who gave the first judgment) asked himself whether Ms M's claim was within the ambit of a convention right. He considered art 8 in detail under three heads (at [31]–[51]): (i) Ms M's former family relationship; (ii) Ms M's present relationship; and (iii) Ms M's private life. He rejected the first of these approaches. He accepted the second, expressing his conclusion as follows (at [49]):

> 'Putting it schematically, the child support scheme sets out to respect family life by making allowance for the joint expenses of an absent parent's new household. It is this, without regard to discrimination, which brings the measure within the ambit of article 8. If then the scheme discriminates between one family unit and another on the ground of its members' sexuality, art 14 too becomes engaged. Here, by treating their finances as wholly separate when they are not, and by consequently assessing M's child support payment at a higher sum that if theirs was a heterosexual partnership, the scheme manifests a different level of respect for their family life.'

Sedley LJ found it unnecessary to express a definite view on the third approach to art 8, that is respect for private life, but he expressed some doubt about it (at [50], [51]). He also found it unnecessary (see [52]–[58]) to decide whether art 1 of the First Protocol was engaged, but here too he expressed considerable doubt about that aspect of Ms M's claim. He concluded that s 3 of the 1998 Act enabled the problem of the definitions to be overcome, not by either of the methods adopted below but (see [86]) 'by simply disapplying—in effect deleting—the definition of "unmarried couple" in reg 1(2)'.

[54] Neuberger LJ agreed with Sedley LJ in rejecting the first approach (former family) to art 8, and (going beyond Sedley LJ's doubts) he also rejected the third approach (private life). He differed from Sedley LJ as to art 1 of the

First Protocol, regarding it as 'an almost paradigm case for invoking the article' (see [107]). Finally he considered the approach to art 8 based on Ms M's present relationship and agreed with Sedley LJ's conclusion, expressing his conclusion as follows (at [133]):

> '. . . the reduction in liability effected by reg 11 is accorded for the purpose of ensuring that that absent parent's new family is not so deprived of money that it is significantly detrimentally affected by the liability of the absent parent to pay child support. To my mind, it follows from this that M has made good her case that the relevant provision, of which she does not have the benefit because she is in a same sex, rather than a heterosexual, relationship, was enacted out of respect for family life, the family life in question being that of the absent parent and his/her new partner.'

He agreed, although only with some hesitation, with Sedley LJ's application of s 3 of the Human Rights Act 1998 (at [139]). Kennedy LJ rejected all M's claims on the ground that (at [173]): '... no reliance can be placed on art 14 because neither art 8 nor art 1 Protocol 1 are sufficiently engaged.' He expressed no view as to the possible application of s 3 of the Human Rights Act 1998.

THE ISSUES BEFORE THE HOUSE

[55] There are three issues before the House. They can be stated (substantially as formulated in the agreed statement of facts and issues) as follows. (1) Does the application to Ms M of the maintenance formula contained in the regulations fall within the ambit of art 8 or art 1 of the First Protocol for the purposes of art 14 of the convention? (2) If so, would the application of the regulations (if interpreted without recourse to s 3(1) of the Human Rights Act 1998) be contrary to Ms M's rights under art 14? (3) If so, does s 3(1) operate to modify the interpretation of the regulations, and (if not) what other remedy should be granted?

The first issue: 'ambit' generally

[56] In *Botta v Italy* (1998) 4 BHRC 81 at 90 (para 39) the European Court of Human Rights described (in terms which are now very familiar) the relationship between art 14 and other articles conferring particular convention rights:

> 'According to the court's case law art 14 complements the other substantive provisions of the convention and its protocols. It has no independent existence, since it has effect solely in relation to enjoyment of the rights and freedoms safeguarded by those provisions. Although the application of art 14 does not presuppose a breach of those provisions—and to this extent it is autonomous—there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter . . .'

The quotation is from the judgment of the European Court in *Abdulaziz v UK* (1985) 7 EHRR 471 at 499 (para 71) (a well-known case about discrimination between husbands and wives in the field of immigration law). The case law can be traced back to *National Union of Belgian Police v Belgium* (1976) 1 EHRR 578 (see 592 (para 44)) and to *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252 (see 283–285 (paras 9, 10)).

[57] The Strasbourg case law repeatedly uses, in the English language versions of its judgments, the expressions 'within the ambit' or 'within the scope' in order to describe the sort of link which must be established between any alleged

discrimination and the article conferring a particular convention right (which I will call 'the substantive article'). Similarly the French language versions use terms such as 'emprise' (grasp) and 'champ' (field). An equivalent expression often found in our domestic case law, but not in the Strasbourg case law, is that convention rights under a substantive article are 'engaged'. Its use is however not entirely uniform, and may give rise to misunderstanding, as Lord Hope of Craighead pointed out in *Harrow London BC v Qazi* [2003] UKHL 43 at [47], [2003] 4 All ER 461 at [47], [2004] 1 AC 983.

[58] In the course of the appeal hearing there was some discussion, to my mind rather arid, as to whether the requirement for the alleged discrimination to be within the ambit of the substantive article was an autonomous concept. It is no doubt an autonomous concept in the sense that any attempt by a national legislature to achieve some artificial narrowing of its meaning would be ineffective. But art 14 does not use the expression; it speaks simply of 'the enjoyment of' the convention rights and freedoms being 'secured without discrimination'. The Strasbourg case law does not, and could not, spell out any simple bright-line test for determining how close must be the link between the alleged discrimination and the rights granted by the substantive article.

[59] When *Ghaidan v Mendoza* came to this House my noble and learned friend Lord Nicholls of Birkenhead referred to this point. He mentioned the expressions 'within the ambit' of the right conferred by the substantive article, 'one of the modalities' of the exercise of the right, and 'linked' to the exercise of the right (the latter two expressions being used in *Petrovic v Austria* (1998) 4 BHRC 232 at 236, 237 (paras 22, 28)). Lord Nicholls went on to observe ([2004] 3 All ER 411 at [11], [2004] 2 AC 557):

> 'These expressions are not free from difficulty. In *R (on the application of Carson) v Secretary of State for Work and Pensions, R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797 at [32]–[41], [2003] 3 All ER 577 at [32]–[41], Laws LJ drew attention to some difficulties existing in this area of the Strasbourg jurisprudence. In the Court of Appeal in the present case Buxton LJ appeared to adopt the approach, espoused in the leading text book Grosz, Beatson and Duffy *Human Rights: The 1998 Act and the European Convention* (2000) p 327 (para C14-10), that "even the most tenuous link with another provision in the Convention will suffice for Article 14 to enter into play": [2002] 4 AlL ER 1162 at [9]. In your Lordships' House counsel for the First Secretary of State criticised this approach. He drew attention to later authorities questioning its correctness: *R (on the application of Erskine) v Lambeth London BC* [2003] EWHC 2479 (Admin) at [21]–[22], [2003] All ER (D) 227 (Oct) at [21]–[22] per Mitting J ("it overstates the effect of the Strasbourg case law") and *R (on the application of Douglas) v North Tyneside Metropolitan BC* [2003] EWCA Civ 1847 at [53]–[54], [2004] 1 All ER 709 at [53]–[54] per Scott Baker LJ.'

[60] It was not an issue which this House had to resolve in *Ghaidan v Mendoza*. It is a live issue in this appeal. Though there is no simple bright-line test, general guidance can be derived from the Strasbourg case law, and it does not in my opinion lead to the conclusion that even a tenuous link is sufficient. Nor does it lead to the conclusion that precisely the same sort of approach is appropriate, whatever substantive article is in point. That is particularly important, I think, in considering the ambit of art 8.

[61] Some convention rights have a reasonably well-defined ambit (or scope). Article 11 (freedom of assembly and association) is one example. In *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578 the Belgian government failed to consult a municipal police union about legislation affecting public sector employment rights. The union's direct claim under art 11 failed, but art 14 was engaged (though on the particular facts the art 14 claim also failed). Another example is art 2 of the First Protocol (headed 'the right to education', but commencing in a negative manner, 'no person shall be denied the right to education'). This article sets an undemanding standard, but its ambit is one in which discrimination is particularly likely to occur, and so it is a field in which claimants are more likely to succeed under art 14 than under the substantive article. The well-known case of *Equal Opportunities Commission v Birmingham City Council* [1989] 1 All ER 769, [1989] AC 1155 (in which proportionately fewer grammar school places were available for girls than for boys) was decided under domestic law years before the commencement of the Human Rights Act 1998, but in convention terms it would have been a classic example of discrimination amounting to a breach under art 14, although there was no breach under the substantive article (since there is no general right to grammar school education). The *Belgian Linguistics* case provides (on the fifth question (1968) 1 EHRR 252 at 310–319 (paras 26–32)) an early example under the convention, although the facts were complicated and the discrimination was on the grounds of language rather than gender. As I shall seek to demonstrate, art 8 is very different because of its much wider and much less well-defined ambit.

The first issue: art 8 case law

[62] I have already set out the text of art 8. It has been described as one of the most open-ended provisions of the convention (Jacobs and White *European Convention on Human Rights* (3rd edn, 2002) p 217, referring to Feldman 'The developing scope of article 8 of the European Convention on Human Rights' [1997] EHRLR 265 and Warbrick 'The Structure of article 8' [1998] EHRLR 32). It has several striking features. First, uniquely among the convention rights, the right conferred is a right to 'respect' for one's private and family life and one's home and correspondence: not a right to privacy or to family life, or to a home. This gives rise to both negative and positive obligations whose boundaries are not easy to discern. Second, although personal privacy is certainly an important constituent element of the right to respect for private life, that right is not exclusively (and perhaps not even primarily, as the law seems to be developing) concerned with personal privacy. Third, there has been a similar tendency to extend the scope of respect for family life.

[63] The Strasbourg Court has however shown itself to be well aware of the dangers of any unrestrained or unprincipled extension of art 8. A large number of Strasbourg authorities have been referred to on this topic, some concerned with respect for private life, some concerned with respect for family life or the home, and a few concerned with other convention rights. I shall refer to the most important of these, in chronological order, as briefly as I can, and then seek to draw some conclusions as to respect for private life and respect for family life, the two approaches on which Ms Monaghan relies (with variations so far as family life is concerned). Some of the authorities are also relevant on the second issue.

[64] The first case, *Dudgeon v UK* (1981) 4 EHRR 149 was concerned with the position of a male homosexual in Northern Ireland at a time when private sexual activity which would have been lawful in England (under the Sexual Offences

Act 1967) was in theory a serious criminal offence, but did not in practice lead to prosecution, in Northern Ireland. The European Court (without opposition from the United Kingdom) agreed with the commission (at 161–162 (para 41)) that—

> 'the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of article 8(1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life.'

The case turned mainly on whether the climate of opinion in Northern Ireland provided justification under art 8(2). The European Court made no separate ruling under art 14, regarding it as unnecessary to do so.

[65] Ms Monaghan relied on *Van der Mussele v Belgium* (1984) 6 EHRR 163, the case of the pupil-advocate who objected to being required to do his stint of pro bono work. His complaint was (very unusually) made under art 4 of the convention (forced labour) and the judgment is authority to the proposition (see 178–179 (para 43)) that 'Work or labour that is in itself normal may in fact be rendered abnormal if the choice of the groups or individuals bound to perform it is governed by discriminatory factors'. Nevertheless the claim failed on the allegation of discrimination. I do not think that this unusual case assists either side.

[66] I have already referred to *Abdulaziz v UK* (1985) 7 EHRR 471, a well-known case about art 14 in conjunction with art 8. The complaint was squarely within the ambit of respect for family life, since it was concerned with whether wives (settled in the United Kingdom) would be able to be reunited with their husbands (who were outside the United Kingdom).

[67] *Norris v Ireland* (1991) 13 EHRR 186 was the Republic of Ireland's counterpart of *Dudgeon v UK,* except that the Irish government contended (unsuccessfully) that art 8 was not applicable at all since (see 197 (para 37)) 'the applicant had been able to maintain an active public life side by side with a private life free from any interference on the part of the State or its agents'. There was no reliance on art 14.

[68] *Logan v UK* (1996) 22 EHRR CD 178 was a decision of the commission that an application was inadmissible because it was manifestly ill-founded. Complaints were made under arts 6, 8 and 9 (not 14). It merits passing mention only because the applicant was aggrieved by a CSA assessment made under the 1991 Act. His complaint under art 8 was that the maintenance which he had to pay gave him insufficient money to maintain reasonable contact with his children. The commission noted that the CSA legislation 'in so far as it seeks to regulate the assessment of maintenance payments from absent parents, does not by its very nature affect family life'. Nor, on the facts, was the financial burden on the applicant such as to disclose any lack of respect for his rights under art 8.

[69] Mr Sales relied on *Botta v Italy* (1998) 4 BHRC 81, to which I have already referred. The applicant was physically disabled and complained of the lack of facilities for the disabled at a seaside holiday resort; he contended that this lack of facilities was in breach of national law. The European Court rejected his complaint both under art 8 (lack of respect for private life) and under art 14 in conjunction with art 8. In the context of the state being under a positive obligation, it distinguished cases (such as *Airey v Ireland* (1979) 2 EHRR 305) in which a 'direct and immediate link' had been established between the measures

sought and the applicant's private or family life. It concluded (at 89 (para 35)) that the right claimed—

> 'concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the state was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life.'

The case was not within the ambit of art 8 at all, and therefore the claim under art 14 also failed.

[70] *Petrovic v Austria* (1998) 4 BHRC 232 was concerned with a father's complaint under 14 in conjunction with art 8 (family life) of discrimination in that he (unlike his wife) had not been allowed a parental leave allowance. The European Court held that the matter was within the scope of art 8 (see 237 (paras 26–29)) and that there was a difference in treatment on the ground of sex (see 238 (para 35)). However (at 238 (paras 38, 39)):

> 'the contracting states enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the contracting states.
>
> It is clear that at the material time, that is at the end of the 1980s, there was no common standard in this field, as the majority of the contracting states did not provide for parental leave allowances to be paid to fathers.'

The case is of interest because the European Court of Human Rights referred (at 237 (para 28)) (citing an expression in *National Union of Belgian Police v Belgium* (1976) 1 EHRR 578 at 592–593 (para 45) to a test of whether 'the subject-matter of the disadvantage . . . constitutes one of the modalities of the exercise of a right guaranteed' (but in para 29 it actually applied the more familiar test of 'within the scope'). The case is also of interest in attaching importance to the gradual evolution of cultural and social standards in Europe (see 238 (paras 40, 41)):

> 'Only gradually, as society has moved towards a more equal sharing between men and women of responsibilities for the bringing up of their children, have the Contracting States introduced measures extending to fathers, like entitlement to parental leave.
>
> 41. In this respect Austrian law has evolved in the same way, the Austrian legislature enacting legislation in 1989 to provide for parental leave for fathers. In parallel eligibility for the parental leave allowance was extended to fathers in 1990. It therefore appears difficult to criticise the Austrian legislature for having introduced in a gradual manner, reflecting the evolution of society in that sphere, legislation which is, all things considered, very progressive in Europe.'

[71] *Marzari v Italy* (1999) 28 EHRR CD 175 was an admissibility decision rejecting an application under art 8 by a disabled tenant of a public housing authority. When the authority declined to carry out various works which the tenant asked for, he stopped paying rent and after a good deal of indulgence he was eventually evicted. The court, following *Botta v Italy*, held that there was a positive obligation on the state to assist with housing needs where 'there is a

direct and immediate link between the measures sought by the applicant and the latter's private life'. a

[72] *Smith v UK* (2000) 29 EHRR 493 and *Lustig-Prean v UK* (1999) 29 EHRR 548 were the sequel to *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257, [1996] QB 517. In two separate judgments delivered on 27 September 1999 the European Court decided in favour of two men who had been discharged from the Royal Navy, and a woman and a man who had been discharged from the b Royal Air Force despite their exemplary records, on the grounds of their admitted homosexuality. Their discharge was not for any misconduct but in line with official policy. The United Kingdom government accepted (*Smith v UK* (2000) 29 EHRR 493 at 522 (para 70) and *Lustig-Prean v UK* (1999) 29 EHRR 548 at 572–573 (para 63)) that the intrusive investigation and humiliating discharge of the c applicants had been interferences with their right to respect for their private lives, and the case turned on justification under art 8(2). The European Court found no separate issue under art 14 (see (2000) 29 EHRR 493 at 537 (para 116) and (1999) 29 EHRR 548 at 587 (para 109)).

[73] In *Salgueiro da Silva Mouta v Portugal* [2001] 1 FCR 653, a divorced father, who then entered into a same-sex relationship, was awarded custody of his d daughter by the Lisbon Family Court. The Court of Appeal reversed this decision solely (as the European Court found) on the ground of the father's sexual orientation. The European Court found a breach of art 14 in conjunction with art 8 on the basis that the overruling of the Family Court was an interference with the father's right to respect for his family life. The government of Portugal e accepted (at 668 (para 25)) that the matter was within the ambit of art 8, but only as regards respect for family life.

[74] Ms Monaghan placed some reliance on *Thlimmenos v Greece* (2000) 9 BHRC 12. A person who had been convicted of felony was prohibited by law from becoming a member of the Greek chartered accountants' professional body. The applicant, a Jehovah's Witness, had been convicted of felony for refusing, for f religious reasons, to enlist in the army. He relied on art 14 in conjunction with arts 6 and 9. The case demonstrates (at 22 (para 44)) that—

> 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the convention is also violated when states without an g objective and reasonable justification fail to treat differently persons whose situations are significantly different.'

It also shows that the European Court was prepared to look through the undisputed fact of the applicant's conviction for felony to see that it arose from his conscientious objection to military service (within the ambit of art 9) and not h from any disgraceful conduct. To that extent it shows the European Court as being sensitive to the full facts of the particular case. Beyond that I do not find it of much assistance.

[75] *Estevez v Spain* App No 56501/00 (10 May 2001, unreported) is of some importance as it is the first case put before the House in which a homosexual j relied on art 14 in conjunction with respect for family life (as well as respect for private life) under art 8. After his partner had died in an accident the applicant claimed a social security allowance as a surviving spouse. When this was refused he applied to the European Court. The European Court ruled the application inadmissible as manifestly ill-founded. As regards respect for family life it stated (p 4):

> 'The court considers that, despite the growing tendency in a number of European states towards the legal and judicial recognition of stable de facto partnerships between homosexuals, this is, given the existence of little common ground between the contracting states, an area in which they still enjoy a wide margin of appreciation ... Accordingly, the applicant's relationship with his late partner does not fall within art 8 in so far as that provision protects the right to respect for human life.'

As regards respect for private life it accepted that the complaint might be within the ambit of art 8, but that the Spanish legislation had a legitimate aim, 'the protection of the family based on marriage', and that the difference in treatment was within the state's margin of appreciation. Consequently the claim failed both under art 8 alone and under art 14 in conjunction with art 8.

[76] *Pretty v UK* (2002) 12 BHRC 149 was the well-known case concerned with a sufferer from motor neurone disease who wished for assisted suicide. Its importance here is for the European Court's recent wide statement (at 183 (para 61)) of the scope of private life under art 8:

> 'As the court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by art 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has established as such any right to self-determination as being contained in art 8 of the convention, the court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.'

Nevertheless the European Court did not extend the right to respect for private life so far as to cover personal autonomy over assisted suicide.

[77] *Goodwin v UK* (2002) 13 BHRC 120 was the culmination of a line of cases in which the European Court had, by increasingly slim majorities, rejected claims by United Kingdom transsexuals that their inability to marry infringed their rights under art 8 (and art 12). In *Goodwin v UK* there was a unanimous finding of breach of both articles, with no separate finding about art 14. The European Court paid particular attention (at 143–144 (paras 92, 93)) to the United Kingdom's slow response to its warnings in earlier cases, concluding—

> 'that the respondent government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the convention now tilts decisively in favour of the applicant.'

[78] *Fretté v France* [2003] 2 FCR 39 concerned a single homosexual man who wished to adopt a child. The European Court found that the claim was within the ambit of art 8 (apparently as regards respect for family life, though the judgment is not entirely clear) but dismissed the claim under art 14, in

conjunction with art 8, on margin of appreciation grounds (see 57–59 (paras 40–44)). However the applicant was successful on a separate complaint of a breach of art 6.

[79] *Karner v Austria* [2004] 2 FCR 563 was on facts comparable to those of *Estevez v Spain*, except that the surviving same-sex partner was seeking succession to a tenancy (of their previously shared flat) rather than a social security benefit. It was decided on the 'home' limb of art 8. Several interveners—

> 'pointed out that a growing number of national courts in European and other democratic societies require equal treatment of unmarried different-sex partners and unmarried same-sex partners, and that that view is supported by recommendations and legislation of European institutions.' (See [2004] 2 FCR 563 at 571 (para 36).)

The claim succeeded. As to the margin of appreciation the European Court stated (at 572 (paras 40–41)):

> 'The court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment. It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality has been respected.
>
> 41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to member states is narrow, as [is] the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of [the relevant provision] of the Rent Act in order to achieve that aim.'

[80] *Connors v UK* (2004) 16 BHRC 639 is a very important decision, on respect for the home under art 8, which is currently being considered by another appellate committee of this House. For present purposes I wish to refer only to one general passage about art 8 (at 662 (para 82)), that it—

> 'concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community. Where general social and economic policy considerations have arisen in the context of art 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant.'

The footnotes to this passage refer to *Gillow v UK* (1986) 11 EHRR 335 at 352 (para 55); *Pretty v UK*; *Goodwin v UK*; and *Hatton v UK* (2002) 34 EHRR 1 at 25, 29 (paras 103, 123). Although the 'extent of the intrusion into the private sphere' is here being treated as relevant to the state's margin of appreciation, the authorities suggest to me that it is also not without relevance to the question of ambit.

[81] The most recent case, on this part of the appeal, is *Sidabras v Lithuania* [2004] ECHR 55480/00. The applicants had been KGB officers and as such were debarred from holding any post in the public sector, and from many responsible jobs in the private sector. The European Court held that their complaint fell within the ambit of art 8 (respect for private life) and observed (at para 49)—

'in the instant case there is more at stake for the applicants than the defence of their good name. They are marked in the eyes of society on account of their past association with an oppressive regime. Hence, and in view of the wide-ranging scope of the employment restrictions which the applicants have to endure, the court considers that the possible damage to their leading a normal personal life must be taken to be a relevant factor in determining whether the facts complained of fall within the ambit of art 8 of the Convention.'

The ban was disproportionate and the claim under art 14 in conjunction with art 8 (respect for private life) was successful.

[82] Ms Monaghan submitted that since the concept of respect for private and family life is so wide and multifaceted, your Lordships should be ready to conclude, in considering a complaint under art 14, that any alleged act of discrimination is within the ambit of art 8. But if that were right virtually every act of discrimination on grounds of personal status (gender, sexual orientation, race, religion, and so on) would amount to a breach of art 14, since these are all important elements in an individual's private life. There would be little or no need for the wider prohibition in art 1 of the Twelfth Protocol on discrimination in the enjoyment of any legal right.

[83] My Lords, in my opinion that is not the effect of the Strasbourg case law which I have attempted to summarise. The European Court has taken a more nuanced approach, reflecting the unique feature of art 8 to which I have already drawn attention: that it is concerned with the failure to accord *respect*. To criminalise any manifestation of an individual's sexual orientation plainly fails to respect his or her private life, even if in practice the criminal law is not enforced (*Dudgeon v UK; Norris v Ireland*); so does intrusive interrogation and humiliating discharge from the armed forces (*Smith v UK; Lustig-Prean v UK*). Banning a former KGB officer from all public sector posts, and from a wide range of responsible private-sector posts, is so draconian as to threaten his leading a normal personal life (*Sidabras v Lithuania*). Less serious interference would not merely have been a breach of art 8; it would not have fallen within the ambit of the article at all.

[84] Similarly the cases in which art 14 has been considered in conjunction with the family life limb of art 8 were all (whichever way they were ultimately decided) concerned with measures very closely connected with family life: *Petrovic v Austria* (1998) 4 BHRC 232 (parental leave); *Estevez v Spain* App No 56501/00 (10 May 2001, unreported) (social security benefit for surviving spouse); *Fretté v France* [2003] 2 FCR 39 (adoption). By contrast *Logan v UK* (1996) 22 EHRR CD 178 (the CSA case) is an example of unsuccessful reliance on a much more remote link (financial resources to visit absent children).

THE FIRST ISSUE: CONCLUSIONS ON FAMILY LIFE AND PRIVATE LIFE

[85] All three members of the Court of Appeal rejected the argument that the method of calculation of Ms M's maintenance assessment under the 1991 Act and the regulations fell within the ambit of the right to respect for the family relationship between Ms M and her two children by her marriage to her ex-husband: see [2004] 3 FCR 507 at [36]–[39], [2006] QB 380 per Sedley LJ, at [97]–[100] per Neuberger LJ, and at [155]–[166] per Kennedy LJ. In my opinion they were right to do so. Ms M is of course entitled to respect for her continuing relationship with her children. But she is not complaining of being deprived of all contact with her children, or of being deprived of contact with them at her

home where her same-sex partner lives. On the contrary, they spend part of the time with her at her home. She is complaining because she considers that she should be paying less towards their maintenance. As Neuberger LJ said (at [99]) her art 14 complaint has nothing to do with respect for her relationship with her children.

[86] Ms M's stronger argument (as regards family life) depends on her present relationship with her same-sex partner. Kennedy LJ held (in the passage already referred to) that *Estevez v Spain* is still good law at Strasbourg, and that our domestic law has not moved further forward. Sedley and Neuberger LJJ held that domestic law has moved further forward, although that bald summary does not do justice to their careful reasoning (see [2004] 3 FCR 507 at [40]–[49] and [108]–[133] respectively, relying heavily on *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705, [2001] 1 AC 27 and *Ghaidan v Mendoza* [2004] 3 All ER 411, [2004] 2 AC 557).

[87] I do not go into their reasoning because I am content to assume that the unit consisting of Ms M, her new partner and (especially when living with them) their children by their former marriages should be regarded as a family for art 8 purposes. I would also accept that the complicated formulae employed by the 1991 Act and the regulations are intended to strike a fair balance between the competing demands (on often limited financial resources) of the children (when living away from the new home) and the new household. To that extent the legislation is intended, in a general sort of way, to be a positive measure promoting family life (or, it might be more accurate to say, limiting the damage inevitably caused by the breakdown of relationships between couples who have had children). But I do not regard this as having more than a tenuous link with respect for family life. I do not consider that this way of putting Ms M's case brings it within the ambit of respect for family life under art 8.

[88] In my opinion Ms M's case on respect for private life also fails, for similar reasons. There has been no improper intrusion on her private life. She has not been criminalised, threatened or humiliated. The tribunal respectfully recorded that she and her partner 'were living in a very close, loving and monogamous relationship'. Her complaint is that the state has calculated her liability to contribute to her children's maintenance under a formula which is different from (and on the particular facts of her case, more onerous than) that which would have been used if she had been in a heterosexual relationship. The link with respect for her private life is in my view very tenuous indeed.

The first issue: art 1 of the First Protocol

[89] I can deal with this issue briefly as I am in full agreement with the majority of the Court of Appeal (Sedley LJ [2004] 3 FCR 507 at [52]–[53] and Kennedy LJ at [169]–[172]). Sedley LJ quoted from the commission in *Burrows v UK* App No 27558/95 (27 November 1996, unreported) that art 1 of the First Protocol was—

> 'primarily concerned with the formal expropriation of assets for a public purpose, and not with the regulation of rights between persons under private law unless the state lays hands—or authorises a third party to lay hands—on a particular piece of property for a purpose which is to serve the public interest.'

Sedley LJ added:

> 'Child support is neither a tax nor a form of expropriation: it is an allocation of private financial responsibility, and an expansive approach to [art 1 of the First Protocol] is in my view to be resisted.'

[90] Neuberger LJ fastened on the words 'or authorises a third party to lay hands' as indicating that art 1 of the First Protocol has a wide scope. But those words are needed to cover cases such as *James v UK* (1986) 8 EHRR 123 (leasehold enfranchisement). In this case the CSA is concerned as an official intermediary, but it is enforcing a personal obligation of the absent parent. It is no more expropriating property than (in an analogy suggested in argument) when the civil justice system enforces a private contract by converting a contract debt into a judgment debt which can be recovered by the process of execution.

The second issue

[91] I would therefore allow this appeal on the first issue. I would also allow it on the second issue, if the case gets that far, on the ground that Parliament has acted with reasonable promptness, and within its margin of appreciation, in the complex process of legislative change which has resulted in the 2004 Act. The United Kingdom government was criticised by the European Court for dilatoriness in *Goodwin v UK* (decided in July 2002) but it has since been engaged in a necessarily time-consuming process of deliberation and consultation (initiated by the consultation document: *Civil Partnership*, a framework for the legal recognition of same-sex couples published in June 2003) leading to the preparation and enactment of the 2004 Act. It is a massive piece of legislation extending to 264 sections and 30 schedules. It received the royal assent on 18 November 2004 and came into force, as already noted, on 5 December 2005. The delay in bringing it into force was necessary in order to make far-reaching administrative changes including the adaptation of computer systems, the training of staff, and so on.

[92] The enactment of the 2004 Act was possible only because of the profound cultural change which has occurred in most of Europe, within the last two generations, in attitudes towards homosexuality. Many people (and not only homosexuals) would say that that change has taken far too long, and they would be right ('They are taking him to prison for the colour of his hair . . . For the nameless and abominable colour of his hair' wrote Housman in a poem not published for many years after it was written). Nevertheless two generations is not a long time in which to change prejudices which have been deeply ingrained for many centuries. In Europe, where the Christian religion has provided the cultural matrix for two thousand years, male homosexual activity was regarded as a grave sin, at one time punishable as a form of heresy; it was also for centuries a capital crime under the secular law of many European countries; other world religions also condemned it, and many still do.

[93] In a recent article, 'Homosexual Rights' (2004) 16 CFLQ 125 my noble and learned friend Baroness Hale of Richmond has commented on the evolutionary process of legal change:

> 'It is a fair hypothesis, advanced by Kees Waaldijk, that "most countries, at different times and at different paces, go through a standard sequence of legislative steps recognising homosexuality." The first steps are taken by the criminal law: permitting homosexual acts between male adults and then

> removing age and other distinctions between same-and opposite-sex sexual activity. The next steps are taken by the civil law: prohibiting discrimination against homosexuals in employment, and in the provision of goods, education, housing and other services. The final steps are taken by family law, extending laws applicable to unmarried heterosexual couples to homosexual couples, recognising the parental relationship between homosexual parents and their own, their partners' and even other people's children, providing for registered civil partnerships, and finally providing for civil marriage.'

That sequence can be seen in our domestic law: the main steps being the Sexual Offences Act 1967, the beginning of specific anti-discrimination legislation in the 1970s (though with some back-sliding over Clause 28), and now sweeping changes in family law. The United Kingdom may have been following the lead of other states within the Council of Europe, but it has not been so far behind as to go outside its margin of appreciation, except in relation to transsexuals.

[94] In *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29 at [62], [2006] 1 All ER 487 at [62], [2005] 1 WLR 1681 Lord Hoffmann said, in the course of discussing *Walden v Liechtenstein* App No 33916/96 (16 March 2000, unreported):

> 'I can quite understand that if one has a form of discrimination which was historically justified but, with changes in society, has gradually lost its justification, a period of consultation, drafting and debate must be included in the time which the legislature may reasonably consider appropriate for making a change. Up to the point at which that time is exceeded, there is no violation of a Convention right. But there is no suggestion in the report of *Walden v Liechtenstein* that the discrimination between married couples was ever justified and I find it hard to see why there was no violation of Convention rights as long as the old law remained in place.'

[95] Both sides sought to draw some comfort from that passage. *Hooper*'s case recognised that until a date in 2001 (I need not go into the significance of the precise date) the United Kingdom social security law had favoured widows in a way that could be justified as positive discrimination. No right-minded person would now suggest that discrimination against homosexuals was ever justifiable, and so Lord Hoffmann's observations about the need for consultation, drafting and debate are not (Ms Monaghan submitted) in point. But that is to my mind a deeply unrealistic approach, and one that is at odds with the realistic approach of the European Court in cases such as *Estevez v Spain* App No 56501/00 (10 May 2001, unreported). Although discrimination against homosexuals could never have been justified, by today's standards, the fact is that for centuries a homosexual couple living together were (even if they escaped criminal sanctions and social ostracism) regarded as quite different from a married couple, or a heterosexual unmarried couple. Profound cultural changes do take time: as Sir Thomas Bingham MR said in *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 at 263, [1996] QB 517 at 554: 'A belief which represented unquestioned orthodoxy in Year X may have become questionable by Year Y and unsustainable by Year Z.'

[96] In my opinion it was within the United Kingdom's margin of appreciation, down to the preparation, enactment and coming into force of the

2004 Act, whether to treat a same-sex couple (for social security purposes, and the allied purposes of the 1991 Act) as a family unit or as two individuals.

The third issue

[97] The third issue (the possible application of s 3 of the Human Rights Act 1998) does not therefore arise, and I think it better to say nothing about it.

[98] For these reasons I would allow the appeal, set aside the orders below and remit the matter to the tribunal for any necessary adjustments to be made to the maintenance assessment.

BARONESS HALE OF RICHMOND.

[99] My Lords, the Civil Partnership Act 2004 came into force on the day we began to hear this case. It grants to same-sex couples the same legal recognition that the law grants to opposite-sex couples. It allows them to contract into a formal status with virtually identical legal consequences to those of marriage. It treats those couples who choose not to enter such a partnership, but live together as if they were civil partners, in the same way as it treats opposite-sex couples who choose not to marry, but live together as if they were married. Before then, the law had generally treated same-sex couples as if they were two separate individuals.

[100] In practical terms, many same-sex couples will benefit from the change; but many others will not. Indeed, they will be worse off. This is because our means tested welfare benefit systems generally assume that a couple needs less to live on than two single people. They also assume that couples share both their resources and their expenditure. So the resources of both are brought into the calculation, but their combined needs are set at a lower level than they would be if they were two individuals. These systems also treat unmarried couples in the same way as married couples so as not to make marriage less attractive (in the old parlance 'less eligible') than living together.

[101] Government policy-makers, of course, knew full well that there were snakes as well as ladders involved in applying the same legal rules to same-sex couples as were applied to opposite–sex couples. So too did those in the lesbian and gay community who were campaigning for the change. To people who have traditionally been excluded by society and the law, what matters most is equal dignity, being taken seriously on the same terms as the traditionally included, unless there is a good reason for making a difference.

[102] Until the 2004 Act came into force, the child support scheme adopted the same approach as the welfare benefits system, although there is no necessary connection between the two. In calculating the liability of a non-resident parent to maintain her children, parents living in same-sex relationships were treated as two individuals whereas parents living in opposite-sex relationships were treated as a single unit. As with the welfare benefits system, this had some advantages for same-sex couples, about which opposite-sex couples might wish to complain, and some disadvantages, about which same-sex couples might wish to complain. The issue in this case is whether this difference in treatment breached the parent's right under art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). This requires that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race' and a number of other named characteristics 'or other status'. It is agreed that sexual orientation is such a ground. Indeed, it falls within the list of

specially suspect grounds, where 'particularly serious reasons' are required if a difference in treatment is to be justified and 'the margin of appreciation afforded to member states is narrow': see *Karner v Austria* [2004] 2 FCR 563 at 571, 572 (paras 37, 41).

[103] It is also agreed that art 14 is not an open-ended guarantee of non-discrimination: see, for example, *Botta v Italy* (1998) 4 BHRC 81 at 90 (para 39), quoted by my noble and learned friend, Lord Walker of Gestingthorpe, at [56], above. It does not require member states to secure the equal protection of all the laws to everyone within its jurisdiction. That is required by the Twelfth Protocol to the convention, which came into force on 5 April 2005, but has not yet been signed or ratified by the United Kingdom. This is closely modelled on art 26 of the International Covenant on Civil and Political Rights 1966 (New York, 19 December 1966; TS 6 (1977); Cmnd 6702), which itself is quite closely modelled on the fourteenth amendment to the United States Constitution. Article 14 is limited to discrimination in the enjoyment of the convention rights.

[104] The rights in question here are those protected by art 8 of the convention itself and by art 1 of the First Protocol to the convention. Article 8 gives everyone 'the right to respect for [her] private and family life, [her] home and [her] correspondence' and limits the circumstances in which a public authority may interfere with the exercise of that right. Article 1 of the First Protocol gives every natural and legal person 'the right not to be deprived of [her] possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law'.

[105] But it is also agreed that there can be a breach of art 14 even if there is no breach of a substantive convention right: see *Abdulaziz v UK* (1985) 7 EHRR 471. Ms Monaghan, appearing for the mother, does not suggest that her rights under art 8 or art 1 of the First Protocol have actually been violated. She accepts that there is a threshold below which the effect of an interference is not so severe as to infringe her rights. She is wise to do so. It is completely unrealistic to isolate one feature of the child support scheme and complain of its unfavourable effects when there are other features of the scheme which have favourable effects. The scheme has to be looked at as a whole, with its ladders as well as its snakes. It must also be borne in mind that the same will apply to opposite-sex couples. Sometimes treating them as a couple will be a good thing from their point of view, sometimes it will not.

[106] Hence the complaint is not about the way that the scheme treated the mother and her partner as such. Had the scheme treated everyone in the same way there could have been no complaint. The complaint is that some couples were treated differently from others. If art 14 is read literally, the first question is whether the difference in treatment impacts upon the enjoyment of their convention rights. The trouble with that reading is that almost anything might be said to have some impact upon the enjoyment of convention rights, especially a broadly framed right such as that in art 8. The European Court of Human Rights has put it rather differently: does the subject matter of the disadvantage 'constitute one of the modalities of the exercise of a right guaranteed', or is it 'linked to the exercise of a right guaranteed', or, more commonly, does it 'fall within the ambit' of a convention right: see, for example, *Fretté v France* [2003] 2 FCR 39 at 53–54 (para 31). However, it does not follow from the fact that there has not been a sufficiently severe interference to breach art 8 or art 1 of the First Protocol that the subject matter does not fall within the ambit, reach or grasp of the right in question. Nor does it follow from the fact that an interference or lack

of respect can be justified under art 8(2) that a difference in treatment does not require to be justified under art 14. That was the whole point of *Abdulaziz v UK*. The refusal to let husbands join their wives here was justified by the right of the United Kingdom to control immigration. But the difference in treatment between the husbands of wives settled here and the wives of husbands settled here had still to be justified under art 14. And it was not.

[107] The child support scheme is clearly capable of affecting the enjoyment of the right to respect for the family life of the mother and father and their children. There is no doubt that family life was established between this mother, this father and their children. There is equally no doubt that the family life of the mother and her children did not come to an end when the parents separated and divorced. Most children whose parents do not live together do not see themselves as living in 'single parent families'. They see themselves as having two parents, indeed sometimes more than two, who happen not to be living in the same household. These children actually spent two and a half days each week living with their mother and her partner. In the family courts such arrangements are increasingly reflected either in a shared residence order, which recognises that the children have two homes and divide their time between the two, or in no order at all, which leaves it to the parents to make their own arrangements about how the children will divide their time.

[108] Does the operation of the child support scheme fall within the ambit of the mother's right to respect for her family life with her children? In my view, it clearly does. It is one aspect, among many others, of the state's support for family life. The United Kingdom argued as much before the European Commission of Human Rights in *Logan v UK* (1996) 22 EHRR CD 178. Mr Sales, for the agency, argued that it is simply the state's way of enforcing the private obligation of parents to support their children. That, of course, was the very point that I was making in my dissenting opinion in *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2005] 4 All ER 905, [2006] 1 AC 42. There is a private law obligation upon every parent to support their children and a private law right of the parent looking after those children to receive that money for the benefit of the children (and sometimes there is an express private law right for the children to receive it directly). But there is also a public law obligation upon every parent to support their children, currently expressed in s 78(6) of the Social Security Administration Act 1992. The child support scheme is the state's way of enforcing both of these obligations—the obligation owed to the children and the obligation owed to the state to prevent the children becoming a charge on the state. Before the child support scheme was instituted, the private law obligation was enforced through the family courts, no doubt not as efficiently as the state would have liked, but then neither is the child support scheme conspicuous in its efficiency.

[109] The Court of Appeal rejected this way of putting the case, because they could not see how the operation of scheme impacted upon the mother's family life with her children. But there are many ways in which it may do so. In *Logan v UK* the complaint was that the mandatory child support payments meant that the father could not visit his children as often as he was entitled under the court's order to do. The complaint of a direct breach of art 8 failed because he could not show that the impact upon his family life was sufficiently grave, but in another case it might have been. There was no complaint under art 14. A more common complaint might be that the mandatory payments did not leave the parent in a shared residence situation with enough money to support the children while they

were with her. It may be unlikely that any of these complaints would reach the minimum level of severity of impact required to breach art 8. But that the scheme falls within the reach of the parent's right to respect for her family life with her children seems to me clear. *Petrovic v Austria* (1998) 4 BHRC 232 was concerned, not with the right to parental leave to look after the child, but the right to a parental leave allowance to facilitate that leave. No one was preventing or interfering with the father's decision to look after the child. The state was simply not supporting him in doing so. There was no breach of art 8 because there was no positive obligation to provide such an allowance. But its existence demonstrated the state's respect for family life. That was sufficient to engage art 14. In *Fretté v France* [2003] 2 FCR 39, there was no breach of art 8, because the right to respect for family life presupposes the existence of a family and the refusal to allow the applicant to adopt a child 'could not be considered to infringe his right to the free expression and development of his personality or the manner in which he led his life, in particular his sexual life' (para 31). Nevertheless, the subject matter was sufficiently within the ambit of art 8 for the state to be required to justify a difference in treatment based on sexual orientation.

[110] Test it this way. The private law of child maintenance used to discriminate *systematically* between mothers and fathers. There was power to order a father to pay maintenance to the mother for the benefit of the children when there was no power to order the mother to pay maintenance to the father. The enforcement of the obligation to maintain one's children was one of the ways in which the state respected and facilitated the family life of both parents and children. Had the system continued to discriminate between mothers and fathers, this would surely have been sufficient to engage art 14. Whether or not the difference in treatment could be justified (as it was in both *Petrovic v Austria* and *Fretté v France*) is another matter.

[111] I appreciate that Ms Monaghan did not emphasise this aspect of her case in the course of argument. She was understandably concerned to emphasise the impact of the scheme upon the mother's right to respect for her private and family life with her partner. For the state to disregard their relationship and treat it as non-existent is to demonstrate a lack of respect for this most intimate and important part of their lives and personalities. The state no longer prevents or punishes their relationship, as it did the relationships of gay men in the days before the Sexual Offences Act 1967. I do not think that the state (as opposed to the customs of society or religion) has ever prevented or punished lesbian relationships. The contempt shown for the mother's relationship by the child support scheme is not on the same level as the contempt shown for gay relationships in the past. But we are not here concerned with whether or not there has been a breach of art 8, merely with whether it is within the reach of the right which it protects. As is already apparent, I do not accept that a lack of respect has to reach such a level of severity as to constitute a breach of art 8 for art 14 to be engaged.

[112] The European Court of Human Rights has not yet recognised that the relationship between two adult homosexuals amounts to family life. But then I know of no case in which it has recognised that the relationship between two unmarried adult heterosexuals amounts to family life. Family life has so far been confined to the relationships between married couples and between parents or other relatives and carers and their children. This includes the relationship between a same-sex parent and his children and between a same-sex couple and the children of their family. This mother and her partner were clearly enjoying

their right to respect for the family life which they had with their children while those children were with them. And family life continues even when parents and children are apart. The assessment and enforcement of child support clearly affects that family life, whether for better or for worse. This is another reason for holding that art 14 is engaged. Furthermore, if the discriminatory treatment in *Fretté v France* [2003] 2 FCR 39 fell within the ambit of the right to respect for private life, I do not see why the discriminatory treatment in this case does not do so. I do not therefore find it necessary to inquire whether art 14 is also engaged by virtue of art 1 of the First Protocol.

[113] In my view, the difference in the treatment of homosexual and heterosexual relationships by the child support scheme in relation to the family lives of the parents and their children has to be justified if it is not to fall foul of art 14. The only justification which is offered is the historical discrimination between the two types of relationship in both the welfare benefit and child support schemes. Although it is now recognised that there is no objective justification for such discrimination, it is said that the law must be given time to catch up. The realisation that there is no justification is remarkably recent. It used to be taken for granted that discriminating against extra-marital relationships of any sort was a way of protecting and supporting the preferred relationship of marriage. The European Court of Human Rights acknowledges that 'the protection of the family in the traditional sense', by which it means the marital family, is in principle capable of being weighty justification for a difference in treatment: see *Karner v Austria* [2004] 2 FCR 563 at 572 (para 40). But it has still to be shown that the exclusion of same-sex couples is necessary to achieve that aim. No one has yet explained how failing to recognise the relationships of people whose sexual orientation means that they are unable or strongly unwilling to marry is necessary for the purpose of protecting or encouraging the marriage of people who are quite capable of marrying of they wish to do so.

[114] It is hugely to the credit of the United Kingdom government and Parliament that they have recognised this. They are ahead of much of Europe, although parts of Europe are ahead of them. But can this be an objective justification for not having recognised it sooner? I do not see how it can be. Race discrimination was always wrong, long before the world woke up to that fact. Sex discrimination was always wrong, long before the world woke up to that fact. But there may on occasions still be good and objective reasons for distinguishing between the sexes. One such reason may be the persistence of historical disadvantage and exclusion. Until remarkably recently, married women were excluded from parts of the labour market. Until remarkably recently, overt sex discrimination in the pay and conditions of women workers at all levels was not only lawful but common. Even though such discrimination is now unlawful, the reality is that there is still a 'gender gap' between men and women in life time earnings and an even larger 'mother gap' between mothers and others. Discriminatory treatment of pregnant women is still common. While such systemic discrimination against women persisted, it may have been justified for the benefits system to make some small adjustment in their favour. It may well be a matter of judgment when the effects of that exclusion have been so far overcome that the compensation is no longer justified: see *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2006] 1 All ER 487, [2005] 1 WLR 1681.

[115] But it is one thing to use historical disadvantage and exclusion to justify some compensatory treatment for the excluded group which is denied to others. It may then be fair to give the system some time to catch up. This is in effect what happened in *Petrovic v Austria* (1998) 4 BHRC 232. Mothers had been given an allowance because they were traditionally expected to give up work to care for their children whereas fathers were not. It is another thing entirely to use historical disadvantage and exclusion to justify continued disadvantage and exclusion *of the excluded group*. No one has suggested any legitimate aim that this difference in treatment pursues. By contrast, in *Fretté v France* [2003] 2 FCR 39, there was the legitimate aim of protecting the interests of children at a time when child psychiatrists and psychologists were divided in their opinions of the effects of being adopted by homosexual parents. Even so, the discrimination was held justified by the narrow margin of four votes to three. The partly dissenting opinion of Sir Nicholas Bratza and Judges Fuhrmann and Tulkens says this of the margin of appreciation:

> ' . . . we might conceivably accept the government's view that some margin of appreciation should be afforded to states in the sensitive area of adoption by homosexuals . . . On the other hand, the reference in the present judgment to the lack of "common ground" in the contracting states or "uniform principles" on adoption by homosexuals . . . which paves the way for states to be given total discretion, seems to us to be irrelevant, at variance with the court's case law relating to art 14 of the Convention, and when couched in such general terms, liable to take the protection of fundamental rights backwards.
>
> It is the court's task to secure the rights guaranteed by the Convention. It must supervise the conditions in which art 14 of the Convention is applied and consider therefore whether there was a reasonable, proportionate relationship in the instant case between the methods used—the total prohibition of adoption by homosexual parents—and the aim pursued—to protect children . . . The absolute position taken by the French court] fundamentally precludes any real consideration of the interests at stake and the possibility of finding any practical way of reconciling them.
>
> At a time when all the countries of the Council of Europe are engaged in a determined attempt to counter all forms of prejudice and discrimination, we regret that we cannot agree with the majority.' (See [2003] 2 FCR 39 at 71.)

In that case, there was a legitimate aim, so the point at issue was the application of the margin of appreciation to the question of proportionality. In this case, no one has suggested a legitimate aim. No one has suggested, for example, that the religious or moral views of sections of the community might constitute such a justification (as opposed to an explanation). This is much closer to the position in *Karner v Austria* [2004] 2 FCR 563, where the court was unanimous in finding a violation of art 14, than it is to the position in *Fretté v France*, decided more than a year earlier, where the court was so narrowly divided.

[116] The fact that Parliament has now legislated is very welcome but it does not make right what was done before. These facts arose before the Civil Partnership Bill was introduced. Had the Bill not been introduced, the same questions would have arisen. In my view, they should have received the same answers, just as they did in *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, [2004] 2 AC 557. In that case, the government supported the surviving partner's claim to succeed to the tenancy on the same terms as the survivor of a

heterosexual relationship. Mr Sales did not argue that we should wait for Parliament to remedy the historical discrimination between heterosexual and homosexual partnerships in respect of the home they had shared.

[117] In my view, therefore, this is a case of unjustified discrimination in the enjoyment of the convention right to respect for private and family life. It is our duty to remedy that, if possible, by interpreting the legislation so as to comply with the convention rights: see s 3(1) of the 1998 Act. The relevant legislation is the definition of an 'unmarried couple' in reg 1(2) of the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815 as amended. As this is delegated legislation, the majority of the Court of Appeal simply deleted the provision, thus leaving it to the agency and appellate authorities to supply their own non-discriminatory definition of the equivalent relationship. The tribunal, presided over by Mrs Priest, invoked the Interpretation Act 1978 to interpret 'a man and a woman . . . living together as husband and wife' as 'a man or a woman and a woman or a man . . . living together as husband and wife'. My present inclination is to prefer the latter approach. There is still a need to define the type of couple relationship with which the legislation is concerned. This approach does that. This House in *Ghaidan v Mendoza* emphasised the scope of what was 'possible' under s 3. This approach does not offend against any 'cardinal feature' of the legislation. It also avoids the arbitrary effect of interpreting 'two persons' to include homosexual partners but 'a man and a woman' to exclude them. The original version of this definition in the Supplementary Benefits Act 1972 referred to 'two persons' cohabiting as man and wife. It was only in the Social Security Act 1980 that the alternative expression 'a man and a woman' was chosen. The operative words were undoubtedly 'living together as husband and wife' rather than the description of the two people involved. This House has already held, in *Ghaidan v Mendoza*, that these words are apt to cover both homosexual and heterosexual relationships.

[118] For these reasons, which are essentially the same as those of the tribunal chaired by Mrs Priest, and in common not only with the tribunal, but also with the child support commissioner and the majority of the Court of Appeal, I would dismiss this appeal.

LORD MANCE.

INTRODUCTION

[119] My Lords, the issue in these proceedings is the compatibility with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) of the child support regime which applied in the period from 13 August 2001 to 18 February 2002 under the Child Support Act 1991 and the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815).

[120] Mrs M lived during that period with a same-sex partner, and was obliged under the 1991 Act and 1992 Regulations to pay child support maintenance in respect of her two sons who lived with her former partner (although they spent two-and-a-half days a week with her). The computation of maintenance required under the regulations took account of the level of her housing costs, as well as her disposable and protected income. In this respect, reg 15 provided:

'(1) Subject to the provisions of this regulation . . . a parent's housing costs shall be the aggregate of the eligible housing costs payable in respect of his home . . .

(3) Where a parent has eligible housing costs and another person who is not a member of his family is also liable to make payments in respect of the home, the amount of the parent's housing costs shall be his share of those costs.'

Regulation 1(2) defines a 'family' as follows:

'In these Regulations unless the context otherwise requires . . .

"family" means . . . (b) a married or unmarried couple . . . and any child or children living with them for whom at least one member of that couple has day to day care . . .

"partner" means—(a) in relation to a member of a married or unmarried couple who are living together, the other member of that couple . . .

"married couple" means a man and a woman who are married to each other and are members of the same household.

"unmarried couple" means a man and a woman who are not married to each other but are living together as husband and wife . . .'

[121] Living with a same-sex partner, Mrs M was only allowed her half share in the calculation of her housing costs. She was also treated as having no partner for the purposes of the calculation of her disposable and protected income under other regulations. But the overall effect in her case was that the maintenance that she was called upon to pay was higher than it would have been had her new partner been of the opposite sex. In other cases the effect would be the opposite. As Sedley LJ said ([2004] EWCA Civ 1343 at [88]–[89], [2004] 3 FCR 507 at [88]–[89], [2006] QB 380), 'Other provisions in the material regulations can work either way, depending on the facts of each case . . . there will be some same-sex couples who will not thank M for succeeding'. Further, the child benefit regime is, like many aspects of social legislation, a package. The distinction between the treatment of heterosexual partners as a couple and the treatment of same-sex partners as two individuals on a 'stand-alone' basis extended, prior to 5 December 2005, across the whole social security system; it affected therefore not merely the calculation of child support benefit but also for example income support, job-seekers' allowance, housing benefit and council tax benefit; and it was, the Secretary of State has informed your Lordships, one which was 'in general' to the (financial) benefit of same-sex couples. But that does not address the issue whether it was discriminatory in a sense and manner falling within and contrary to art 8 read with art 14.

[122] Mrs M took this issue to the Appeals Tribunal for Child Support, which on 11 November 2002 determined that her housing costs and her disposable and protected income should all be calculated on the basis that she had a partner who was a member of her family within the meaning of the regulations. The tribunal concluded that any other result would be discriminatory both under art 8 and under art 1 of the First Protocol, read in each case with art 14 of the convention, and that it was possible to avoid a discriminatory result under s 6 of the Interpretation Act 1978 by reading 'man' to include 'woman' and 'woman' to include 'man' in the definitions in para 1 of the regulations. Mr Edward Jacobs, as child support commissioner, upheld this result on 1 October 2002, but found the 1978 Act route 'unnecessarily inventive'. In his view, the definitions did not

apply, because, in accordance with their opening words, the context consisting in a need to read the legislation compatibly with the convention 'otherwise required'. The Court of Appeal, by a majority, dismissed the appeal, but took the view that a result compatible with the convention was 'better accomplished . . . by simply disapplying—in effect deleting—the definition of "unmarried couple" in reg 1(2)' (see [2004] 3 FCR 507 at [86], [2006] QB 380 per Sedley LJ).

[123] Since 5 December 2005, the same issues could not arise. The regime has been re-structured by the Civil Partnership Act 2004, giving same-sex couples expressly the same rights as opposite-sex couples. The laws relating to social security and tax credits were also embraced within a general restructuring of the law, to the same end. The legislative story goes back at least to late 2001. In October 2001, Jane Griffiths's Relationships (Civil Registration) Bill was introduced in the House of Commons, in November 2001 a major cross-departmental review of the policy and cost implications of a civil partnership registration scheme was initiated, supported by the Women and Equality Unit of the Department of Trade and Industry. In January 2002 Lord Lester of Herne Hill introduced a Civil Partnerships Bill in the House of Lords but withdrew it on 11 February 2002 to allow completion of the cross-departmental review. At the conclusion of the review, in December 2002 it was announced that a strong case was seen for a civil partnership scheme and that a consultation paper would be published in the summer of 2003, as it was on 30 June 2003. There followed a three-month consultation period, which showed strong public support for such a scheme. In the Department of Trade and Industry report 'Responses to Civil Partnership' dated November 2003, the government undertook to introduce legislation as soon as parliamentary time allowed. The first draft of the Civil Partnership Bill was dated 22 April 2004, and ensuing parliamentary process led to the 2004 Act receiving the royal assent on 18 November 2004. The 2004 Act is an extremely comprehensive piece of legislation, covering not merely the creation and regulation of civil partnerships, but many other subjects, some-interrelated, including social security, pensions, tax credits and the present, with the aim of achieving equality of treatment between opposite-sex and same-sex couples. The implementation of the legislation required time, and took place just over a year later.

MRS M'S CASE

[124] Mrs M's case under art 8 read with art 14 of the convention is that the regime fell 'within the ambit' or 'scope', or was 'one of the modalities of the exercise', of her right to respect for (a) her family life with her children and former partner, (b) her family life with her new same-sex partner and (c) her private life. She does not have to show an actual breach of the United Kingdom's obligation to afford such respect under art 8, taken by itself. See *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252 at 283 and *Petrovic v Austria* (1998) 4 BHRC 232 considered in [141]–[142] below. But the circumstances must fall within the ambit of art 8, in order for art 14 to be relevant. In this connection, I have had the benefit of reading in draft the opinion of my noble and learned friend, Lord Walker of Gestingthorpe, and I am in agreement with his analysis of the authorities and the reasoning leading him to the conclusion that a tenuous link between the child support regime and her family or private life is insufficient.

Mrs M's relationship with her children and former partner

[125] In the present case, Mrs M was entitled to respect for such continuing family life as she had with her children as well as, possibly, with her former partner. But the regime as a whole was directed at supporting her children in the new family in which her children lived; while the particular aspects of the regime about which she complains were directed at any new relationship she formed. If these aspects (or indeed the whole regime) had any bearing at all on her continuing family life with her children or former partner, the link could only be of the most indirect and tenuous nature. I agree with the Court of Appeal's unanimous rejection of the case based on her family life with her children and former partner.

Mrs M's relationship with her new same-sex partner

[126] The crux of the present case lies in my view in the submission, accepted by the majority in the Court of Appeal, that the regime fell within the ambit of family life which Mrs M shared with her new same-sex partner. That involves two issues, first, whether Mrs M's same-sex relationship during the period from 13 August 2001 to 18 February 2002 was to be regarded as involving family life, and whether, if so, the child support regime impinged sufficiently on that family life for it to be said to fall within its ambit.

[127] As to the second issue, if Mrs M's relationship with her same-sex partner in the relevant period falls to be regarded as having involved family life within the meaning of art 8(1), I would regard the regime about which, or certain aspects of which, she complains as falling, though only just, within the ambit of her right to respect for such family life under art 8, or as one of the 'modalities' by which the state exercised respect for that right in relation to any new family relationship that she might form. The aim of the regulations was to reflect and give effect to Mrs M's obligations as an absent parent to contribute to the living costs of her children. But they calculated housing costs and protected income by taking account of any new opposite-sex partner. They did this, no doubt, in a manner which was designed to avoid any unduly adverse impact on that new relationship and to achieve a fair balance between it and the children's needs. The commissioner specifically mentioned that the computation of protected income was 'put crudely, to ensure that the [absent] parent's family had enough to live on after the child support maintenance has been paid'. The full allowance made for housing costs in the case of any new opposite-sex relationship must be taken to have been designed to respect the perceived needs or status of those in such a relationship.

[128] So I would regard the first issue as critical. It opens a number of questions. The relevant articles of the convention are, under s 1(1) of the 1998 Act, 'Convention rights' and, under s 1(2), have effect for the purposes of the Act. Under s 2(1) a court or tribunal determining a question which has arisen in connection with a convention right 'must take into account' any judgment, decision, declaration or advisory opinion of the European Court of Human Rights 'whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen'. Under s 3(1) primary and subordinate legislation must, so far as possible, be read and given effect compatibly with the convention rights, while s 4(1) provides for a declaration of incompatibility in any proceedings in which a court determines that a provision of primary legislation is incompatible with a convention right.

[129] The meaning of s 2(1) was authoritatively expounded by my noble and learned friend, Lord Bingham of Cornhill, in reasoning with which all other members of the House agreed in *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26 at [20], [2004] 3 All ER 785 at [20], [2005] 2 AC 323:

> 'In determining the present question, the House is required by s 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: see *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [26], [2001] 2 All ER 929 at [26], [2003] 2 AC 295. This reflects the fact that the convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by s 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under s 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the convention, but such provision should not be the product of interpretation of the convention by national courts, since the meaning of the convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'

[130] In *R (on the application of S) v Chief Constable of South Yorkshire, R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39 at [27], [2004] 4 All ER 193 at [27], [2004] 1 WLR 2196, Lord Steyn cited this paragraph with approval in relation to art 8, distinguishing between art 8(1), which had, he said, to 'receive a uniform interpretation throughout member states, unaffected by different cultural traditions' and art 8(2), in relation to which differing cultural traditions in different states could be material to the question of objective justification. The observation was made by way of qualification of a statement by Lord Woolf CJ in the Court of Appeal ([2002] EWCA Civ 1275, [2003] 1 All ER 148, [2002] 1 WLR 3223) that—

> 'just as in the appropriate circumstances a margin of appreciation has to be extended for any shortcomings in this jurisdiction in relation to observing the convention, so there can be situations where the standards of respect for the rights of the individual in this jurisdiction are higher than those required by the convention. There is nothing in the convention setting a ceiling on the level of respect which a jurisdiction is entitled to extend to personal rights.'

Lord Steyn's reasoning was agreed by all other members of the House (save in the case of my noble and learned friend, Baroness Hale of Richmond, on the one question whether there was on the facts an interference with private life under art 8(1)). Baroness Hale also said ([2004] 4 All ER 193 at [78]): 'I accept that we must interpret the convention rights in a way which keeps pace with rather than leaps ahead of the Strasbourg jurisprudence as it evolves over time.'

[131] In *R (on the application of Ullah) v Special Adjudicator* [2004] 3 All ER 785 at [20], [2005] 2 AC 323, Lord Bingham referred to 'clear and constant jurisprudence of the Strasbourg court', and a domestic court may have to consider whether this criterion is met. In an evolving area, a domestic court may perhaps also have to consider whether relatively elderly jurisprudence reflects the result that the court would still reach. The Strasbourg court itself said in *Goodwin v UK* (2002) 13 BHRC 120 at 139 (para 74), that, whilst it will not depart without good reason from prior precedents—

> 'the court must have regard to the changing conditions within the respondent state and within contracting states generally and respond, for example, to any evolving convergence as to the standards to be achieved.'

It is relevant that it is in the first instance for the domestic courts of this country to consider and, so far as possible, give effect to convention rights (or, if this is not possible in the case of primary legislation, to make a declaration of incompatibility).

[132] Two decisions show the established jurisprudence of the Strasbourg court in the present area. The first is the relatively old commission decision of *S v UK* (1986) 47 DR 274 decided on 14 May 1986. The applicant had for three years lived in a same-sex relationship with a partner, following whose death on 8 February 1984 she was unable to succeed to the deceased's local authority tenancy, since she was not, under s 30 of the Housing Act 1980, regarded as a spouse or as a member of the deceased's family living with the deceased as husband or wife. The commission declared inadmissible her claim that she had been discriminated against in relation to her rights under art 8, saying:

> 'As regards family life, the commission recalls that it has already found that, despite the modern evolution of attitudes towards homosexuality, a stable homosexual relationship between two men does not fall within the scope of the right to respect for family life ensured by art 8 of the Convention . . . The present applicant's relationship with her now deceased partner accordingly also falls outside the scope of art 8 in so far as it protects the right to respect for family life.'

The commission also rejected complaints of interference with her private life and her home. In *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705, [2001] 1 AC 27, decided on 28 October 1999, Lord Slynn of Hadley, Lord Clyde and Lord Hobhouse of Woodborough referred to this authority as indicating the current Strasbourg position, but Lord Slynn observed that the law was still 'in an early stage of development' and 'attitudes may change as to what is acceptable throughout Europe' (see [1999] 4 All ER 705 at 716, [2001] 1 AC 27 at 40), while Lord Clyde referred to the 'developing' Strasbourg jurisprudence ([1999] 4 All ER 705 at 730, [2001] 1 AC 27 at 54). The ruling in *S v UK* regarding interference with the home must on any view now be seen in the light of later Strasbourg jurisprudence to contrary effect: see *Karner v Austria* [2004] 2 FCR 563, decided on 24 July 2003, with regard to a claim to succeed to a tenancy held by a same-sex partner who died in 1994.

[133] The second decision is more recent and is the nearest Strasbourg authority on the facts to the present. In *Estevez v Spain* App No 56501/00 (10 May 2001, unreported), the applicant lived with a same-sex partner for ten years, until the partner died in an accident on 13 June 1997. The applicant claimed a surviving spouse's pension, which the relevant Spanish law conferred only on heterosexual

couples married in accordance with art 149 of the Civil Code (the one exception being for unmarried couples who could not marry because divorce was not possible in Spain before 1981). He argued, inter alia, that this law discriminated against him in respect of his family life, contrary to arts 8 and 14. The commission, in rejecting the argument, said:

> 'As regards establishing whether the decision in question concerns the sphere of "family life" within the meaning of art 8(1) of the Convention, the court reiterates that, according to the established case-law of the Convention institutions, long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by art 8 of the Convention (see *X v UK* (1983) 32 DR 220, and *S v UK* (1986) 47 DR 274). The court considers that, despite the growing tendency in a number of European states towards the legal and judicial recognition of stable de facto partnerships between homosexuals, this is, given the existence of little common ground between the contracting states, an area in which they still enjoy a wide margin of appreciation (see, mutatis mutandis, *Cossey v UK* (1991) 13 EHRR 622 at 640–641 (para 40), and, a contrario, *Smith v UK* (2000) 29 EHRR 493 at 535 (para 104)). Accordingly, the applicant's relationship with his late partner does not fall within art 8 in so far as that provision protects the right to respect of family life.'

Although the commission's decision related to a refusal to pay a survivor's pension following a death in 1997, the loss of pension was presumably continuing. The decision thus re-affirms both that homosexual relations did 'not fall within the scope of the right to respect for family life protected by art 8 of the Convention' and that contracting states 'still' had a wide margin of appreciation at a time very shortly before the period relevant to the present appeal.

[134] I also mention at this point *Fretté v France* [2003] 2 FCR 39, decided on 26 February 2002. A homosexual complained under arts 8 and 14 that his application to adopt a child had been rejected based solely on his sexual orientation. The complaint was that his right to enjoy respect for his private life without discrimination had been infringed; the law permitted single men and women to apply to adopt, subject to prior authorisation in any particular case: see paras 28–29 of the Strasbourg court's judgment (at 52–53) as well as para 32 (at 54), where the court observed that no question arose of family life, because 'the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family'. As to the claim relating to respect for private life, the court held that art 8 read with 14 was engaged, but that 'Since the delicate issues raised in this case ... touch on areas where there is little common ground among Member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State' (para 41). In this light and in the light of divided opinions then current in the scientific community, the court held by a narrow majority that sufficient objective justification appeared to exist for the refusal to permit adoption by a homosexual, so that the difference in treatment was not discriminatory.

[135] One view of *Estevez v Spain* might have been that the Strasbourg court was leaving it to each domestic court to interpret the meaning of 'family life' in art 8(1) of the convention in its own national context. That would mean that it was using the term 'margin of appreciation' in a sense identified by Lord Hope of

Craighead, in *R v DPP, ex p Kebilene, R v DPP, ex p Rechachi* [1999] 4 All ER 801 at 844, [2000] 2 AC 326 at 380, when he said:

> 'This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions.'

In support of this view, it might be said that conceptions of 'family life' may differ in different cultural, traditional and religious environments, and the common law authorities which I cite in [139]–[140] below certainly show an evolution within the United Kingdom.

[136] However, the Strasbourg court spoke in categorical terms in *Estevez v Spain* when it said that, according to the established case-law, 'long-term homosexual relations . . . do not fall within the scope of the right to respect for family life protected by art 8 of the Convention'; and the decisions in your Lordships' House in *R (on the application of Ullah) v Special Adjudicator* [2004] 3 All ER 785, [2005] 2 AC 323 and *R (on the application of S) v Chief Constable of South Yorkshire* [2004] 4 All ER 193, [2004] 1 WLR 2196 establish that the concepts deployed in art 8(1) should be given 'a uniform interpretation throughout member states, unaffected by different cultural traditions'. The reference to 'margin of appreciation' in *Petrovic v Austria* is thus to be understood in another sense, as referring to the freedom of national courts, or member states, to provide for rights more generous than those guaranteed by the convention, though not as the product of interpretation of the convention. In this connection, the United Kingdom already has, quite apart from the convention, a developing body of common law authority underlining the importance attaching to fundamental rights, which surely include equal treatment.

[137] Another point made by Lord Hope of Craighead in *R v DPP, ex p Kebilene* [1999] 4 All ER 801, [2000] 2 AC 326 and worth noting at this stage was that the margin of appreciation is an international concept, not directly applicable in domestic courts. He said ([1999] 4 All ER 801 at 844, [2000] 2 AC 326 at 380–381):

> 'This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court . . . But in the hands of the national courts also the convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.
>
> In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. This point is well made in *Human Rights Law and Practice* (1999) p 74, para 3.21, of which Lord Lester of Herne Hill QC and Mr David Pannick QC are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the "discretionary area of

judgment". It will be easier for such an area of judgment to be recognised where the convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection. But even where the right is stated in terms which are unqualified the courts will need to bear in mind the jurisprudence of the European Court which recognises that due account should be taken of the special nature of terrorist crime and the threat which it poses to a democratic society: *Murray v UK* (1994) 19 EHRR 193 at 222 (para 47).'

[138] Another way to explain the position, avoiding the language of deference, is that the legislature or executive are, in some circumstances, recognised as being better placed to evaluate and decide and, on that basis, as having a greater or lesser margin of decision-making or discretionary power: see eg *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97 at 114, [2003] 1 AC 681 at 703 per Lord Bingham of Cornhill; *R (on the application of ProLife Alliance) v BBC* [2003] UKHL 23 at [74]–[77], [2003] 2 All ER 977 at [74]–[77], [2004] 1 AC 185 per Lord Hoffmann; and Lester and Pannick's *Human Rights Law and Practice* (2nd edn, 2004) pp 95–100 (paras 3.19–3.21). The scope of any such margin will depend, as Lord Hope said in *Ex p Kebilene*, on the nature of the rights in issue. Lord Hoffmann made the same point in *R v East Sussex CC, ex p Reprotech (Pebsham) Ltd, Reprotech (Pebsham) Ltd v East Sussex CC* [2002] UKHL 8 at [34], [2002] 4 All ER 58 at [34], [2003] 1 WLR 348:

'Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection . . . while ordinary property rights are in general far more limited by considerations of public interest . . .'

DOMESTIC DEVELOPMENTS IN THE CONCEPT OF 'FAMILY LIFE'

[139] That domestic conceptions of the 'family' have radically altered is reflected in domestic case law. In *Gammans v Ekins* [1950] 2 All ER 140, [1950] 2 KB 328, the issue was, again, succession to a tenancy as a member of the deceased tenant's family, in this case under the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 Mr Ekins had lived 'in close but unmarried association' with the deceased, Mrs Smith, for 20 years. They were regarded by neighbours as man and wife, although the judge made no finding whether the relationship was platonic. Asquith LJ regarded membership of the same family as limited to three relationships: that of children, that constituted by way of legitimate marriage and, thirdly, relationships whereby one person becomes in loco parentis to another. He and Jenkins LJ considered it to be outside any ordinary accepted use of language to treat two people 'masquerading' or 'posing' as a married couple, there being no children to 'complicate the picture' as members of the same family. Both Asquith LJ, and Evershed LJ, who found greater difficulty in the case, would also have been influenced by the 'sinful' nature of any sexual relationship.

[140] In stark contrast, a quarter of a century on in *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030, [1976] QB 503 the Court of Appeal concluded that changed social practice and attitudes meant had led to an expansion of the concept of

'family' to embrace just such a situation under the same statutory provision. A further quarter of a century later, in *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705, [2001] 1 AC 27, decided on 28 October 1999 prior to the coming into force of the 1998 Act, the House considered a similar question under successor legislation, the Rent Act 1977, but in relation to same-sex partners following the death in 1994 of the partner who had been the tenant. The House held that Parliament by using the concept of a 'spouse' living with the original tenant 'as his or her wife or husband' had used gender-specific language which could not apply to a same-sex relationship. So there was no statutory tenancy under para 2(2) of Sch 1 to the 1977 Act. But, by a majority of three to two, it held that changes in habits and opinions meant that a same-sex partner was now capable of being regarded at common law as 'a member of the original tenant's family' and so as entitled to succeed at least to an assured tenancy under para 3(1) of Sch 1 (although this was in some respects less favourable than a statutory tenancy under para 2(2)). I return in para 29 to the final chapter written in this story after the coming into force of the 1998 Act.

FURTHER STRASBOURG AND DOMESTIC CASE LAW

[141] At this point, it is convenient to step back and look at *Petrovic v Austria* (1998) 4 BHRC 232 and a line of other authority reaching up to the present date. In *Petrovic v Austria*, the applicant complained that the state's refusal to pay him parental allowance in 1989, on the ground that it was only available to mothers, discriminated against him on grounds of sex. During an eight-week period after birth, mothers received a maternity allowance. Parental allowance was payable in respect of any further leave taken thereafter in order to care for the newborn child. The court held that there was no breach of art 8 alone, since there was no obligation on the state to pay any allowance to anyone in respect of that further period, but that:

> '27. Nonetheless, this allowance paid by the state is intended to promote family life and necessarily affects the way in which the latter is organised as, in conjunction with parental leave, it enables one of the parents to stay at home to look after the children.
>
> 28. The court has said on many occasions that art 14 comes into play whenever "the subject-matter of the disadvantage . . . constitutes one of the modalities of the exercise of a right guaranteed" (see *National Union of Belgian Police v Belgium* (1976) 1 EHRR 578 at 592–593 (para 45)), or the measures complained of are "linked to the exercise of a right guaranteed" (see *Schmidt v Sweden* (1976) 1 EHRR 632 at 645 (para 39)).
>
> 29. By granting parental leave allowance states are able to demonstrate their respect for family life within the meaning of art 8 of the convention; the allowance therefore comes within the scope of that provision. It follows that art 14—taken together with art 8—is applicable.' (See (1998) 4 BHRC 232 at 237.)

[142] There was, however, no breach, because the area was one where states enjoyed a margin of appreciation. There was no common standard in the field at the material time (the late 1980s) and—

> '40 . . . Originally, welfare measures of this sort—such as parental leave—were primarily intended to protect mothers and to enable them to look after very young children. Only gradually, as society has moved towards a more equal sharing between men and women of responsibilities

for the bringing up of their children, have the contracting states introduced measures extending to fathers, like entitlement to parental leave.

41. In this respect Austrian law has evolved in the same way, the Austrian legislature enacting legislation in 1989 to provide for parental leave for fathers. In parallel, eligibility for the parental leave allowance was extended to fathers in 1990 . . .

It therefore appears difficult to criticise the Austrian legislature for having introduced in a gradual manner, reflecting the evolution of society in that sphere, legislation which is, all things considered, very progressive in Europe.'

[143] Shortly after *Petrovic v Austria*, in July 1998 the court decided *Sheffield v UK* (1998) 5 BHRC 83, rejecting complaints, under art 8 and art 8 read with art 14, by female post-operative transsexuals about the United Kingdom's refusal to give legal recognition to their status as women following their gender reassignment operations. The court referred (at 98 (para 76)) to the margin of appreciation, and said that it was—

'satisfied that a fair balance continued to be struck between the need to safeguard the interests of transsexuals . . . and the interests of the community in general and that the situations in which the applicants may be required to disclose their pre-operative gender do not occur with a degree of frequency which could be said to impinge to a disproportionate extent on their right to respect for their private lives.'

But the court earlier also observed (at 96 (para 60)) that, even if there had been no significant scientific developments regarding the aetiology of transsexualism:

' . . . it is nevertheless the case that there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of art 8 in this case, the court reiterates that this area need to be kept under review by contracting states.'

[144] In *Goodwin v UK* (2002) 13 BHRC 120, decided on 11 July 2002, this message came home. The Home Secretary had in April 1999 set up an interdepartmental working group, which reported in April 2000, suggesting three options for public consultation. The Court of Appeal in *Bellinger v Bellinger* [2001] EWCA Civ 1140 at [96], [2002] 1 All ER 311 at [96], [2002] Fam 150, decided on 17 July 2001, had expressed its views that the situation was 'profoundly unsatisfactory', that the recommendation for public consultation merited action and that the problems might well come before the Strasbourg court again 'sooner rather than later'. Against this background, it is no surprise that the Strasbourg court now concluded that, with the passing of further time and no significant domestic reform, the unsatisfactory position whereby post-operative transsexuals lived in the United Kingdom in an intermediate legal zone was 'no longer sustainable' under art 8. It was 'no longer' within the margin of appreciation.

[145] Within a short time, the House of Lords considered *Goodwin v UK* in the appeal in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467, [2003] 2 WLR 1174, decided on 10 April 2003. The claimant, a female transsexual born as a male claimed a declaration that her 'marriage' with a man in 1981 was valid and subsisting. The House held that she could not be regarded as a 'female'

within the meaning of s 11(c) of the Matrimonial Causes Act 1973, but declared, in the light of *Goodwin v UK*, that s 11(c) was incompatible with her right to respect for her private and family life and her right to marry under arts 8 and 12.

[146] In *Karner v Austria* [2004] 2 FCR 563, decided 24 July 2003, the court's decision was clearly based on discrimination contrary to arts 8 and 14, taken together, affecting the applicant's right to respect for his *home*. The claims relating to family and private life were left on one side. (See para 33 of the judgment (at 570)). The Austrian Supreme Court had held that domestic legislation only allowed succession by opposite-sex partners, married or unmarried. The Strasbourg Court accepted that protection of the family was a 'weighty and legitimate reason which might justify a difference in treatment' but could see no need to exclude homosexuals from succession in order to achieve any such aim.

[147] In *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, [2004] 2 AC 557, decided on 21 July 2004, the House, in that light and in relation to a death occurring on 5 January 2001 returned to the subject of succession by a homosexual partner to a statutory tenancy under para 2(2) of the Rent Act 1977. It held that there was no justification and no legitimate aim served by the difference in treatment of hetero- and homosexual partners, and by a majority of four to one it also concluded that, under the 1998 Act (and contrary to the conclusion reached prior to the coming into force of that Act in *Fitzpatrick v Sterling Housing Association Ltd*), it was possible to read para 2(2) in such as way as to treat the survivor of a homosexual couple as the surviving spouse of the original tenant.

[148] My noble and learned friend, Lord Nicholls, with whose speech Lord Steyn, Lord Rodger of Earlsferry and my noble and learned friend, Baroness Hale of Richmond, agreed, also rejected an argument based on *Petrovic v Austria* and *Walden v Liechtenstein* App no 33916/96 (16 March 2000, unreported) to the effect that, as there had been a continuing evolution in society's attitude to cohabiting homosexual couples and because the relevant death had occurred two years before the decision in *Karner v Austria* [2004] 2 FCR 563, the United Kingdom should not be criticised. Counsel pointed out that the United Kingdom had responded quickly to the decision in *Karner v Austria* by two bills, the Housing and Civil Partnership Bills. But Lord Nicholls, in rejecting this submission, said ([2004] 3 All ER 411 at [23], [2004] 2 AC 557) that—

> 'Under the Human Rights Act 1998 the compatibility of legislation with the Convention rights falls to be assessed when the issue arises for determination, not as at the date when the legislation was enacted or came into force: *Wilson v First County Trust Ltd* [2003] UKHL 40 at [62], [2003] 4 All ER 97 at [62], [2004] 1 AC 816. The cases of [*Walden v Liechtenstein*] and [*Petrovic v Austria*] concerned the margin of appreciation afforded to contracting states. In the present case the House is concerned with the interpretation and application of domestic legislation. In this context the domestic counterpart of a state's margin of appreciation is the discretionary area of judgment the court accords Parliament when reviewing legislation pursuant to its obligations under the Human Rights Act 1998. I have already set out my reasons for holding that in the present case the distinction drawn in the legislation between the position of heterosexual couples and homosexual couples falls outside that discretionary area.'

[149] In *Wilson v First County Trust Ltd* [2003] 4 All ER 97 at [62], [2004] 1 AC 816 Lord Nicholls of Birkenhead had referred to a 'value judgment by the court, made by reference to the circumstances prevailing when the issue has to be decided', and to its being 'the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force'. I fully accept the rejection of the date of enactment or coming into force. But the circumstances and issues in a particular case may in my view require a court to consider an intermediate time between the date when legislation came into force and the date, whenever that may be, when an issue about its compatibility happens to be determined at first instance or on appeal. This may be a consideration of particular relevance in times of changing social conditions and attitudes where courts may, in appropriate circumstances, recognise the legislature or executive as better placed to make an assessment of the appropriate timing and form of any amending legislation.

[150] The last case that I mention at this point is *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2006] 1 All ER 487, [2005] 1 WLR 1681, decided on 5 May 2005. Widowers, whose wives had died in the 1990s, claimed that there had been a violation of their rights under art 14 read with art 1 of the First Protocol. This consisted in not paying to widowers the equivalent of the widowed mother's allowance and the widow's pension that a widow would have received from 2 October 2000, when the 1998 Act came into force, and 9 April 2001, when the United Kingdom legislative scheme was altered by the Welfare Reform Pensions Act 1999, eliminating any difference in treatment. (The discrimination consisted rather in maintaining an out-of-date benefit scheme in favour of widows, than in not extending it to men: see para [17] per Lord Hoffmann.) The widowers were able to rely on *Willis v UK* [2002] 2 FCR 743, where the Strasbourg court had already held that the scheme involved illegitimate discrimination in the period prior to 2 October 2000. No objective justification was claimed for the payment of the benefits to widows at the relevant times: see [2006] 1 All ER 487 at [41] per Lord Hoffmann. So there was no basis for the application of the principle in *Petrovic v Austria* or *Walden v Liechtenstein* (which Lord Hoffmann found a difficult decision on its facts): see [60]–[63]. But Lord Hoffmann also said (at [62]):

> '. . . I can quite understand that if one has a form of discrimination which was historically justified but, with changes in society, has gradually lost its justification, a period of consultation, drafting and debate must be included in the time which the legislature may reasonably consider appropriate for making a change. Up to the point at which that time is exceeded, there is no violation of a Convention right . . .'

[151] This appeal is concerned with a period in the years 2001–2002 commencing only just after the decision in *Estevez v Spain* App No 56501/00 (10 May 2001, unreported) (see [132], above). The decisions in *Karner v Austria* [2004] 2 FCR 563 and *Ghaidan v Mendoza*, which followed it domestically, were concerned with the right to respect for the home (see [146], [147], above). In the light of the Strasbourg court's decision in *Estevez v Spain* and what your Lordships' House has previously stated regarding art 8(1)—cf [18], above—the concept of 'family life' under art 8 cannot, I think, be regarded as having included same-sex relationships during the relevant period from 13 August 2001 to 18 February 2002.

[152] I have little doubt that the Strasbourg court would see the position now as having changed very considerably, and that, if such an issue were to come before it in respect of the position in 2006, Mrs M's same-sex relationship could very well be regarded, in both Strasbourg and the United Kingdom, as involving family life for the purposes of art 8. But that is because there have been continuing changes in social attitudes and in the legislative picture across Europe. The respondents' schedule of countries legally recognising familial relationships between same-sex couples shows the extent to which there has been a general move towards legal recognition of same-sex relationships across Europe in recent years. Laws were passed providing for registered partnerships in the Nordic countries, Denmark (1989), Norway (1993), Sweden (1994), Iceland (1996) and Finland (2001), for unregistered cohabitation in Hungary (1996), Portugal (2001) and Croatia (2003), for registered cohabitation or partnerships in Belgium (1998), the Netherlands (1998), France (1999), Germany (2001) and Switzerland (2004), for marriage in the Netherlands (2001) and Belgium (2003) and Spain (2005) and for registered cohabitation and marriage Luxembourg (2004). Italy, Greece and a number of the new Eastern European and Baltic democracies still appear to stand on one side, but the picture is overall one of radical change since the beginning of 2001. Outside Europe, the list shows not dissimilar developments. Unregistered cohabitation was the subject of laws in New South Wales (1999), Victoria (2001), Western Australia (2002), Tasmania (2003), Canada (2000) (with a further law on marriage in 2005), New Zealand (2002) (with a further law on registered partnership in 2004) and South Africa (various laws from 1999–2003). In Israel court decisions recognised several spousal benefits (1994–1996), adoption rights (2001), civil service survivor benefits (1998), insurance compensation survivor rights (1999) and pension rights (2000). The legal restructuring evidenced by this list marks a general recognition by legislatures and societies of the need for equal treatment of opposite and same-sex couples. It is right to add that we were not given sufficient detail to judge how far all relevant inequalities in other countries' legislation, were eliminated (as they appear to have been in the United Kingdom) at the same time as same-sex civil registration, partnership or marriage schemes were introduced. So it may be that the United Kingdom legislation is more advanced than that of some of such other countries. But, on the face of it, a great change has taken place across Europe during the last five or so years, of which any court considering the current scope of art 8(1) would take most careful account.

[153] The position is in my view different in respect of the period from 13 August 2001 to 18 February 2002 with which the House is concerned. I have summarised (at [123], above) the history of the recent changes to United Kingdom law, encompassed by the 2004 Act. My noble and learned friend, Baroness Hale, has said of them that they are 'hugely to the credit of the United Kingdom government and Parliament. They are ahead of much of Europe, although parts of Europe are ahead of them'. Such changes required a very careful process of development, consultation and drafting, to achieve a comprehensive legislative picture based on equality of treatment. Baroness Hale, has herself observed, in words quoted in para [93] of his speech by my noble and learned friend, Lord Walker of Gestingthorpe, that there is necessarily an evolutionary process, by which the law in this area has adapted to achieve an equality-based treatment of the sexes across the whole legal scene. Because of the front-line importance of a home, the Strasbourg and United Kingdom courts

have been active at a relatively early stage to eliminate differences in treatment which were evidently unfair. The area of law with which the House is concerned is not so front-line. It is one where there are swings and roundabouts, advantages and disadvantages, for same-sex couples in achieving complete equality of treatment. There are many allied areas of legislation that used similar terminology and required close attention, to achieve coherent, comprehensive reform. It is an area in relation to which Parliament and the democratically elected government should be recognised as enjoying a limited margin of discretion, regarding the stage of development of social attitudes, when and how fast to act, how far consultation was required and what form any appropriate legislative changes should take.

[154] In these circumstances, the House has not been shown any basis for criticism of the United Kingdom for delay either in reviewing the law or in moving to alter it in the light of the review. It is said, none the less, that this is not a situation where the principle discussed in *Petrovic v Austria* (1998) 4 BHRC 232 and *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2006] 1 All ER 487, [2005] 1 WLR 1681 could have any operation, because unequal or discriminatory treatment of same-sex couples has never been justified. That is how we would now see it from a moral viewpoint. But here we are concerned with the legal position during a particular period in the years 2001–2002. If it is right that, until quite recently neither the Strasbourg court nor a United Kingdom domestic court would have regarded a same-sex relationship as involving family life, then it also follows that it was not then unlawful, under arts 8 and 14 of the convention, to discriminate in domestic legislation between opposite and same-sex couples.

[155] Justification exists where discrimination is prima facie unlawful, but there is a special reason legitimising it—eg where (as in probably in *Petrovic v Austria* itself) men and women were treated differently for a reason for which there was historically rational justification but which has now disappeared. In such a case *Petrovic v Austria* accepts, and Lord Hoffmann in *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2006] 1 All ER 487 at [62], [2005] 1 WLR 1681 agreed, reasonable time may be allowed for legislative change—though it must not be exceeded as it was in relation to transsexuals (cf *Goodwin v UK* (2002) 13 BHRC 120). Here, discrimination was, as a matter of history, not even prima facie unlawful under art 8, because the concept of 'family life' did not extend to cover the situation. It cannot have become unlawful so, until a broader understanding of the concept developed. There is in my view no logical or fair distinction between a situation where there once was, but no longer is, justification and this situation. Accordingly, in so far as it may be necessary, I consider that the principle in *Petrovic v Austria* is capable of applying to the present situation, and that it underlines the conclusion that the United Kingdom is not open to criticism for the changes in its internal law, which occurred—both as a result of judicial decision and as a result of legislation—gradually over a period. This process reflected the evolution of society and its attitudes and the unreality of supposing that all aspects of any exercise in achieving complete equality in every area of United Kingdom law could have been addressed by the courts and/or Parliament at one and the same moment.

[156] For these reasons, I would hold that Mrs M has not established that the child benefit regime as it existed under the regulations in the United Kingdom in the period from 13 August 2001 to 18 February 2002 was inconsistent with the

convention right to respect for family life introduced into domestic law by the 1998 Act.

RESPECT FOR MRS M'S PRIVATE LIFE

[157] This brings me to the third basis on which Mrs M relies on art 8 read with art 14. That is that the regulations would interfere with her right to respect for her personal life, unless read in one of the ways they were read below. None of the members of the Court of Appeal accepted this submission, although Sedley LJ did no more than express his doubt about it. Neither the child support regime nor those aspects of which Mrs M complains were directed at Mrs M's private life. Any possible effect would appear to me as remote and indeterminate as, if not more so than, that suggested by the complainant in *Botta v Italy* (1998) 26 EHRR 241. In my view, any link with Mrs M's private life would be tenuous in the extreme, and quite insufficient for the purposes of bringing the regime and those aspects within the ambit of art 8 read with art 14.

ARTICLE 1 OF THE FIRST PROTOCOL AND ARTICLE 14

[158] Finally, Mrs M relies on art 1 of the First Protocol read with art 14. The commission recalled in *Burrows v UK* App No 27558/95 (27 November 1996, unreported) that the article is primarily concerned with the formal expropriation of assets for a public purpose, and not with the regulation of rights between persons under private law unless the state lays hands—or authorises a third party to lay hands—on a particular piece of property for a purpose which is to serve the public interest. A scheme providing for leasehold enfranchisement falls none the less within the scope of art 1 of the First Protocol, although the tenants benefiting from enfranchisement are private individuals, where the scheme as a whole is devised and introduced in the public interest in pursuance of legitimate social policies (see *James v UK* (1986) 8 EHRR 123). Possessions may include the notional 'proprietary' right conferred on individual citizens by legislation providing for social security and welfare benefits, whether or not these are conditional on the prior payment of contributions (see *STEC v UK* [2005] ECHR 6573/01 and 65900/01 (admissibility decisions taken on 6 July 2005)). The second paragraph of the article provides that the first paragraph 'shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary . . . to secure the payment of taxes or other contributions or penalties', but is, as Sedley LJ pointed out, no more than a proviso to the first paragraph. The second paragraph may to some degree have been introduced as a matter of caution, and it certainly cannot expand the scope of the first paragraph.

[159] It seems to me artificial to treat child support payments as 'depriving' the absent parent of 'possessions' within the first paragraph. As Sedley and Kennedy LJJ observed, to treat the first paragraph of the article as directed to the level of financial payments between parents which the state enforces by its machinery would carry the scope of the article into every situation where legislation has a net adverse financial impact on a person. The regulations were not expropriating anything belonging to the absent parent, but seeking to achieve a fair measure of the absent parent's pre-existing obligation to support his or her children. This is so, even though the legislative measure and procedure were no doubt introduced as a matter of legitimate policy, to address a growing social problem. There is still no element of, or resembling, expropriation in the public interest, as there undoubtedly was in the case of leasehold enfranchisement. I

agree with the reasoning on this point of all my noble and learned friends, Lord Walker, Lord Bingham of Cornhill and Lord Nicholls. It follows that neither the child support regime nor the aspects of which Mrs M complains fall within the ambit of art 1 of the First Protocol so as to engage art 14.

CONCLUSION

[160] In the result, I consider that Mrs M has not established that the child support regime during the relevant period from 13 August 2001 to 18 February 2002 was on its face inconsistent with any convention right. It is therefore unnecessary for me to consider whether any such potential inconsistency could have been avoided or eliminated by the exceptional verbal treatment, or as the Secretary of State would have it mistreatment, prescribed by the tribunal, the commissioner or the Court of Appeal. It is also unnecessary for me to express any view on the difficult issue of remedy which would have arisen had I been of a contrary view. I would allow this appeal accordingly.

Appeal allowed.

Dilys Tausz Barrister.

Flora v Wakom (Heathrow) Ltd

[2006] EWCA Civ 1103

COURT OF APPEAL, CIVIL DIVISION

SIR MARK POTTER P, BROOKE AND MOORE-BICK LJJ

11, 12, 28 JULY 2006

Damages – Personal injury – Amount of damages – Periodical payments – Statute providing for variation of periodical payments by reference to retail prices index – Whether provision to be disapplied or modified only in exceptional circumstances – Damages Act 1996, s 2(8), (9).

The claimant had suffered personal injury. The defendant had admitted liability but the amount of compensation and the form of the order for compensation remained in issue. Under s 2[a] of the Damages Act 1996 the court was obliged in every personal injury case involving a claim for damages for pecuniary loss to consider whether to make an order that the damages should take the form of periodical payments. Section 2(8) provided that an order for periodical payments was to be treated as providing for the amount of payments to vary by reference to the retail prices index and under sub-s (9) a periodical payments order could include provision for disapplying or modifying the effect of sub-s (8). The claimant considered that sub-s (8) identified the default position, and that the court could make the orders identified in sub-s (9) whenever it appeared just to do so. His statement of case identified reasons for his contention that a wage-related index would be more suitable in his case than the retail price index as the mechanism for varying the sums payable under a periodical payments order. In support of his case he wished to rely on a particular expert. The defendant applied to strike out those parts of the claimant's statement of case and to exclude the evidence of the expert. It maintained that sub-s (8) provided for the order a court would ordinarily make, and that sub-s (9) could only be triggered in exceptional circumstances. The judge dismissed the application and the defendant appealed.

Held – If a periodical payments order did not identify on its face the manner in which the amount of the payments was to vary in order to maintain their real value then s 2(8) of the 1996 Act prescribed that the order was to be treated as providing for the amount of payments to vary by reference to the retail prices index unless the order contained provision of a type identified in s 2(9). There was nothing in the language of those subsections to suggest that the power to make provision such as identified in s 2(9) could only be triggered in an exceptional case. The principal purpose of the provisions for periodical payments was to achieve the aim of awarding such a sum of money as would amount to no more, and at the same time no less, than the net loss. There was no indication in s 2 itself or in the 1996 Act that Parliament had intended the courts to depart from the principle that a victim of a tort was entitled to be compensated as nearly as possible in full for all pecuniary losses. In the instant case the claimant should be allowed to advance his statement of case and adduce the evidence of the expert

a Section 2, so far as material, is set out at [4], below

witness at the trial of the action. It would then be for the trial judge to decide whether it was appropriate to use the powers given to him by Parliament in s 2(9) and to make such order for index-linking the periodical payments, if a periodical payments order were in fact made, as he considered appropriate and fair in all the circumstances, without being obliged to detect exceptional circumstances before he was at liberty to depart from the retail prices index. Accordingly, the appeal would be dismissed (see [10], [18], [19], [28], [29], [37]–[40], below).

Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc [1998] 3 All ER 481 considered.

Notes

For periodical payments under the Damages Act 1996, see Supp to 37 *Halsbury's Laws* (4th edn reissue) para 1223A.

For the Damages Act 1996, s 2, see 13 *Halsbury's Statutes* (4th edn) (2004 reissue) 748.

Cases referred to in judgments

Cooke v United Bristol Healthcare NHS Trust, Sheppard v Stibbe, Page v Lee [2003] EWCA Civ 1370, [2004] 1 All ER 797, [2004] 1 WLR 251.

Cookson v Knowles [1978] 2 All ER 604, [1979] AC 556, [1978] 2 WLR 978, HL.

Harding v Wealands [2006] UKHL 32, [2006] 4 All ER 1, [2006] 3 WLR 83.

Heil v Rankin [2000] 3 All ER 138, [2001] QB 272, [2000] 2 WLR 1173, CA.

Lim Poh Choo v Camden and Islington Area Health Authority [1979] 2 All ER 910, [1980] AC 174, [1979] 3 WLR 44, HL.

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

R (on the application of Quintavalle) v Secretary of State for Health [2003] UKHL 13, [2003] 2 All ER 113, [2003] 2 AC 687, [2003] 2 WLR 692.

R (on the application of S) v Chief Constable of South Yorkshire, R (on the application of Marper) v Chief Constable of South Yorkshire [2004] UKHL 39, [2004] 4 All ER 193, [2004] 1 WLR 2196.

R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38, [2002] 4 All ER 654, [2002] 1 WLR 2956.

R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] 1 All ER 195, [2001] 2 AC 349, [2001] 2 WLR 15, HL.

Robinson v Secretary of State for Northern Ireland [2002] UKHL 32, [2002] NI 390.

Warren v Northern General Hospital Trust [2000] 1 WLR 1404, CA.

Warriner v Warriner [2002] EWCA Civ 81, [2003] 3 All ER 447, [2002] 1 WLR 1703.

Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc [1998] 3 All ER 481, [1999] AC 345, [1998] 3 WLR 329, HL.

Appeal

Wakom (Heathrow) Ltd, the defendant in proceedings for damages for personal injury brought by the claimant Tarlochan Singh Flora, appealed with permission of Latham and May LJJ from the decision of Sir Michael Turner sitting as a High Court judge on 7 December 2005 ([2005] EWHC 2822 (QB)) dismissing its application to strike out part of the claimant's statement of case and to exclude certain evidence. The facts are set out in the judgment of Brooke LJ.

Michael Pooles QC and *Oliver Ticciati* (instructed by *Beachcroft Wansbroughs*) for the defendant.

Robert Glancy QC and *Robert Weir* (instructed by *Irwin Mitchell*) for the claimant.

Cur adv vult

28 July 2006. The following judgments were delivered.

BROOKE LJ (giving the first judgment at the invitation of Sir Mark Potter P).

[1] This is an appeal by the defendants from an order of Sir Michael Turner, sitting as a High Court judge, on 7 December 2005 ([2005] EWHC 2822 (QB), 150 Sol Jo LB 130), whereby he dismissed their application to strike out 11 paragraphs of the claimant's statement of case and to exclude the evidence of a particular expert witness. The appeal raises an important point on the construction of s 2(8) and (9) of the Damages Act 1996.

[2] These two subsections, together with ss 2A and 2B, were substituted for s 2 of the original Act with effect from 1 April 2005 (see s 100 of the Courts Act 2003 and the Courts Act 2003 (Commencement No 10) Order 2005, SI 2005/910). The section as originally enacted gave the court power to make an order for periodical payments in a personal injuries case provided that the parties consented to the making of such an order. Section 2(1), as substituted, provides:

> 'A court awarding damages for future pecuniary loss in respect of personal injury—(a) may order that the damages are wholly or partly to take the form of periodical payments, and (b) shall consider whether to make that order.'

[3] In other words, the court is obliged in every personal injury case involving a claim for damages for future pecuniary loss to consider whether to make such an order. This is why the present appeal has an importance transcending the significance of the dispute between the present parties, which is concerned with the consequences of a very serious workplace accident. On 13 May 2002 the 50-year-old claimant fell 35 feet from a ramp. His annual loss of earnings has been calculated at just under £12,000 and his annual need for care has been valued at between £18,000 and £27,000. Liability has been admitted, and only the amount of compensation, and the form of the order for compensation, is in issue.

[4] The dispute centres round the interpretation of s 2(8) and (9) of the 1996 Act:

> '(8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules.
>
> (9) But an order for periodical payments may include provision—(a) disapplying subsection (8), or (b) modifying the effect of subsection (8).'

[5] The claimant maintains that sub-s (8) identifies the default position, and that a court may make the orders identified in sub-s (9) whenever it appears just to do so. The defendants, on the other hand, maintain that sub-s (8) provides for

the order a court will ordinarily make, and sub-s (9) may only be triggered in exceptional circumstances. It is common ground that so far as cases involving severe injuries are concerned there is nothing particularly exceptional about the present case. The claimant's injuries have deprived him of the ability to work, and he has to rely on others to support his daily needs, but this is a common feature of many cases of this type.

[6] The parts of his statement of case which the defendants wish to strike out are concerned to identify the reasons why he contends that a wage-related index such as the average earnings index (AEI) would be more suitable than the retail price index (RPI) as the mechanism for varying the sums payable under the periodical payments order. In support of his case he wishes to rely on the expert (Dr Victoria Wass) whose evidence the defendant seeks to exclude. He wishes to argue that the latter index is not a reliable measure of wage inflation, and because the court will be largely concerned with assessing compensation for future loss of earnings (which are of necessity wage-related) and the cost of future care (which is largely, if not entirely, wage dependent), he would not receive full compensation through a s 2 order linked to the RPI given that wage inflation has historically outstripped RPI inflation, and that it is legitimate, he says, to refer to the past as a guide to what the future may bring. It was conceded for the purposes of the defendant's application that Dr Wass's evidence was capable of demonstrating that in future there would or might be a shortfall between the actual or likely cost of providing for his needs throughout his lifetime and the amount he would receive under a periodical payments order linked to the RPI.

[7] On the present appeal it is not our job to express any views about the merits of his case in this respect. If this appeal is dismissed it will proceed to trial, and it will be for the trial judge to make appropriate findings on the evidence before him or her. Sir Michael Turner, who has immense experience in this field of litigation, expressed the view when refusing permission to appeal that an appeal at this interlocutory stage would not enable this court to give the definitive guidance which was plainly required. Latham LJ, however, with whom May LJ agreed, decided to grant permission to appeal after being told that the relationship between s 2(8) and (9) was an issue of importance which was creating concern to courts all round the country. He considered that there was sufficient material already before the court to enable it to make an early determination on the issue of construction without having to await the consideration of detailed arguments based on the respective merits of the two indices in the present context.

[8] The primary submission of Mr Pooles QC, who appeared for the appellants, was that the language of the two subsections was clear and that there was no need for us to look at Hansard as an aid to interpretation. If, contrary to this submission, we found any ambiguity in the words used by Parliament, we should consider the extracts from the debate in the House of Lords on the committee and report stages and on the third reading of the Bill, and these would help us to resolve any ambiguity in his client's favour. Mr Glancy QC, who appeared for the respondent, submitted that the language was quite clear—although in an opposite sense to that contended for by Mr Pooles—and that in those circumstances evidence from Hansard was inadmissible. We read the extracts to which Mr Pooles referred us without ruling one way or another in relation to the rival submissions.

[9] The House of Lords has made it clear that reference to statements made in Parliament about the meaning or effect of a particular clause in a Bill is only permissible for the purpose of construing the equivalent section (when enacted) if three conditions are all satisfied. Those conditions were first identified by Lord Browne-Wilkinson in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, and are clearly set out by Lord Bingham of Cornhill in his speech in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195 at 211, [2001] 2 AC 349 at 391. In that case he and other members of the House made it clear that these conditions should be strictly insisted upon (see [2001] 1 All ER 195 at 212, 227, 233, [2001] 2 AC 349 at 392, 408, 413). The first of these conditions is that such reference was permissible only where legislation was ambiguous or obscure, or led to an absurdity.

[10] In my judgment this condition is not satisfied in the present case. If a periodical payments order does not identify on its face the manner in which the amount of the payments is to vary (in order to maintain their real value) then s 2(8) prescribes that it is to be treated as providing for what is set out in that subsection unless the order contains provision of a type identified in s 2(9). There is nothing in the language of these subsections to suggest that the power to make provision such as identified in s 2(9) may only be triggered in an exceptional case (whatever may be the meaning of that phrase). Incidentally, it is interesting to see that the same neutrality is apparent in CPR 41.8(1)(d) which simply provides:

> 'Where the court awards damages in the form of periodical payments, the order must specify ... (d) that the amount of the payments shall vary annually by reference to the retail prices index, unless the court orders otherwise under section 2(9) of the 1996 Act.'

[11] Mr Pooles referred us to a passage in the speech of Lord Carswell in *Harding v Wealands* [2006] UKHL 32 at [81], [2006] 4 All ER 1 at [81], [2006] 3 WLR 83, but there is nothing in that speech, or in the speeches of the other members of the House in that case, to suggest that the strict conditions laid down in *Pepper v Hart* and *Ex p Spath Holme* have been relaxed. Lord Carswell perceived 'sufficient possible ambiguity' in *Harding*'s case to justify resort to Hansard as a confirmatory aid, a perception not shared by the other members of the House.

[12] My belief that it is illegitimate in this case to rely on what was said by a minister at an advanced stage of the progress of the Bill through the House of Lords is fortified by a passage in the speech of Lord Hoffmann in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 at [40], [2002] NI 390 at [40]:

> '... I am not sure that it is sufficiently understood that it will be very rare indeed for an Act of Parliament to be construed by the courts as meaning something different from what it would be understood to mean by a member of the public who was aware of all the material forming the background to its enactment but who was not privy to what had been said by individual members (including ministers) during the debates in one or other House of Parliament. And if such a situation should arise, the House may have to consider the conceptual and constitutional difficulties which are discussed by my noble and learned friend Lord Steyn in his Hart Lecture

['Pepper v Hart; A Re-examination'] ((2001) 21 Oxford Journal of Legal Studies 59) and were not in my view fully answered in *Pepper v Hart.*'

Lord Hoffmann no doubt had in mind, among other things, the passage in that lecture in which Lord Steyn said (p 65):

> 'Parliament can legislate only through the combined action of both Houses . . . Although the legislative powers of Parliament are exercised by human beings, Parliament as an abstraction cannot have a state of mind like an individual. Parliament legislates by the use of general words. It would be strange use of language to say even of an individual legislator that he intended something in regard to the meaning of a Bill which was never present in his mind. To ascribe to all, or a plurality of legislators, an intention in respect of the meaning of a clause in a complex Bill and how it interacts with a ministerial explanation is difficult. The ministerial explanation in *Pepper v Hart* was made in the House of Commons only. What is said in one House in debates is not formally or in reality known to the members of the other House. How can it then be said that the minister's statement represents the intention of Parliament, i.e. both Houses.'

[13] The remainder of this long paragraph need not be cited here, but it provides a powerful reminder of the problems inherent in access to Hansard unless Lord Browne-Wilkinson's three conditions are all met. In *Robinson*'s case Lord Hobhouse of Woodborough spoke powerfully to similar effect (at [65]), and Lord Millett (at [76]) expressed himself fully in agreement with Lord Hoffmann.

[14] We were also referred to the explanatory notes to the 2003 Act, which by s 100 effected the change in the law with which we are concerned on this appeal. Paragraph 354 of these notes forms part of the explanation of the new provisions as to periodical payments. It states:

> 'To ensure that the real value of periodical payments is preserved over the whole period for which they are payable, new section 2 provides that periodical payments orders will be treated as linking the payments to the Retail Prices Index (RPI). The timing and manner of adjustments to take account of inflation will be determined by, or in accordance with, Civil Procedure Rules. It is expected that, as now, periodical payments will be linked to RPI in the great majority of cases. However subsection (9) preserves the court's power to make different provision where circumstances make it appropriate.'

Mr Pooles argued that the expectation that periodical payments would be linked to RPI in the great majority of cases would be belied if we were to interpret the two subsections at the heart of this appeal in the way favoured by Mr Glancy. The reason for this is that it is common ground on this appeal that the greater part of the awards for future pecuniary loss is wage-related (see [6], above).

[15] The use that courts may make of explanatory notes as an aid to construction was explained by Lord Steyn in *R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 at [2]–[6], [2002] 4 All ER 654 at [2]–[6], [2002] 1 WLR 2956; see also *R (on the application of S) v Chief Constable of South Yorkshire, R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39 at [4], [2004] 4 All ER 193 at [4],

[2004] 1 WLR 2196. As Lord Steyn says in the *NASS* case, explanatory notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. They are prepared by the government department responsible for the legislation. They do not form part of the Bill, are not indorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it.

[16] The text of an Act does not have to be ambiguous before a court may be permitted to take into account an explanatory note in order to understand the contextual scene in which the act is set (see the *NASS* case, at [5]). In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the value of explanatory notes as an aid to construction by saying (at [6]):

> 'What is impermissible is to treat the wishes and desires of the government about the scope of the statutory language as reflecting the will of Parliament. The aims of the government in respect of the meaning of clauses as revealed in explanatory notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.'

[17] The value of para 354 of the explanatory notes as an aid to construction in the present appeal is that it identifies the contextual scene as containing a determination '[t]o ensure that the real value of periodical payments is preserved over the whole period for which they are payable'. That is all. If, however, it is impossible to treat the wishes and desires of the government about the scope of the statutory language as reflecting the will of Parliament, it is in my judgment equally impossible to treat the government's expectations as reflecting the will of Parliament. We are all too familiar with statutes having a contrary result to that which the government expected through no fault of the courts which interpreted them.

[18] The explanatory notice is helpful in that it confirms that the principal purpose of these provisions is to achieve the aim identified by the former Lord Chancellor, Lord Irvine, when he gave his reasons for setting the discount rate mentioned in s 1 of the 1996 Act at 2·5% on 27 July 2001. He quoted this passage from the speech of Lord Hope of Craighead in *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481 at 507, [1999] AC 345 at 390:

> '. . . the object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss.'

[19] This is merely an updated restatement of what Lord Blackburn said in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39, when he spoke of the—

> 'general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who

a has been injured . . . in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation . . .'

There is no indication in s 2 of the 1996 Act, as substituted, that Parliament intended to depart from this well-known principle, unless we were to adopt the interpretation of s 2(8) favoured by the defendant's insurers.

b **[20]** Mr Pooles also urged us to take into account the contents of the regulatory impact assessment (RIA) which accompanied this part of the Courts Bill when it was presented to Parliament. This, too, reflects the government's expectation of the effect of the Act. Whatever may be the merits of such a document in a different context, it is in my judgment of no value at all when the c provision with which we are concerned was introduced by amendment at a late stage of the Bill's passage through the House of Lords, and when no reference at all was made to indexation either in the RIA or in the departmental consultation paper that preceded the introduction of the Bill.

[21] We were also encouraged to take into account recent history d surrounding the identification of the appropriate discount rate for the purpose of calculating lump sum awards in personal injury cases and the July 2001 statement by the Lord Chancellor (see [18], above). Carnwath LJ's judgment in *Cooke v United Bristol Healthcare NHS Trust, Sheppard v Stibbe, Page v Lee* [2003] EWCA Civ 1370 at [48]–[56], [2004] 1 All ER 797 at [48]–[56], [2004] 1 WLR 251 provides a valuable summary of the history that led up to the enactment of the e 1996 Act. In short, the view of the House of Lords in *Cookson v Knowles* [1978] 2 All ER 604, [1979] AC 556 and *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910, [1980] AC 174, namely that inflation was best left to be dealt with by investment policy, was succeeded by the view of the Law Commission in its 1994 report on *Structured Settlements and Interim and* f *Provisional Damages* (Law Com No 224) that courts should be obliged to take into account the net return on an index-linked government security (ILGS) when determining the rate to be expected from the investment of a sum awarded as damages for future pecuniary loss. This in turn was superseded by the decision of Parliament that the rate of return prescribed by an order made by the Lord Chancellor should be definitive for this purpose (see s 1(1) of the 1996 Act, g subject to the exception provided for in s 1(2) which we were told is for all intents and purposes treated as a dead letter today).

[22] *Wells v Wells* [1998] 3 All ER 481, [1999] AC 345 was decided before the Lord Chancellor exercised his new statutory power for the first time. In *Warriner v Warriner* [2002] EWCA Civ 81 at [28]–[30], [2003] 3 All ER 447 at h [28]–[30], [2002] 1 WLR 1703 Dyson LJ summarised the main effect of that decision and cited passages from three of the speeches in the House of Lords. The flavour of what he said can be derived from para [28] of his judgment:

> 'In *Wells'* case . . . the House of Lords laid down a guideline discount rate j of 3% that was to be applied generally until Lord Irvine LC prescribed a rate pursuant to s 1(1) of the 1996 Act. Their Lordships recognised that a single rate was a somewhat rough and ready instrument, but they embraced it on policy grounds. These grounds were that the certainty of such a rate was desirable, would facilitate settlements, and result in saving the expense of expert evidence at trial . . .'

[23] The need for some fairer system for awarding damages for future pecuniary loss was signalled by Lord Steyn in his speech in *Wells v Wells* [1998] 3 All ER 481 at 502, [1999] AC 345 at 384:

> '[T]here is a major structural flaw in the present system. It is the inflexibility of the lump sum system which requires an assessment of damages once and for all of future pecuniary losses. In the case of the great majority of relatively minor injuries, the plaintiff will have recovered before his damages are assessed and the lump sum system works satisfactorily. But the lump sum system causes acute problems in cases of serious injuries with consequences enduring after the assessment of damages. In such cases, the judge must often resort to guesswork about the future. Inevitably, judges will strain to ensure that a seriously injured plaintiff is properly cared for whatever the future may have in store for him. It is a wasteful system since the courts are sometimes compelled to award large sums that turn out not to be needed. It is true, of course, that there is statutory provision for periodic payments: see s 2 of the [1996 Act]. But the court only has this power if both parties agree. Such agreement is never, or virtually never, forthcoming. The present power to order periodic payments is a dead letter. The solution is relatively straightforward. The court ought to be given the power of its own motion to make an award for periodic payments rather than a lump sum in appropriate cases. Such a power is perfectly consistent with the principle of full compensation for pecuniary loss. Except perhaps for the distaste of personal injury lawyers for change to a familiar system, I can think of no substantial argument to the contrary. But the judges cannot make the change. Only Parliament can solve the problem.'

[24] The passages from Lord Irvine LC's 2001 statement that were quoted by Laws LJ in *Cooke*'s case [2004] 1 All ER 797 at [19] show that Lord Irvine LC decided to seek to set a discount rate which would satisfy the legal principle already laid down authoritatively by the courts, particularly in *Wells v Wells*. He was keen to set a single fixed rate which was easy for everyone to apply in practice. Because experience showed that it was probable that nobody in fact invested their award solely in ILGS, and because claimants' advisers were unlikely to advise their clients to invest primarily in those securities, Lord Irvine LC considered that it was reasonable to postulate claimants investing in a mixed portfolio in which investment risks would be managed so as to be very low.

[25] When rejecting an attempt to adduce expert evidence to the effect that future care costs would be grossly underestimated if the effect of inflation were only built into the multiplier by means of Lord Irvine LC's discount rate and the multiplicand was based on current costs at the date of trial, Laws LJ spoke in his judgment in *Cooke*'s case (at [29]) of—

> 'the fact, plain in my judgment beyond the possibility of sensible argument, that it is a *premise* of the 2001 order that the effects of inflation in claims for future loss are to be catered for solely by means of the multiplier, conditioned as it is by the discount rate. Accordingly the multiplicand was necessarily treated as based on current costs at the date of trial . . .'

[26] He reported (at [31]) that if a single discount rate was taken across the board, as had been done by Lord Irvine LC's order, the full compensation principle would only be achieved in a rough and ready way, since actual rates of inflation would differ between different sectors. He said (at [32]) that even if the present appellants stood to suffer very substantial shortfalls, this could not amount to a proper basis for allowing their appeals to prosper, because the court was obliged by ordinary constitutional principles to act conformably with the discount rate set by Lord Irvine LC.

[27] This brief summary of the recent history of the discount rate used for the purpose of calculating lump sum awards for future pecuniary loss is sufficient to show that an award of a lump sum is entirely different in character from an award of periodical payments as a mechanism for compensating for such loss. When setting the appropriate discount rate in the context of a lump sum award the House of Lords or the Lord Chancellor had to guess the future and to hope that prudent investment policy would enable a seriously injured claimant to benefit fully from the award for the whole of the period for which it was designed to provide him/her with appropriate compensation.

[28] A periodical payments order is quite different. This risk is taken away from the claimant. The award will provide him or her year by year with appropriate compensation, and the use of an appropriate index will protect him/her from the effects of future inflation. If he or she dies early the defendants will benefit because payments will then cease. It is unnecessary in the context of this statutory scheme to make the kind of guesses that were needed in the context of setting a discount rate. The fact that these two quite different mechanisms now sit side by side in the same Act of Parliament does not in my judgment mean that the problems that infected the operation of the one should be allowed to infect the operation of the other. There is nothing in the statute to indicate that in implementing s 2 of the 1996 Act (as substituted) Parliament intended the courts to depart from what Lord Steyn described in *Wells v Wells* [1998] 3 All ER 481 at 501, [1999] AC 345 at 382–383 as the '100% principle', namely that a victim of a tort was entitled to be compensated as nearly as possible in full for all pecuniary losses (see also [18]–[19], above).

[29] For this reason I reject the argument that in enacting s 2(8) and (9) of the 1996 Act Parliament must be taken to have intended to provide compensation lower than that which would be awarded through adherence to the 100% principle if a periodical payments order was to be made. For the same reason I reject the argument that the courts should consider questions of affordability when determining what order to make because, as Lord Steyn said in *Wells v Wells* [1998] 3 All ER 481 at 502, [1999] AC 345 at 383–384, policy arguments based on affordability are a matter for Parliament and not for the courts. It is true that in *Heil v Rankin* [2000] 3 All ER 138 at 165, [2001] QB 272 at 311 (para 95) this court took into account questions of affordability when determining what amount for general damages, for pain, suffering and loss of amenity the public would perceive as fair, reasonable and just. There is no material, however, on which a court could safely rely in deciding whether the public would perceive it to be fair, reasonable and just for compensation for future pecuniary losses to be reduced simply on affordability grounds. It would have been easy for Parliament to decree that this should be so (and to be willing to incur the accompanying political odium for doing so) but there is no evidence in the language of s 2 of the 1996 Act that this was Parliament's intention.

[30] Mr Pooles also pointed out that under the law as it now stands an annuity provider is bound to hold close-matching securities, of which ILGS are the most obvious example. This is why representatives of claimants have traditionally favoured RPI or RPI plus a fixed percentage because ILGS are linked to RPI. It appears to me that arguments of this kind are best left to a trial at which a judge can hear evidence from both sides before deciding what order it would be fair and appropriate to make. The regulations now made under the Insurance Companies Act 1982 and the Financial Services and Markets Act 2000 may change as new AEI-related instruments are devised, and in my judgment it would be quite wrong to interpret the 1996 Act as being immune to future changes of this kind. In any event it appears that the defendant's insurance company, like a government agency, carries out a self-funding policy in relation to periodical payments orders. So long as the court is satisfied that the continuity of payment under the order is reasonably secure, whether by one of the means identified in s 2(4) or otherwise, the order may lawfully be made. In contrast, if the court is not so satisfied, the order may not be made (see s 2(3)).

[31] In the same way, arguments that a simple application of the AEI may over-compensate workers in the lowest quartile of average earnings and may under-compensate workers in the highest quartile are more appropriately left to a trial at which a judge can consider all the evidence before deciding what order it is fair and reasonable to make.

[32] Mr Pooles expressed forensic concern about the prospect of trials at which a host of expensive expert witnesses would have to be called on each side while the court was exploring the merits, if any, of using an index other than RPI. He reminded us of what Stuart-Smith LJ said in *Warren v Northern General Hospital NHS Trust* [2000] 1 WLR 1404 at 1408 (para 13) about the undesirability of extensive evidence from accountants, actuaries or economists. This judicial comment was made, however, in a quite different context, in the period after *Wells v Wells* when people were waiting for the Lord Chancellor to use his statutory power to fix a discount rate for the calculation of lump sum awards.

[33] We are now dealing with a different statutory provision and, if the experience of the past is any useful guide, it is likely that there will be a number of trials at which the expert evidence on each side can be thoroughly tested. A group of appeals will then be brought to this court to enable it to give definitive guidance in the light of the findings of fact made by a number of trial judges. The armies of experts will then be able to strike their tents and return to the offices or academic groves from which they came.

[34] There was, in my judgment, considerable force in Mr Glancy's submission that if the court were to adopt an approach to the interpretation of s 2(8) and (9) which was different to that which he advanced there would be a very real danger that this new statutory scheme would not have the beneficial effect identified by Lord Steyn in *Wells v Wells* but would be rendered to a great extent a dead letter. If it is ordered that the whole of the damages for future pecuniary loss are to take the form of periodical payments, then the claimant will lose the facility of an investment policy that may extinguish the baneful effect of a discount rate that ultimately derives from calculations based on RPI. While there was some evidence that courts were now making orders that represented a mix of a lump sum and periodical payments, the greater the periodical payment content of the award, the more likely it is, on the assumptions on which the court conducted this appeal, that the claimant's

inability to invest a significant part of his award will lead him to be seriously under-compensated as the years wear on.

[35] There is no evidence that this was Parliament's purpose, and we should not go down that interpretive path if there is any other that is reasonably open to us. (For the importance of purposive interpretation, see *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13 at [8], [21], [2003] 2 All ER 113 at [8], [21], [2003] 2 AC 687 per Lord Bingham and Lord Steyn.) The court must not, as Lord Bingham put it, frustrate the will of Parliament under the banner of loyalty to that will, and neglect the purpose which Parliament intended to achieve when it enacted the statute:

> '. . . Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose . . .'

In enacting s 2 of the 1998 Act, as substituted, it cannot have been Parliament's purpose to create a scheme which no properly advised claimant would ever wish to use.

[36] Sir Michael Turner ended his judgment in these terms:

> 'On the narrow procedural basis, I would dismiss this application as being procedurally misconceived. At this juncture, there is no relevant jurisprudence by reference to which it could be said that the statement of case is bound to fail. In contrast there is a pressing necessity for the issues, which the claimant wishes to have judicially determined, to be the subject of such determination. It might be that following that process, the courts will deny significant content to s 2(9) of the Act. Doubting, as I do, that such will be the result, I regard it as eminently arguable that the courts should consider whether or not variation by reference to RPI is not merely the default option but is, in practical terms, the only option which should be allowed. If the courts should take that line, it is my respectful opinion that the legislative attempt to meet the long-felt need for a system of compensation for future losses and expenses may prove to be as dead in the water as the earlier attempt to do so consensually. It is hard to envisage circumstances in which the court would in effect, intentionally, deprive the current legislative attempt of practical effect. In so concluding I do not overlook the fact that in so far as claims against private sector defendants there may be real difficulties in defendants and their insurers in being able to satisfy the court that the continuity of such payments is reasonably secure, this being a condition precedent to the court exercising its powers to award damages by way of periodical payments. The long history of the insurance industry, however, demonstrates that it is capable of devising innovative strategies to cope with changing demands.'

[37] The members of this court do not have Sir Michael's unrivalled experience of personal injuries litigation. While I would be readier than he was to consider the defendant's application to be properly made (based as it was on the defendant's advisers' belief that the courts would interpret s 2(8) along the lines so forcefully advocated by Mr Pooles) there is very great force in what he said in the remainder of this powerfully expressed passage. At all events, I agree

with him that the claimant should be allowed to advance his statement of case and adduce Dr Wass's evidence at the trial of this action. It will then be for the trial judge to decide whether it is appropriate to use the powers given to him by Parliament in s 2(9) and to make such order for index-linking the periodical payments (if a periodical payments order is in fact made) as he considers appropriate and fair in all the circumstances, without being obliged to detect exceptional circumstances before he is at liberty to depart from the RPI.

[38] For all these reasons I would dismiss this appeal.

MOORE-BICK LJ.

[39] I agree.

SIR MARK POTTER P.

[40] I also agree.

Appeal dismissed.

Celia Fox Barrister.

R v Bossom and another

[2006] EWCA Crim 1489

COURT OF APPEAL, CRIMINAL DIVISION
GAGE LJ, FORBES AND COX JJ
19 MAY 2006, 29 JUNE 2006

European Community – Fishing rights – Common fishing policy – Fishing vessels – Licence – Community law exempting under ten metre vessels from detailed record keeping and reporting obligations – Fishing licence under domestic law for under ten metre vessels including condition as to monthly catch limit – Whether condition contrary to Community law – Sea Fish (Conservation) Act 1967, s 4 – Council Regulation (EEC) 2847/93.

The defendants were commercial fishermen each owning and operating a fishing vessel out of Hastings which fell within the 'under ten metre' fleet. Under Council Regulation (EEC) 2847/93 'over ten metre' fishing vessels were required to keep a log book of their fishing operations including the quantities of each species of fish caught and to comply with other monitoring obligations relevant to the member state's annual fish quota. Under ten metre vessels were exempt from those record keeping obligations although their catch formed part of the member state's quota. The Sea Fish (Conservation) Act 1967 provided for the licensing of fishing boats. A licence could contain conditions and under s 4(6) it was a criminal offence if the licence condition was broken. In early 2002 the volume of catches of cod by the United Kingdom Channel cod fishery was unexpectedly high. The Department for the Environment, Food and Rural Affairs (DEFRA) decided, after consultation, to impose individual monthly quotas in respect of each under ten metre boat. The defendants' licences were varied so as to limit their monthly catch of cod. Fisheries inspectors subsequently discovered that the defendants had exceeded the limit imposed, and they were charged with breaching a condition of their fishing licences, contrary to s 4(6) of the 1967 Act. The defendants submitted that DEFRA's decision to impose the catch limits as part of their licence conditions had been unlawful. The judge rejected those submissions, whereupon the defendants pleaded guilty and were fined. They appealed, submitting (i) that the monthly catch limits were incompatible with EU law under the Common Fisheries Policy, by the imposition on them, de facto, of onerous log-keeping and landing declaration requirements, from which 'under ten metre' vessels were specifically exempt under Council Regulation (EEC) 2847/93; and (ii) that DEFRA had infringed the principle of proportionality.

Held – The imposition of monthly catch limits as a condition of the defendants' fishing licences was not incompatible with the exemption of the under ten metre fleet from the detailed record keeping and reporting obligations required of over ten metre vessels under Council Regulation (EEC) 2847/93, nor was the requirement of proportionality infringed. The imposition of monthly catch limits as a condition of the fishing licences did not impose on them de facto for the purposes of control and enforcement the obligations required of over ten metre vessels. There was no legal requirement to maintain a log book or complete a landing declaration as a condition of the fishing licences and no

administrative requirement to do so as a result of any instructions from DEFRA. There was no practical requirement, for enforcement purposes, for the defendants to keep a log book rather than a rough and ready record of catches in order to enable them to keep a tally and comply with the relevant monthly limits. The exemption for under ten metre vessels from the record keeping and reporting obligations did not prohibit other measures of control adopted by the member state. There was no legal or evidential basis for suggesting that it would be disproportionate to require the under ten metre fleet to keep some record of the quantity of fish caught and sold. Moreover it was well established that the Common Fisheries Policy did not allow fishermen or member states to avoid quota restrictions by contending that it would be contrary to Community law to discard fish once caught. The system of enforcement was not unworkable without the obligation to complete landing declarations. Accordingly, the appeals against conviction would be dismissed (see [36], [37], [39], [43], [44], [46], [52], below).

Notes

For common organisation of fisheries in the European Economic Community, see 18 *Halsbury's Laws* (4th edn) para 659, and for licensing of fishing boats, see Supp to 18 *Halsbury's Laws* (4th edn) para 771A.

For the Sea Fish (Conservation) Act 1967, s 4, see 19 *Halsbury's Statutes* (4th edn) (2005 reissue) 820.

Cases referred to in judgment

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Boddington v British Transport Police [1998] 2 All ER 203, [1999] 2 AC 143, [1998] 2 WLR 639, HL.

Appeals and application

The defendants Graeme Bossom and Paul Joy (i) appealed with leave of the full court from their convictions on 14 January 2005 in the Crown Court at Lewes for breaching a condition of their fishing licences contrary to s 4(6) of the Sea Fish (Conservation) Act 1967 following their pleas of guilty after a preliminary hearing before Judge Coltart; (ii) applied for leave to appeal against the sentences imposed of fines of £6,574 and £7,496 respectively. The facts are set out in the judgment of the court.

Nicholas Paines QC and *Philip Moser* (instructed by *Goodall Barnett James*, St Leonards-on-Sea) for Bossom.

Nicholas Paines QC and *Ian Lawrie* (instructed by *Goodall Barnett James*, St Leonards-on-Sea) for Joy.

Rhodri Thompson QC and *Martin Edmunds* (instructed by the *Department for Environment, Food and Rural Affairs*) for the Crown.

Cur adv vult

29 June 2006. The following judgment of the court was delivered.

GAGE LJ.

INTRODUCTION

[1] On 14 January 2005 at Lewes Crown Court the appellants, Paul Joy and Graeme Bossom, pleaded guilty to breaching a condition of their fishing licences contrary to s 4(6) of the Sea Fish (Conservation) Act 1967 (as amended) (the 1967 Act). On 25 January 2005 Joy was fined £7,496 and Bossom £6,574. Each appellant was given a year to pay with three months' imprisonment in default. They now appeal against conviction by leave of the full court. The focus of this appeal is a challenge to a ruling by Judge Coltart rejecting a submission by both appellants that the condition of their separate licences, which it is alleged they breached, was ultra vires European Community law. Following his ruling the appellants changed their pleas of not guilty entered on arraignment to pleas of guilty. The single ground of appeal is that the judge's ruling was wrong.

[2] At the preliminary hearing before Judge Coltart the prosecution relied on written statements of witnesses and called Mr John Winterton, a senior executive officer in the Department for Environment, Food and Rural Affairs (DEFRA). The appellants called no evidence. The argument deployed by the appellants before the judge was that the fishing licence conditions imposed by DEFRA were unlawful.

THE AGREED FACTS

[3] It is a criminal offence contrary to s 4(6) of the 1967 Act on the part of the master, owner and any charterer of any vessel if a licence condition of the fishing licence for the vessel is broken.

[4] Mr Joy and Mr Bossom, as we shall refer to the appellants throughout, were at all relevant times commercial fishermen of many years experience. Each owned and operated a shore launched fishing vessel from Hastings beach which fell within the under ten metre fleet. Mr Joy's vessel, Sandra RX 83, has an overall length of 8·73m. Mr Bossom's vessel, Jackelly RX 52, has an overall length of 9·2m. Mr Joy was the secretary of the Hastings Fisherman's Protection Society, of which Mr Bossom was also a member.

[5] DEFRA granted each man a fishing licence for their vessel containing conditions. Variations of the conditions were issued from time to time during the two-year period of the licence. The relevant variations for the purposes of this appeal were contained in standard form letters posted on 23 January 2003 and came into effect on 28 January 2003.

[6] The English fishing fleet is subject to catch quotas imposed by European Community regulations. We shall deal with the quota system in more detail later in this judgment. Between the years 1998 to 2003 there was a substantial reduction in the amount of the United Kingdom's quota for Channel cod for the sea areas from Milford Haven/Fishguard to Folkestone. In that period the quota was reduced from 1660 tonnes to 537 tonnes. The overall quota is subdivided between different categories of the fishing fleet. The under ten metre fleet allocated catch in 2002 was 268 tonnes which in 2003 was reduced to 132 tonnes.

[7] Before July 2002 the under ten metre fleet had not been made subject to individual monthly catch restrictions in respect of the Channel cod fishery. Instead when the overall allocated quota for the under ten metre fleet had been exceeded the fisheries were closed. We are told that this happened on one occasion in 1998.

[8] In the first few months of 2002 the volume of catches of cod by the United Kingdom Channel cod fishery was unexpectedly high. By May 2002 a substantial proportion of the United Kingdom's Total Allowable Catches (TAC) had been taken up. Therefore it was decided by DEFRA that from July 2002 licences for the Channel fishery should contain conditions which restricted the amount of certain species, including cod that could be 'caught and retained on board, landed or transhipped per calendar month'.

[9] The unchallenged evidence before the judge showed that before monthly quotas for individual vessels in the under ten metre fleet were imposed there was a consultation process in which the competing interests of the Eastern and the Western Channel fishermen were addressed. The evidence demonstrated that the consultation process involved the National Federation of Fishermen's Organisations and Channel Fishing Interests. The appellant Paul Joy, representing the Hastings Fishermen's Protection Society, was involved to some extent in this process. As a result it was decided to impose individual monthly quotas in respect of each under ten metre boat in the under ten metre fleet. This was effected by attaching conditions to the fishing licence issued in respect of each vessel pursuant to the 1967 Act. We shall deal with the relevant statutory provisions later in this judgment.

[10] By a variation of those licences dated 23 January 2003 coming into effect on 28 January 2003 a monthly quota for cod per vessel was introduced limiting catches to variable monthly figures. By this variation the limit for October 2003 for the two vessels owned respectively by Mr Joy and Mr Bossom was set at 150kg.

[11] In late October 2003 fisheries inspectors at the quayside at Hastings in the course of conducting their usual inspection duties noticed high levels of landings of cod by the two vessels, Sandra RX 83 and Jackelly RX 52. As a result an inquiry was instituted. The inquiry disclosed that in the month of October 2003 both Mr Joy and Mr Bossom landed and sold through the Hastings Fish Auction amounts of cod significantly in excess of the 150kg limit. In respect of Mr Joy the excess was 969kg; and in respect of Mr Bossom the excess was 704kg.

[12] On 19 November 2003 Mr Joy was interviewed. He maintained that he had only read the first page of his licence and was unaware of the variations and therefore unaware of the existence of individual monthly catch restrictions. Mr Bossom was also interviewed. He said that he had not read the conditions of his fishing licence and did not keep any track of fish which he had caught. He said that he was unaware of the individual monthly catch restrictions.

[13] The trial judge found that both men knew exactly what they were doing and were fully aware that there were mandatory limits on their monthly fishing catches. This finding is not challenged in this appeal. Further it is not in issue that on these facts Mr Joy and Mr Bossom had exceeded the limits in respect of cod provided by a condition of their fishing licences.

THE DOMESTIC LEGISLATION

[14] The 1967 Act provides for regulating the commercial use of, fishing for, and landing of, sea fish, and for authorising measures for the increase of improvement of marine resources. Section 4 provides for the licensing of fishing boats. By s 4(1)(a) it is provided that:

> '(1) The Ministers may by order provide—(a) that in any specified area within [relevant] British fishery limits fishing by fishing boats . . . is prohibited unless authorised by a licence granted by one of the Ministers . . . '

Section 4(5)(c) provides that a licence under s 4 may confer limited authority by reference to, in particular, 'the descriptions and quantities of fish which may be taken'. It is provided in s 4(6) that:

> 'A licence under this section may authorise fishing either unconditionally or subject to such conditions as appear to the Minister granting the licence to be necessary or expedient for the regulation of sea fishing . . . and in particular a licence may contain conditions . . . and if a licence condition is broken the master, the owner and the charterer (if any) of the vessel named in the licence are each guilty of an offence under this subsection.'

Finally s 4(11) provides that ministers may make arrangements for any of their licensing powers to be exercised by other persons on their behalf.

[15] We should also refer to s 5(1) which provides that ministers may by order prohibit in any specified area all fishing for sea fish without limitation of time.

[16] The effect of these provisions is that under domestic law the 1967 Act provided for the variation of the conditions which came into effect on 28 January 2003 to be attached to the fishing licences of vessels in the under 10 metre fleet.

THE APPEAL

[17] The judge was asked to rule that the relevant licence condition was ultra vires on the basis of what now forms the four grounds of appeal set out below. As we have said he heard evidence given by Mr Winterton and read written statements of witnesses. In view of the fact that the issues on this appeal are the same as before the judge, albeit in oral argument the appeal is put on a narrower basis, we do not need to recite the judge's reasons for ruling as he did. It will suffice for us to say that the judge's reasons are succinctly set out in the transcript of his ruling which is before this court. He ruled against the appellants on all four issues.

[18] By their perfected grounds of appeal, dated 30 March 2005, the appellants contend that their convictions are unsafe on the basis that DEFRA's decision to impose individual monthly catch limits for under 10 metre vessels as part of their licence conditions was ultra vires, unlawful and void, and that the trial judge erred in finding to the contrary. The following grounds were relied upon in support of that proposition. (i) The decision to impose individual monthly catch quotas for under ten metre vessels was incompatible with supreme rules of EU law governing the Common Fisheries Policy, which are determinative of DEFRA's powers in this field. The contested licence provision is contrary to the distinction, in relation to monitoring and enforcement measures, between under ten and over ten metre vessels in Council Regulation (EC) 2847/93 (OJ 1993 L 261 p 1) and Council Regulation (EC) 2341/2002 (OJ 2002 L 356 p 12) which, for vessels under ten metres, permit neither individual quotas nor any requirement to keep log books or to make landing declarations. The regime provides instead for the monitoring of under ten metre vessels by means of a sampling plan. (ii) The decision to impose individual quotas in the present cases infringed the fundamental EU principles of proportionality and non-discrimination. (iii) The licence provision regarding the maximum amount of cod 'that may be caught and retained on board, landed or trans-shipped per

calendar month' lacked the requisite legal certainty. It was impossible or, at least, impractical to weigh the cod on board so that the licence provision would be breached and the crime committed before either appellant was or could reasonably have become aware of it. (iv) Under domestic, administrative law principles the decision was 'Wednesbury unreasonable' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) as an arbitrary or capricious exercise of discretion.

[19] In his oral submissions on the appellants' behalf, however, Mr Paines QC indicated that he was no longer pursuing the domestic law challenge in ground (iv). Further, he did not pursue the argument set out in the written grounds that the relevant EU provisions are to be interpreted in the light of art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and the right to run a business without undue interference from the state. His challenge to these convictions before us was based squarely on the alleged incompatibility of the monthly catch limits with EC law by the imposition on these appellants, de facto, of onerous log-keeping and landing declaration requirements, from which under 10 metre vessels are exempt, and thereby the alleged infringement by DEFRA of the fundamental EU principle of proportionality.

[20] Mr Thompson QC accepts that DEFRA is required to comply with general principles of Community law in the discharge of the United Kingdom's obligations under the Common Fisheries Policy of the European Community. He accepts also that the catch limits and the licence restrictions would be ultra vires if they were incompatible with Community law; and that the appellants are entitled to rely on a challenge to the validity of the licence restrictions as a defence to the criminal charges laid, the burden of establishing invalidity on the balance of probabilities being upon them (see *Boddington v British Transport Police* [1998] 2 All ER 203, [1999] 2 AC 143).

[21] He contends, however, that there is simply no basis for the contention that the catch limits are ultra vires as incompatible with EC law because, essentially: (1) the imposition of the monthly catch limits in these cases does not, either expressly or impliedly, require vessels of under ten metres in length to keep log books or to make landing declarations, and certainly does not require them to complete documents of the kind required by Council Regulation (EC) 2847/93, from which they are exempt; (2) the appellants could readily have avoided infringing their licences had they wished to do so; and (3) the licence restriction is perfectly proportionate, non-discriminatory and clear and does not infringe any general principle of EC law.

THE RELEVANT COMMUNITY FRAMEWORK

[22] The following matters are common ground and we therefore summarise the main points. Pursuant to the Common Fisheries Policy the EU determines the TAC for each relevant species of fish, from which it allocates to the United Kingdom an annual quota for relevant stock, including cod. For the year 2003 this was set out in Council Regulation (EC) 2341/2002. The United Kingdom fleet is not permitted to retain on board and land cod in excess of that quota, and measures are therefore necessary to ensure that the quota is not exceeded. In the event of breach the United Kingdom would suffer a reduction in the quota for the following year, pursuant to art 23(4) of the Common Fisheries Policy Council Regulation (EC) 2371/2002 (OJ 2002 L 358 p 59). Proceedings for infringement

could also be brought against the United Kingdom by the Commission under art 226 EC.

[23] All catches of a relevant stock, including cod, are required by art 21 of Council Regulation (EC) 2847/93 to be charged against the United Kingdom's quota. There is no exemption for the catch by the under ten metre fleet, which has to be charged against the United Kingdom's quota in just the same way as the catch of larger vessels. It follows, therefore, and the appellants do not dispute it, that the catch of the under ten metre fleet must be restricted by some means.

[24] Pursuant to art 23 of Council Regulation (EC) 2371/2002 the UK, as a member state, has the responsibility to'. . . ensure effective control, inspection and enforcement of the rules of the Common Fisheries Policy' and for adopting the measures to do so. Article 24 sets out various measures that the government is obliged to take to promote enforcement of the rules, including the legal pursuit of infringements and sanctions in accordance with art 25. Article 25 describes the criminal proceedings and the penalties against persons responsible where the rules have not been respected. It emphasises that such proceedings should be capable—

> 'of effectively depriving those responsible of the economic benefit of the infringements and of producing results proportionate to the seriousness of such infringements, effectively discouraging further offences of the same kind'.

THE UNITED KINGDOM COD QUOTA ALLOCATION

[25] There is no EU provision prescribing any method of allocation to be adopted. Administration of the quota is therefore an area over which the member state has a discretion, so long as that discretion is exercised in accordance with EC law. The United Kingdom's cod quota is allocated amongst the following three groups. (1) The 'Producer Organisations' of owners of mainly over ten metre vessels. Each organisation is allocated a proportion of the quota and then decides how to distribute it amongst the members. (2) The 'Non-Sector', that is owners of over ten metre vessels who are not members of any producer organisation. Monthly catch restrictions are set by way of licence conditions, having regard to the available proportion of the quota and the level of recorded landings. (3) The under ten metre fleet.

[26] The United Kingdom's quota for Channel cod has steadily reduced over the years which, as Mr Thompson observed, places great pressure on the industry and on DEFRA to address the diverse needs of the fishing industry. The allocations among these three groups are based principally on the fishing activity of their members during a historic reference period. The under ten metre fleet benefit from a minimum percentage allocation, currently 25·7 % of the United Kingdom's quota for Channel cod, as a measure of support for the smaller vessels. Thus, subject to the possibility of transfer between the groups, the proportion of the cod quota allocated to the under ten metre fleet is a finite amount. The government must therefore take steps to ensure that that fleet does not retain on board and land cod in excess of the quota allocated to it.

[27] Against the background of diminishing overall cod quotas the evidence adduced below was that DEFRA has a choice between two basic methods of limiting the under ten metre fleet to the proportion of the cod quota allocated to it. Since there are differing views and competing interests among the fishermen affected, DEFRA carry out consultation before deciding on the method to be

used for any particular year, depending on a number of variables. The two methods are: (1) keeping tally of the catches over the year and, as necessary, closing the fishery to the under ten metre fleet pursuant to s 5 of the 1967 Act when the limit is reached; or (2) imposing individual catch restrictions by way of licence conditions on vessels, under s 4 of the 1967 Act, in order to allow a fair distribution of the quota proportion allocated amongst the vessels in the under 10 metre fleet, even though its effect may be to require fishermen to exercise restraint during much of the season.

[28] The first method had proved, historically, to be very unpopular. Cod catches vary seasonally for different parts of the south coast. Thus vessels fishing off the Western Channel coast, where cod is more common in the earlier part of the year, could fish without restriction until the overall limit was reached, whereas the vessels fishing in the Eastern Channel, where cod is more common later on in the year, would find the fisheries closed to them just as the catches were becoming stronger. Further, if the fishery was closed only for cod, it meant that all cod caught accidentally after a certain date, during fishing for other species, would have to be discarded. As we have already indicated it is the second method which was adopted by DEFRA from June 2002 and which is the subject of challenge by these appellants.

THE ISSUES IN THIS APPEAL

[29] Mr Paines's first submission is that, under Council Regulation (EC) 2371/2002, control and enforcement measures are clearly an important aspect of EC policy on quotas. If, however, the under ten metre vessels are exempt under EC law from the record keeping obligations which are necessary for such control and enforcement measures, then individual catch limits which require compliance with such obligations cannot lawfully be imposed upon them. In the present case such limits were, in effect, unlawfully grafted on to the sampling process as part of DEFRA's monitoring methods for the under ten metre vessels.

[30] He relies for this submission on the provisions of Council Regulation (EC) 2847/93, as amended, establishing a control system applicable to the Common Fisheries Policy. The Preamble to this Regulation states, so far as is relevant:

> 'Whereas the management of fisheries by the fixing of TACs requires detailed knowledge of the composition of catches, such knowledge being equally necessary for the other procedures provided for in Regulation (EEC) No 3760/92; whereas this requires the keeping of a logbook by each master of a fishing vessel . . .
>
> Whereas it is essential to clarify and confirm at the time of landing the information contained in the logbooks; whereas, to this end, it is necessary that those involved in the landing and marketing of catches should declare the quantities landed, transhipped, offered for sale or purchased;
>
> Whereas, in order to provide exemptions from the obligation to keep a logbook or complete a landing declaration by small fishing vessels for which such an obligation would constitute a disproportionate burden in relation to their fishing capacity, it is necessary for each Member State to monitor the activities of such vessels by the implementation of a sampling plan'.

Articles 6 and 8 of this Regulation, dealing with the monitoring of catches, provide, so far as is relevant, as follows:

'Article 6

1. The masters of Community fishing vessels fishing for a stock or group of stocks shall keep a logbook of their operations, indicating particularly the quantities of each species caught and kept on board, the date and location (ICES statistical rectangle) of such catches and the type of gear used . . .

3. The masters of Community fishing vessels shall enter in their logbook the quantities caught at sea, the date and location of these catches and the species referred to in paragraph 2. The quantities discarded at sea may be recorded for evaluation purposes.

4. Masters of Community fishing vessels shall be exempt from the requirements of paragraphs 1 and 3 if the overall length of the vessels is less than 10 metres.

5. The Council may decide by a qualified majority, on a proposal from the Commission, exemptions other than the one mentioned in paragraph 4.

6. Each Member State shall carry out, on the basis of sampling, monitoring of the activities of fishing vessels which are exempt from the requirements specified by paragraphs 4 and 5 in order to ensure respect by these vessels of the Community rules in force. To this end, each Member State shall establish a sampling plan and transmit it to the Commission. The results of monitoring executed shall be communicated regularly to the Commission.'

'Article 8

1. The master of each Community fishing vessel having an overall length equal to, or more than, 10 metres, or his representative, shall after each trip and within 48 hours of landing submit a declaration to the competent authorities of the Member State where the landing takes place. The master shall be responsible for the accuracy of the declaration, which shall indicate, as a minimum, the quantities landed of each species stipulated in Article 6(2) and the area where they were caught.

2. The Council may decide, acting by a qualified majority on a proposal from the Commission, to extend the obligation set out in paragraph 1 to vessels having on overall length of less than 10 metres. The Council may also decide, acting by a qualified majority on a proposal from the Commission, exemptions from the obligation set out in paragraph 1 for certain categories of vessels having an overall length equal to, or more than, 10 metres and pursuing specific fishing activities.

3. Each Member State shall carry out, on the basis of sampling, monitoring of the activities of fishing vessels which are exempt from the requirements specified by paragraph 1 in order to ensure respect by these vessels of the Community rules in force. To this end, each Member State shall establish a sampling plan and transmit it to the Commission. The results of monitoring executed shall be communicated regularly to the Commission.'

[31] Mr Paines submits that these provisions indicate both the importance of log books and the essential role played by landing declarations in relation to the control and monitoring measures established. From these onerous requirements the under ten metre vessels are exempt, on the ground that they would impose a

disproportionate burden, having regard to the limited fishing capacity of such vessels.

[32] By art 35 member states are required, each year, to: 'transmit to the Commission a report on the application of this Regulation over the previous calendar year'. Article 38 provides:

> 'This Regulation shall apply without prejudice to any national control measures which go beyond its minimum requirements, provided that they comply with Community law and are in conformity with the common fisheries policy. The national measures referred to in the first subparagraph shall be communicated to the Commission in accordance with Article 2(2) of Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry.'

[33] Thus Mr Paines submits that the UK government can only go beyond the requirements of this legislation if the national measures adopted comply with EC law and are communicated to the Commission. In the present case the individual catch limits imposed were not communicated to the Commission. Further, since they require the appellants, de facto, to keep records of a nature which the Regulation states expressly would be disproportionate to expect of them and from which they are exempt, the catch limits are incompatible with EC law.

[34] In support of his second submission that the catch limits also infringed the EU principle of proportionality Mr Paines relies essentially on two factors, namely the disproportionately burdensome requirement for these appellants of keeping a log book and, secondly, what he describes as a wholly unworkable system of enforcement. In relation to the first of these he relies, essentially, on his previous submission that DEFRA cannot lawfully introduce catch limits for vessels which are expressly exempt from the disproportionate burden of maintaining the log books regarded as essential for monitoring the compliance by fishermen with such limits.

[35] In relation to the second factor he submits that DEFRA's own evidence shows that this form of licence restriction cannot be properly monitored and cannot be enforced at all. He relies in this respect on a memo from Barry Edwards at DEFRA dated 23 May 2002, in which he acknowledged that:

> 'it will be difficult for the Inspectorate to monitor comprehensively the operation of the 200 kg limit in the absence of catch returns for individual vessels. I also recognise that the Inspectorate is hard pressed on other fronts. Thus I am not looking to the Inspectorate to increase the resource that it devotes to monitoring the activities of the under 10 metre fleet.'

He relies also on a witness statement from Angus Radford dated 16 December 2004 in which he stated, given that there is no requirement for under ten metre vessels to complete a log book or other statutory return, that:

> 'This means that we are only really enforcing a quantitative restriction if the monthly allocation is exceeded on a single landing, when it could (as in these cases) be monitored by the fishery officers . . . In reality we do not inspect the fish at the market every day since our officers are covering an area

a from north Kent to West Sussex and are working away from Hastings on a frequent basis . . . The only way to monitor what an individual boat lands is to observe every landing and follow it to the market. This was not practical given the resources available to "police" the coast from Folkestone to Poole and carry out our other non-enforcement related duties. I would have considered it over zealous enforcement to do so, in any event.'

b

[36] It is, Mr Paines submits, irrational and therefore disproportionate to impose as a licence restriction monthly catch limits which DEFRA are then wholly incapable of monitoring and enforcing. In such circumstances it is unfair to expect an individual fisherman to comply with a requirement which cannot be c enforced against his rivals. The only step available to DEFRA, if they wish to impose such restrictions, is to seek to obtain the necessary enforcement powers from the Commission. They cannot unilaterally impose a wholly unsuitable restriction, incapable of being enforced, in circumstances where they have effectively abstained from providing for themselves the ability to apprehend offenders because they do not have the necessary resources to enable them to do d so. Such measures, it is said, offend the fundamental requirement of proportionality.

[37] In our judgment, however, the flaw in the appellants' case on appeal lies in the factual assumption which underpins all these submissions. Whilst it is correct that the appellants are exempt from the detailed record keeping and e reporting obligations required of the over ten metre vessels under Council Regulation (EC) 2847/93, it is simply not the case, in our view, that the imposition of monthly catch limits as a condition of their licences imposed such obligations upon them de facto, as claimed, forthe purposes of control and enforcement.

f [38] As the judge observed there was here no legal requirement to maintain a log book or complete a landing declaration as a condition of the fishing licence; and no administrative requirement to do so as a result of any instructions from DEFRA. Nor was there any practical requirement, for enforcement purposes, for the appellants to keep a log book at all, rather than, as Mr Thompson expressed it, a 'rough and ready record' of the catches being made throughout each month, g in order to enable the appellants to keep a tally of their catches and to comply with the relevant monthly limits. This, in our view, does not impose upon the appellants a de facto obligation to maintain records from which they are expressly exempted under Council Regulation (EC) 2847/93.

[39] The requirements for vessels of over ten metres are set out in general h terms in Council Regulation (EC) 2847/93, arts 6 and 8, with further details provided in Commission Regulation (EC) 2807/83 (OJ 1983 L 276 p 1). Thus, an EU log sheet must be kept in the form prescribed by Annex I of Commission Regulation (EC) 2807/83 and must contain the information required by Annex IV, including dates and times of departure, return and landing; details of j gear and mesh size; details, for each 24 hours, of the number of fishing operations and locations and of all species of fish caught; and details of any trans-shipment of fish between vessels. This log sheet must be submitted to DEFRA within 48 hours of landing, together with a landing declaration which itself must comply with the requirements of Commission Regulation (EC) 2807/83 Annex I or III and IV. For each species the landing declaration must show the actual weight and the presentation (for example 'GUT' for gutted). It is a criminal offence for the

master and owner of an over 10 metre vessel to fail to comply with these requirements.

[40] The exemption from these obligations, unsurprising in the circumstances, for under ten metre vessels is an exemption from these strict, record-keeping requirements of EC law. Such an exemption does not however prohibit other measures of control adopted by the member state for these smaller vessels, so long as those measures comply with general, EU principles of proportionality, non-discrimination and legal certainty. Nor does the exemption bestow a right upon the owners of the under ten metre vessels to fish entirely without regard to the amount of their catch.

[41] Whilst DEFRA accepts that small boat fishermen would not weigh their fish at sea, it is the case, and is not disputed, that experienced commercial fishermen, which these appellants are, will almost invariably land fish, including cod, in standard sized boxes and will be very familiar with the weight of each species that such boxes would contain. Further, the appellants sold their fish to merchants, generating records then supplied to them, which showed the species of fish and weight for each landing. A number of fishermen keep fishing diaries and others, including the appellant Mr Joy, also keep voluntary log books in order to provide data to CEFAS (Centre for Environment, Fisheries and Aquaculture Science) which, although confidential and not disclosable to DEFRA, would inform the fishermen themselves of the tally as the month progressed.

[42] We note too the evidence that Mr Joy, in his application for a shellfish licence, provided information about the quantity of plaice and cuttlefish he had caught, thereby indicating his ability to monitor his tally, at least in respect of those fish. In the present case it is not in dispute that the appellants landed and sold amounts of cod which exceeded the October monthly limit of 150kg by a very considerable margin. On just one day, namely 31 October, Mr Joy had landed just over 150kg and Mr Bossom 251kg. As we have already stated, it is an agreed fact before us that the judge below found on the evidence that both appellants were fully aware of the mandatory limits on their monthly catches and knew exactly what they were doing.

[43] Nor is there any validity, in our view, in the submission that, because the United Kingdom is required by Council Regulation (EC) 2847/93, art 6(6) and art 8(3) to monitor the catch of the smaller vessels by way of a sampling plan, masters of such vessels cannot lawfully be required to monitor their own catches through the imposition of monthly catch limits. In fact, as the evidence showed, monitoring by means of sampling has been and has continued since June 2002 to be carried out by DEFRA. It was during such a sampling process that the offending of these two appellants came to light.

[44] We are not persuaded, therefore, by Mr Paines's submission that the imposition of the monthly catch limits by means of a licence condition is incompatible with the exemption of the under ten metre fleet from the log book and declaration obligations in Council Regulation (EC) 2847/93. For the same reasons we see no basis for the suggestion that the imposition of these catch limits infringed the requirement of proportionality.

[45] Firstly, as a matter of fact, the limits imposed did not require the appellants to comply with the Community log-keeping and landing declaration obligations which, for them, as is accepted, would be onerous and disproportionate. In addition there is no legal or evidential basis for suggesting that it would be disproportionate, as a matter of Community law, to require the

under 10 metre fleet to keep some sort of record of the quantity of fish which is caught and sold.

[46] Secondly, notwithstanding the obvious undesirability of discarding injured or dead cod caught in excess of the limit, it is well established that the Common Fisheries Policy does not allow fishermen, or the member states, to avoid quota restrictions by contending that it would be contrary to Community law to discard fish once caught. On the contrary Council Regulation (EC) 2341/2002, establishing the quota for 2003, states so far as is relevant at art 6:

> 'Conditions for landing catch and by-catch
>
> 1. Fish from stocks for which fishing opportunities are fixed shall not be retained on board or landed unless: (i) the catches have been taken by vessels of a Member State . . . having a quota and that quota is not exhausted . . .'

In any event, the alternative option of closing the fishery for cod once the quota had been met, if fishing for other species were to continue, which Mr Paines submits would have been in conformity with Community law, would inevitably result in the discarding of any cod caught accidentally in the course of fishing for those other species.

[47] Thirdly, we do not agree with the submission that the system of enforcement in these cases is unworkable without the obligation to complete the landing declarations, from which these appellants are exempt. The evidence in this case, and in particular the statement from Angus Radford of 16 December 2004, reveals a three-pronged approach by DEFRA to the control and enforcement of the limits on the under 10 metre fleet at Hastings. Firstly, the local fish merchants voluntarily supply DEFRA, on a weekly basis, with collated landings from vessels based on the beach by quantity of species. Secondly, local people are paid to provide information about the catches. Thirdly, inspectors will attend to carry out spot checks on an ad hoc basis.

[48] Enforcement priorities and resources will inevitably dictate which information is acted upon and followed up in these cases and when prosecutions are to be brought, but we reject, without hesitation, the submission that the enforcement system is properly to be described in these circumstances as unworkable. The laws prohibiting drivers of motor vehicles from exceeding the prescribed speed limits on our roads depends, to a large extent, on individual restraint and self-monitoring, but cannot legitimately be said to be unworkable or unenforceable merely because the police have other priorities or lack the resources to monitor and prosecute every offender.

[49] Mr Paines made no oral submissions in support of the arguments contained in the skeleton argument, submitted on behalf of the appellants, that the monthly catch limits also infringed the EU principles of non-discrimination and legal certainty, preferring to regard them as part of his general, proportionality challenge. Nevertheless, for the reasons we have already given, there is in our judgment no merit in the suggestion that, by impliedly requiring under 10 metre vessels to comply with the same record keeping obligations imposed on the over 10 metre vessels, DEFRA were treating different cases in the same way and thereby unlawfully discriminating against the appellants. This ground of challenge fails on the facts.

[50] Nor can the licence restriction be said to infringe the principle of legal certainty. As Mr Thompson pointed out it is a restriction applicable to a specific category of boat in a specific area, which prevents that category of boat from

catching more than a specific quantity of a specific stock for a specific calendar month. The restriction itself is therefore both clear and precise, as the judge below found, and both appellants were fully able, as both the judge and we have found, to keep tally of the catches made so as to avoid criminal sanctions.

[51] We agree with Mr Thompson that there will always be a prosecutorial discretion at the margins in such cases. Further, whilst the penalty in the Crown Court for the offence of breaching a licence condition is an unlimited fine, it is reasonably to be expected that the level of fine imposed by the court will be proportionate to the wrongdoing in any individual case.

[52] There has before us been no challenge to the validity of the licence restriction and to the monthly catch limits under domestic law, on the basis of 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). This is unsurprising given that DEFRA's decision to impose the monthly limits was a clear exercise of the wide discretion conferred upon the relevant ministers by the 1967 Act; and was arrived at after consultation and consideration of the available options, all in the context of the need both to give effect to the Common Fisheries Policy and to conserve the decreasing cod population in the English Channel.

[53] For the reasons we have set out above the challenge on the basis of incompatibility with EC law fails and these appeals against conviction must therefore be dismissed.

APPLICATIONS FOR LEAVE TO APPEAL SENTENCES

[54] We now turn to consider the applications for leave to appeal against sentence, both applications having been referred to the full court to be heard at the same time as the appeals against conviction. Although these are applications for leave we will continue to refer to Mr Joy and Mr Bossom collectively as appellants.

[55] The judge's relevant sentencing powers are contained in s 11 of the 1967 Act. In relation to s 4(6) of the Act, under which both appellants were charged and indicted, the material terms of s 11 are as follows:

> '(1) Any person found guilty of an offence under this Act shall be liable—(a) in the case of an offence under section . . . 4(6) . . . on summary conviction to a fine not exceeding £50,000 or on conviction on indictment to a fine . . .
>
> (3) Any person guilty of an offence under section . . . 4(6) . . . of this Act shall, subject to subsection (5) below, be liable on summary conviction to a fine not exceeding the value of the fish in respect of which the offence was committed . . .
>
> (5) . . . any fine to which a person is liable under subsection (3) above in respect of any offence shall be in addition to any other penalty (whether pecuniary or otherwise) to which he is liable in respect of that offence under this section or under any other enactment.'

[56] When passing sentence, the judge said this (see p 4 of the transcript of his sentencing remarks):

> 'And so the penalties will be as follows. There will be two fines in each of your cases, one to reflect the value of the fish, and one as a general fine, and

a you will also pay a contribution towards the prosecution costs. You, Paul Joy, will pay £1,496 by way of fine, representing the value of the fish. You will pay a general fine of £3,500 and I shall order you to pay costs of £2,500 by way of contribution. You, Graeme Bossom, will pay a fine representing the value of the fish of £1,074. You will pay a general fine of £3,000 and you will also make a contribution to the prosecution costs b of £2,500.'

[57] Shortly afterwards, when dealing with the period of imprisonment to be served in default of payment, the judge said this (see p 5 of the transcript):

c 'The only matter I am just checking is whether these two fines in each case are lumped together to produce a figure to which one then applies the default table, or whether they have to have individual default periods attached to them. Perhaps you would like to look at that, Mr Edmunds, whilst I am listening to how they are going to pay this money.'

d [58] The first proposed ground of appeal by both appellants is that, in cases of conviction on indictment such as the present, s 11(1) of the 1967 Act only gives power to impose one fine, not two. It was emphasised that s 11(3) (the only relevant provision that refers to a further fine linked to the value of the fish) relates to summary conviction only and therefore does not apply to the present case. It was also submitted uncontroversially that s 11(5) of the Act e does not give the court any further sentencing powers, but merely clarifies the position that the summary fine referred to in sub-s (3) is without prejudice to such other fines as the court has the power to impose.

[59] It was therefore submitted that: (i) in so far as the judge proceeded on the basis that he was bound to impose two fines, namely a general fine and one f reflecting the value of the fish, he erred in law; and (ii) in so far as the judge did expressly impose two fines, he exceeded his sentencing powers. It was further contended that, because the judge had proceeded on the foregoing erroneous basis, the total financial penalty imposed in each case was consequently too high and that, if he had imposed a single fine, it would (and should) have been lower.

g [60] However, after dealing with an application by Mr Lawrie on behalf of Mr Joy that he be given a period of one year to pay, the judge then heard a similar application by Mr Moser on behalf of Mr Bossom, following which the following exchanges took place between the judge and both counsel with regard to the appropriate period of imprisonment in default of payment (see p 7 h of the transcript):

'Judge Coltart: It is forty-five days in respect of the specific fine and three months in respect of the general fine, I think. I have a feeling one normally lumps them together.

j Mr Lawrie: Certainly my view and the view of my friend and myself is that they are to be aggregated because it is to be viewed and treated as a fine, which is a fine attached to a value.

Mr Moser: Yes, I was just looking at the precise words of the Sea Fishing Act, which does not say it is, as it were, aggregated but we have a situation where there are two distinct elements of fine but for one single offence and on that basis . . .

Judge Coltart: Yes, so it becomes one fine on the basis you could not fine a person twice for the same offence.

Mr Lawrie: Your Honour, yes, and I would venture . . .

Judge Coltart: So it has to be a fine made up of two elements, and I have probably described it wrongly, but I can correct that.

Mr Lawrie: Yes, but we would invite your Honour to say that the time in lieu should be for the aggregate figure.

Judge Coltart: Yes. Twelve months to pay, three months' imprisonment in default of payment. Do you both understand that? If you do not pay within twelve months you go to prison for three months and you are still liable to pay the fine . . .'

[61] Having regard to everything that was said by the judge during the course of his sentencing remarks, we are not persuaded that there is any substance in this first ground of appeal. As it seems to us, it is clear that the judge intended to impose a total financial penalty on each appellant that was to be calculated by reference to the following two elements: (i) the value of the excess fish caught and landed and (ii) an appropriate general fine. In our view, such an approach was entirely appropriate in the circumstances of this case and cannot be faulted. Whilst we agree that it appears from the earlier passages in his sentencing remarks that the judge was initially minded to impose two fines in each case to achieve his intention, we are satisfied that it is apparent from his later remarks that the judge soon realised that such an approach was not possible. He then expressed himself in terms that made it perfectly clear that he was imposing a single fine in each case, albeit a fine that was made up of the two elements that he had earlier identified. In short, the judge did not fall into error in the manner suggested in this ground of appeal. Rather, he adopted a sensible approach to calculating the total financial penalty that was appropriate in each case and in the final stages of his sentencing remarks made it absolutely clear that he was imposing that total financial penalty by way of a single fine in each case.

[62] The second proposed ground of appeal by both appellants is that the total fines were manifestly excessive in all the circumstances. It was suggested that the fines failed to take into account sufficiently the following mitigating factors: (i) the appellants' pleas of guilty; (ii) the good character of both appellants; (iii) the fact that both appellants had held licences for 33 years and about 25 years respectively without any breaches; (iv) the limited financial means of each appellant; (v) the absence of any significant aggravating features; (vi) the limited profit realised as a result of the relevant breach of each appellant's licence; and (vii) the limited economic benefit to each appellant resulting from the offences in question.

[63] As to the last two factors, it was submitted that, after accounting for other crew members' shares, the appellants' true financial benefit from the excess fish was considerably less than the value of the fish in question. In our judgment, there is nothing in that particular point. Each appellant was the licensee and the skipper of the relevant vessel. Each appellant was therefore responsible for the relevant decision-making that resulted in the catching and landing of the excess fish. It was therefore entirely appropriate for the judge to assess the economic benefit and/or profit that had resulted from the appellants'

breaches of licence by reference to the total value of the excess number of fish caught and landed.

[64] In our judgment there is no substance in this second proposed ground of appeal. As we have already indicated, the judge's approach to calculating the total fine to be imposed in each case by reference to the two elements that he identified was entirely correct. For the reasons given in the previous paragraph of this judgment, we are satisfied that the judge was right to regard the total value of the excess fish as the profit and/or economic benefit resulting from the offences. In our view, it is clear that the judge took fully into account all the relevant circumstances and mitigating factors (in particular, each appellant's limited means) when deciding the appropriate amount of the other element of the total fine in each case (ie the general punitive element) and the total that resulted from both elements. Although there are no other decisions of this court in comparable cases from which we can derive any guidance, we are satisfied that the resulting fine appears to be (if anything) relatively modest in each case. Be that as it may, we are completely satisfied that there is no arguable basis for regarding either as manifestly excessive.

[65] For those reasons, these applications for leave to appeal against sentence are both refused.

Appeals dismissed.

Vanessa Higgins Barrister.

R v O'Brien and another
R v Moss
R v Llewellyn

[2006] EWCA Crim 1741

COURT OF APPEAL, CRIMINAL DIVISION
HOOPER LJ, PENRY-DAVEY AND WALKER JJ
7 JUNE, 14 JULY 2006

Sentence – Custodial sentence – Dangerous offenders – Specified offence – Serious offence – Imprisonment for public protection for serious offences – Whether sentence of imprisonment for public protection capable of being ordered to run consecutively to another sentence of imprisonment for public protection – Whether sentence of imprisonment for public protection capable of being ordered to run consecutively to period of return to prison where offence committed during original sentence – Guidance – Powers of Criminal Courts (Sentencing) Act 2000, s 116 – Criminal Justice Act 2003, s 225.

Three appeals were heard together which raised questions as to (i) whether a sentence of imprisonment for public protection under s 225[a] of the Criminal Justice Act 2003 could be ordered to run consecutively to another sentence of imprisonment for public protection; and (ii) how the court should proceed where it wished to order a defendant to serve the remaining period of a previous sentence of imprisonment pursuant to s 116[b] of the Powers of Criminal Courts (Sentencing) Act 2000 (return to custody where offence committed during original sentence) and was also sentencing the defendant to a sentence of imprisonment for public protection.

Held – (1) It was not unlawful to impose consecutive indeterminate sentences or order an indeterminate sentence to be served consecutively to another period of

a Section 225, so far as material, provides: '(1) This section applies where—(a) a person aged 18 or over is convicted of a serious offence . . . and (b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences. (2) If—(a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and (b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life, the court must impose a sentence of imprisonment for life . . . (3) In a case not falling within subsection (2), the court must impose a sentence of imprisonment for public protection . . .'

b Section 116, so far as material, provides: '(1) This section applies to a person if—(a) he has been serving a determinate sentence of imprisonment which he began serving on or after 1st October 1992; (b) he is released under Part II of the Criminal Justice Act 1991 (early release of prisoners); (c) before the date on which he would (but for his release) have served his sentence in full, he commits an offence punishable with imprisonment ("the new offence"); and (d) whether before or after that date, he is convicted of the new offence. (2) . . . the court, by or before which a person to whom this sentence applies is convicted of the new offence may, whether or not it passes any other sentence on him, order him to be returned to prison for the whole or any part of the period which—(a) begins with the date of the order; and (b) is equal in length to the period between the date on which the new offence was committed and the date mentioned in subsection (1)(c) above . . .'

imprisonment but it was undesirable to do so. Common sense suggested that a sentence of life imprisonment or of imprisonment for public protection started immediately on its imposition. There were already difficulties as to when a prisoner had to be released or became eligible for parole and it would be easier not to compound those difficulties by making indeterminate sentences consecutive to other sentences or periods in custody (see [58]–[60], below); *R v Jones* [1961] 3 All ER 668 and dicta of Rose LJ in *R v Lang* [2006] 2 All ER 410 at [20] applied.

(2) In the situation where, but for the undesirability of making indeterminate sentences consecutive to other terms, the judge would want the period before which the defendant would become eligible for parole to be consecutive to an existing sentence or to follow a period imposed under s 116 of the 2000 Act, the judge should ensure that the sentence included the balance of the existing sentence or the s 116 period by increasing the notional determinate term to reflect that balance or that period. A s 116 period attracted the early release provisions, so that by adding the period to the notional determinate term and then halving it, a prisoner was in the same position as he would have been in had the judge passed a determinate term of the same length as the notional determinate term and made it consecutive to the s 116 period (see [61]–[68], below); *R v Haywood* [2000] 2 Cr App R (S) 418 and *R v Szczerba* [2002] 2 Cr App R (S) 387 considered.

(3) Where a judge was imposing concurrent indeterminate sentences for two or more offences with corresponding concurrent minimum terms and, had he not passed indeterminate sentences, he would have passed determinate custodial sentences for those offences consecutive to each other, he should reflect the totality of the offending in the notional determinate term by either choosing the same notional determinate term for all of the offences or taking the most serious and making the notional determinate term reflect the totality of the offending (see [69], below).

Per curiam. (1) The principles which apply to sentences of imprisonment for public protection also apply to sentences of life imprisonment under s 225 of the 2003 Act and sentences of detention for life or for public protection for serious offences committed by those under 18 under s 226 of the 2003 Act (see [1], below).

(2) Permission to appeal should not normally be granted on the sole ground of consecutive indeterminate sentences or indeterminate sentences consecutive to some other term or period of imprisonment. If an appeal succeeds on this point only it is unlikely that the length of time which the prisoner will have to serve before being eligible for parole will be altered and there will be no practical point in giving permission to appeal (see [70], below).

Notes

For dangerous offenders: life sentences, sentences for public protection and extended sentences, see 11(4) *Halsbury's Laws* (4th edn) (2006 reissue) paras 1592–1595.

Section 116 of the Powers of Criminal Courts (Sentencing) Act 2000 was repealed by the Criminal Justice Act 2003, ss 304, 332, Sch 32, Pt 1, paras 90, 116, Sch 37, Pt 7 with effect from 4 April 2005 subject to transitional provisions.

For the Criminal Justice Act 2003, s 225, see 12(2) *Halsbury's Statutes* (4th edn) (2005 reissue) 1541.

Cases referred to in judgment

R v Haywood [2000] 2 Cr App R (S) 418, CA.
R v Jackson [1995] 1 Cr App R (S) 259, CA.
R v Jones [1961] 3 All ER 668, [1962] AC 635, [1962] 2 WLR 575, CA; *affd* [1962] 1 All ER 569, [1962] AC 635, [1962] 2 WLR 575, HL.
R v Lang [2005] EWCA Crim 2864, [2006] 2 All ER 410.
R v Newton (1982) 77 Cr App R 13, CA.
R v S [2005] EWCA Crim 3616, (2005) Times, 30 December.
R v Szczerba [2002] EWCA Crim 440, [2002] 2 Cr App R (S) 387.

Applications for leave to appeal and appeals

R v O'Brien and another

Karl O'Brien applied for leave to appeal with appeal to follow from the sentence of imprisonment for public protection with a minimum term of six months' imprisonment and imprisonment for public protection with a minimum term of 15 months' imprisonment consecutive minus days spent in custody on remand imposed by Judge Elystan Morris in the Crown Court at Chester on 3 November 2005 following O'Brien's pleas of guilty to one count of robbery and on re-arraignment to one count of assault with intent to rob. Christopher Harris applied for leave to appeal with appeal to follow from the sentence of imprisonment for public protection with a minimum term of 18 months' imprisonment minus days spent in custody on remand imposed by Judge Elystan Morris on 3 November 2005 following Harris's plea of guilty to one count of robbery. The facts are set out in the judgment of the court.

R v Moss

Edgar Moss applied for leave to appeal with appeal to follow from the sentence of two terms of imprisonment for public protection with a minimum term of six years minus days spent in custody on remand concurrent and an order to return to custody to serve part of a remaining period of imprisonment pursuant to s 116 of the Powers of Criminal Courts (Sentencing) Act 2000 to be served before the sentence of imprisonment for public protection imposed by Judge Wiggs in the Crown Court at Bournemouth on 19 January 2006 following Moss's pleas of guilty to two counts of robbery. The facts are set out in the judgment of the court.

R v Llewellyn

Gareth Llewellyn appealed by certificate of the sentencing judge from the sentence of imprisonment for public protection with a minimum term of two years and three months minus days spent in custody on remand and an order to return to custody to serve part of a remaining period of imprisonment pursuant to s 116 of the Powers of Criminal Courts (Sentencing) Act 2000 to be served before the sentence of imprisonment for public protection imposed by Judge Warnock in the Crown Court at Bolton on 20 October 2005 following Llewellyn's plea of guilty to one count of robbery. The facts are set out in the judgment of the court.

Siôn ap Mihangel (assigned by the *Registrar of Criminal Appeals*) for O'Brien.
Robin Boag of *Jacobs & Co*, Ellesmere Port (assigned by the *Registrar of Criminal Appeals*) for Harris.

Robert Griffiths (assigned by the *Registrar of Criminal Appeals*) for Moss.
Graham Robinson of *Cyril Morris Arkwright*, Bolton (assigned by the *Registrar of Criminal Appeals*) for Llewellyn.
Peter Cadwallader (instructed by the *Crown Prosecution Service*) for the Crown.

Cur adv vult

14 July 2006. The following judgment of the court was delivered.

HOOPER LJ.

[1] Three separate cases, one with two appellants, were listed before us because the three cases raised the same question: 'Can a sentence of imprisonment for public protection (IPP) under s 225(3) of the Criminal Justice Act 2003 be ordered to run consecutively to another sentence of IPP?' The cases also raise another practical and linked question:

> 'If a court wishes to order a defendant to serve the remaining period of a previous sentence of imprisonment pursuant to section 116 of the Powers of Criminal Courts (Sentencing) Act 2000 and is also sentencing the defendant to a sentence of IPP, how may that be achieved?'

(It should be noted that s 116 has been repealed by the 2003 Act except in respect of offences committed before 4 April 2005. See Archbold *Criminal Pleading, Evidence and Practice* (58th edn, 2006) pp 713, 715 (paras 5-364, 5-364n) and the Comment in *Current Sentencing Practice News* 5 June 2006, p 8 and the cases cited therein.) Although these cases concern sentences of IPP the same principles must, it seems to us, also apply to sentences of life imprisonment under s 225(2) of the 2003 Act and sentences of detention for life or for public protection under s 226 of the same Act.

[2] One of the appellants, Llewellyn, appeals his sentence by certificate of the sentencing judge. The Registrar referred the other applications for leave to appeal to the Full Court and we granted leave. To the extent to which any extension of time is required we grant it.

O'BRIEN AND HARRIS

[3] We start with O'Brien and Harris, both of whom were aged 23 at the time of sentence. On 5 September 2005 at the Crown Court at Chester O'Brien pleaded guilty on re-arraignment to one count of assault with intent to rob (T20057261). On 4 July 2005 at the Crown Court at Chester O'Brien and Harris pleaded guilty to one count of robbery (T20057262). On 3 November 2005 (following a *Newton* hearing (see *R v Newton* (1982) 77 Cr App R 13) in relation to Harris in which the judge found against Harris) they were sentenced by Judge Elystan Morris. The sentences which the judge *must have meant to* pass were as follows:

O'Brien

T20057261 IPP with a minimum term of 6 months' imprisonment

T20057262 IPP with a minimum term of 15 months' imprisonment consecutive

Total sentence: IPP pursuant to s 225 Criminal Justice Act 2003 with a minimum term of 21 months' imprisonment, minus 128 days spent in custody on remand.

Harris

IPP with a minimum term of 18 months' imprisonment.

Total sentence: IPP with a minimum term of 18 months' imprisonment, minus 128 days spent in custody on remand.

[4] Their applications for leave to appeal sentence were referred to the Full Court by the Registrar on the basis that the case of O'Brien raised the novel point of whether a sentence of IPP could be made to run consecutively to a separate sentence of IPP. Harris was referred simply because he was O'Brien's co-accused.

[5] We start with indictment T20057261. On 17 April 2005 a 21-year-old Chinese student, Mr Leang, was walking to work. He noticed O'Brien standing outside a newsagent's with two male companions. He took out his mobile phone to make a call. O'Brien jumped on his back and reached for Mr Leang's phone. Mr Leang attempted to get O'Brien off his back, fell to the floor and shouted for help. O'Brien put his hand over his mouth and punched him on the head, causing his glasses to fall to the floor.

[6] Mr Leang managed to put his phone into his pocket and stood up to face O'Brien. He recognised O'Brien as a customer from his shop. He asked O'Brien what he was doing and O'Brien punched him in the face forcing him to fall to the ground in a dazed state. He got up and one of O'Brien's companions pushed him to the right shoulder forcing him to stumble back. O'Brien then punched him to the lip and then pushed him in the back shouting 'Come on, come on'. O'Brien and his companions walked off and Mr Leang telephoned the police. On apprehension, O'Brien said 'It was me, I had a fight with someone who hit me'. O'Brien was granted bail.

[7] We turn to indictment T20057262. On 26 June 2005 the complainant had been drinking in Chester and approached O'Brien and Harris to ask directions to a taxi. The appellants told him that they were going to get a taxi and that he could follow them. The complainant was a stranger to Chester. They walked, engaged in general conversation when the complainant was struck in the face by one of the appellants. As he fell to the floor his watch came off and was picked up by one of the appellants. The complainant was then punched and kicked, mainly around the face. One of the appellants pulled at the complainant's necklace causing it to break and his gold link bracelet was pulled from his arm. An attempt was also made to pull the other two gold bracelets from his arm. The complainant managed to get to his feet, attempted to get away, but was pulled back and attacked again. The complainant then managed to get away. As a result of the attack, the complainant sustained facial cuts requiring stitches, swelling and bruising to the left eye area and bruising to his chest. The incident was captured on video. The appellants were arrested shortly after.

[8] O'Brien is 23 years of age and has no previous convictions. He received a caution in 2004 for using threatening, abusive or insulting words or behaviour likely to cause distress.

[9] Harris is 23 years of age and has three convictions for nine offences. His first conviction was in 2001 for taking a vehicle without consent for which he was sentenced to 12 months' detention in a young offenders institution. He was sentenced to a community punishment order in 2004 for a bail offence, a common assault and damage to property. In 2004 he was further convicted of having a bladed article in a public place and sentenced to a community punishment order.

[10] A pre-sentence report (PSR) prepared for O'Brien described his behaviour of 26 June 2005 as indicative of a propensity to commit opportunistic offences including the use of violence. His minimisation of responsibility for his behaviour indicated that his risk of reconviction was at a raised level. In a later PSR, requested after O'Brien had pleaded guilty to the assault with intent to rob, it was pointed out that both these offences were serious specified offences under the 2003 Act and both carried a potential sentence of life imprisonment. Both offences involved the appellant in unprovoked attacks on members of the public. As he previously only had a caution recorded against him, this was a significant escalation in his offending behaviour and his potential to cause harm to others was therefore increased. His risk of re-offending and therefore his risk of causing harm were high until he undertook a specific programme of work to address the underlying issues relating to his offending behaviour.

[11] In his PSR Harris was assessed as being at medium risk of causing serious harm to the public, with an increased risk of harm when under the influence of alcohol and in the company of his peers. A further report was requested as the offence of robbery is a serious specified offence as defined in the 2003 Act. The report writer concurred with the risk assessment in the first report. In committing this offence the appellant displayed the potential to cause serious harm to the victim. However he had shown good insight into the factors behind his offending behaviour and if he remained motivated to address these issues then his risk of both offending and of causing harm would be reduced. The appellant did not have a previous conviction for a relevant offence (see s 229(3) of the 2003 Act). He did not have an established pattern of violent offending and provided he undertook the work outlined in the reports, any potential risk he may pose could be reduced for his release.

[12] We summarise the sentencing remarks. In relation to O'Brien, the second offence was committed whilst on bail for the first offence and required a consecutive sentence. Both offences were committed against people who appeared to be vulnerable at that stage and unlikely to offer any resistance to the violence used and threatened. O'Brien attacked a vulnerable Chinese student and had two other persons with him at the time. Mr Leang had been left feeling very uncomfortable and very vulnerable. The injuries that were sustained were bruising injuries but nevertheless nasty and O'Brien had used quite a bit of violence. The offence on 22 June was an even more cowardly attack. It was a wholly cynical joint enterprise and the camera film very adequately showed what happened leading up to the attack. The guilty pleas were taken into account. O'Brien had pleaded guilty in respect of the robbery in June almost at the very first opportunity. In respect of the robbery in April, O'Brien pleaded guilty on the day of trial and he was of previous good character. The discount for Harris's guilty plea would be substantially reduced as he had insisted on a *Newton* hearing. Harris's record was not of the worst but he had served 12 months' youth custody for the taking of a vehicle and he had also been convicted of common assault and of having an unlawful blade in a public place.

[13] The judge had no doubt that the appellants posed a significant risk to society in accordance with ss 224 and 225 of the 2003 Act. They both acted in a less than human way under the influence of alcohol. It might well be that if one could take alcohol completely out of the equation neither of them was a significant risk to society but bearing in mind their track record in relation to the abuse of alcohol one could not with any confidence say that that must be omitted from the equation at that stage. The judge concluded that each appellant was a

significant risk to members of the public within the meaning of s 225(1)(b) of the 2003 Act. This was not a case that would in any way justify a sentence of imprisonment for life and therefore the court was left with no option but to impose a sentence that was indeterminate and also to pass what might be described as the basic sentence that would be passed were it not for ss 224 and 225 of the 2003 Act.

[14] The judge continued in so far as the 'basic sentence' was concerned:

> '... the sentence that I impose ... in your case O'Brien, for the first robbery 12 months' imprisonment; for the second robbery, two-and-a-half years' imprisonment, making three-and-a-half years in all. In your case Harris, 3 years' imprisonment.'

[15] The judge explained that O'Brien had received the full discount for his plea and Harris had received a 'half of that discount'. He continued:

> 'The effect of these sentences is this. In your case ... O'Brien with regard to the total sentence of three years and six months and in your case Harris of three years. You will be eligible after having served one-half of that sentence to release ...'

[16] The judge then said that 'the time spent on remand, 128 days in the case of each of you will of course be discounted'.

[17] We quote the Registrar's note to the court:

> 'O'Brien
>
> Both offences are specified offences and serious offences. The Learned Judge mentions a period of 12 months' imprisonment for the assault with intent to rob and 2 ½ years imprisonment for the second robbery, making a total of 3 ½ years imprisonment. It appears that the Learned Judge was here identifying the notional determinate sentence which would have been imposed if imprisonment for public protection had not been required as he then goes on to explain that the effect of the sentence would be that he would be eligible for release after having served one half of that sentence.
>
> Harris
>
> The Learned Judge mentions a period of 3 years' imprisonment. It appears that the Learned Judge was here identifying the notional determinate sentence which would have been imposed if imprisonment for public protection had not been required as he then goes on to explain that the effect of the sentence would be that he would be eligible for release after having served one half of that sentence. The minimum term would therefore be 18 months imprisonment. The Learned Judge ordered that the 128 days spent on remand be deducted from the sentence. The Crown Court record sheet records the minimum term as 3 years' imprisonment.'

[18] We agree with this note and we have therefore set out the sentences which the judge must have meant to pass. It would in any event have been necessary to allow this appeal in order to ensure that the actual sentence reflected the judge's intentions. In the remainder of this judgment we shall treat the intended sentences as those which are now appealed.

[19] The Crown Court record sheet shows O'Brien's sentence for the assault with intent to rob as 12 months' imprisonment consecutive to an indeterminate sentence with a minimum term of two years and six months 128 days remand time allowed. The record sheet for the robbery reads: '30 months imprisonment

consecutive to T20057261 [assault with intent to rob] Indeterminate sentence of imprisonment with minimum term of 2 years 6 months 128 days remand time.'

[20] According to the prison warrant prepared for O'Brien the sentence was an indeterminate sentence of three years six months with 128 days remand to be served. We note that O'Brien was told by HM Prison Altcourse, Liverpool that he would have to serve the full sentence of three years and six months and thereafter the Parole Board would determine whether or not he was to be released on licence and the length of that licence and that he was to be treated as a person serving a life sentence, the sentence he received being an indeterminate sentence.

[21] One can only feel sympathy for those who have to sentence, record the sentence and implement the sentence.

[22] It is sufficient for us to note that great care must be taken in passing sentences of IPP or life imprisonment and in setting the minimum term (sometimes called the 'specified' period) so that the problems encountered by the appellants do not arise.

[23] The grounds of appeal for O'Brien did not include a ground relating to the order that the two IPPs be served consecutively. That problem was identified within the Registrar's office, to the credit of the relevant member of the Registrar's staff.

[24] At the conclusion of the hearing we announced that the appeal of Harris was allowed to the extent that the sentence of IPP was quashed. We substituted a sentence of three years' imprisonment, and we directed that the 128 days 'for which the [appellant] was remanded in custody' 'is to count as time served by him as part of the sentence' (see s 240(3) of the 2003 Act).

[25] We are of the opinion applying ss 224(3) and 226(1)(b) of the 2003 Act and *R v Lang* [2005] EWCA Crim 2864, [2006] 2 All ER 410 (which post-dated the sentence in this case) that there is not a *significant* risk to members of the public of *serious personal injury* (whether physical or psychological) occasioned by the commission by Harris of further specified offences. This was an unpleasant robbery but neither the facts of the robbery nor the other convictions nor the PSR support a finding that Harris poses a significant risk to members of the public of serious personal injury

[26] We reserved judgment in the case of O'Brien. It is accepted on his behalf that sentences of IPP were appropriate for the offences in question and we affirm those sentences. For reasons which we shall explain later the order that the two sentences of IPPs be served consecutively is quashed.

[27] We turn to the requirement in s 82A of the 2000 Act to order that the early release provisions shall apply to the offender as soon as he has served the part of his sentence specified in the order, which we shall call 'the minimum term'. The starting point is the notional determinate term (or to use the language of the Practice Direction (criminal: consolidated) [2002] 3 All ER 904 at 937, [2002] 1 WLR 2870 at 2905 (Pt IV, para 47) 'the relevant part' which consists of the period of detention imposed for punishment and deterrence). We do not accept the judge's notional determinate term was manifestly excessive or that insufficient credit was given for the pleas. We adopt the same approach as the judge. For the assault with intent to rob the notional determinate term remains at 12 months and for the robbery it is increased to three-and-a-half years. We shall explain later why it is necessary to increase the term. As we explain in more detail below, the provisions of s 82A(3)(c) of the 2000 Act lead us to the next stage, which is to adjust the notional determinate term in order to reflect the

comparison with s 244(1) of the 2003 Act. This is followed by the requirement under s 82A(3)(b) of the 2000 Act to take account of the effect of any direction which would have been given under s 240 of the 2003 Act (crediting periods of remand in custody). Our conclusion is that in this appellant's case the minimum term for the assault with intent remains at six months and the minimum term for the robbery becomes 21 months, minus the 128 days on remand.

[28] We have halved the notional determinate sentence in accordance with the authorities (see *R v Szczerba* [2002] EWCA Crim 440, [2002] 2 Cr App R (S) 387 at 395 and Archbold *Criminal Pleading, Evidence and Practice* (58th edn, 2006) pp 683–685 (para 5-312)) and taking account of s 244 of the 2003 Act (which incidentally alters the regime which applied, by virtue of s 33 of the Criminal Justice Act 1991, to long term prisoners) and of s 82A of the 2000 Act.

[29] Section 244 of the 2003 Act reads:

> '(1) As soon as a fixed-term prisoner, other than a prisoner to whom section 247 applies, has served the requisite custodial period, it is the duty of the Secretary of State to release him on licence under this section . . .
>
> (3) In this section "the requisite custodial period" means—(a) in relation to a person serving a sentence of imprisonment for a term of twelve months or more or any determinate sentence of detention under section 91 or 96 of the Sentencing Act, one-half of his sentence . . .'

[31] Section 82A of the 2000 Act, as amended makes provision for the setting of the minimum term for sentences of IPP and for life sentences (other than for murder). It provides:

> '(2) The court shall, unless it makes an order under subsection (4) below, order that the provisions of section 28(5) to (8) of the Crime (Sentences) Act 1997 (referred to in this section as the "early release provisions") shall apply to the offender as soon as he has served the part of his sentence which is specified in the order.
>
> (3) The part of his sentence shall be such as the court considers appropriate taking into account—(a) the seriousness of the offence, or of the combination of the offence and one or more offences associated with it; (b) the effect of any direction which it would have given under section 240 of the Criminal Justice Act 2003 (crediting periods of remand in custody) if it had sentenced him to a term of imprisonment; and (c) the early release provisions as compared with section 244(1) of the Criminal Justice Act 2003.'

[32] By virtue of ss 28(1B) and 34(2)(d) of the Crime (Sentences) Act 1997 (as amended), O'Brien may only require the Secretary of State under s 28(7) to refer his case to the Parole Board after he has served the 21 months minus the 128 days. Given the minimum term of 21 months for the offence of robbery, he may not require the Secretary of State under s 28(7) to refer his case to the Parole Board after he has served only six months. The substituted sentences do not increase the length of time which O'Brien will spend in prison and thus do not offend s 11(3) of the Criminal Appeal Act 1968.

LLEWELLYN

[33] We turn to the case of Llewellyn (now aged 24). On 14 September 2005 in the Crown Court at Bolton the appellant pleaded guilty to one count of robbery. On 7 October 2005 he was sentenced by Judge Warnock to IPP with a minimum term of two years and three months. On 20 October 2005 and on

review of the sentence, Judge Warnock reviewed the sentence and reduced the minimum term by 24 days to take the time spent in custody on remand into account. The judge ordered that the revised minimum term would be two years and 68 days in custody. Having committed an offence before the expiry of a full term of an earlier sentence of imprisonment, he was ordered to return to custody to serve the remaining period of 300 days pursuant to s 116 of the 2000 Act, to be served before the sentence for the instant offences. The total sentence was therefore: a sentence of imprisonment for public protection pursuant to s 225 of the 2003 Act with a minimum term of two years and 68 days, consecutive to 300 days.

[34] Shepherd, the co-accused, pleaded guilty to one count of robbery and was sentenced to 42 months' detention in a young offender institution. It was directed that the 113 days spent in custody on remand would count towards that sentence pursuant to s 240 of the 2003 Act.

[35] Llewellyn appeals against his sentence by certificate of the sentencing judge in the following terms:

> 'Should a sentence for Public Protection under the [2003 Act] be treated as a "life" sentence such that it is unlawful to activate an unserved period of imprisonment, such to be served before the commencement of the "minimum period" set by the Court?'

[36] He further applies for leave to appeal against sentence on a further ground that the learned judge erred in concluding that the appellant represented a significant risk of serious harm to the public. We granted leave on that ground during the hearing.

[37] On 11 June 2005 Mr Ryder was at home with a friend. The friend went out to take the dog for a walk and five minutes later Mr Ryder took some rubbish to the adjacent rubbish chute, leaving his front door open as he did so. Upon re-entering his property the appellant and his co-accused were present within. The co-accused was unplugging his playstation in his living room. The co-accused sprung up and lunged towards him; holding a silver-handled carving knife with a six-inch blade. Mr Ryder recognised this knife as one of his own from his kitchen. The co-accused held the knife to Mr Ryder's throat and said 'Don't do anything stupid'. He put the knife down on a nearby speaker and continued to steal Mr Ryder's property. The appellant appeared from behind the living room door and kept an eye on Mr Ryder while the co-accused continued to steal various items (a playstation, ten games and two control handles). Both men then left carrying the property. Importantly the respondent does not dispute that the appellant was not a 'party' to the obtaining from the kitchen of the knife or its subsequent use.

[38] Shepherd and the appellant were subsequently arrested and interviewed whereupon they chose to make no comment during the interview.

[39] Llewellyn is 24 years old and has nine convictions for 24 offences. The majority of offences are for dishonesty. He has convictions for 11 offences of robbery and two offences of attempted robbery. The first offence was an indecent assault on a male under the age of 14 for which he was sentenced to a two-year supervision order. His first custodial sentence was for robberies committed in 1997 and for which he received four months' detention in a young offenders institution. On 9 August 2002 he was convicted on two indictments of four offences of robbery, one attempted robbery and one offence of theft for which he was sentenced to three years and nine months' imprisonment. For

having committed an offence before the expiry of a full term of an earlier sentence of imprisonment, he was ordered to return to custody to serve the outstanding 399 days before commencing his sentence for those offences. His total sentence was 60 months' imprisonment. He was released on 18 April 2005 on licence until 12 September 2005.

[40] The PSR prepared in February 2002 stated:

> 'The three offences of robbery in May 1998 relate to three different individuals, on separate occasions. Two of them were particularly vulnerable given their age, 82 years and 64 years, having cash stolen after the appellant had gained entry to their homes on some pretext. Whilst all victims were threatened, the first offence also involved the presence of a knife and the latter, physical violence.'

[41] According to the PSR prepared for sentencing for the index offence, the appellant's use of substances, willingness to commit high harm offences against vulnerable people and threaten violence are contributory factors in assessing that he represents a high risk of harm to members of the general public as well as committing further offences of a specified violent nature. Until he can successfully refrain from substance misuse and address his tendency to resolve issues in a violent manner, the risks he poses will remain high. There was a high likelihood that he was at high risk of further acquisitive and harmful offences. His ongoing drug use, propensity to commit serious offences and his entrenched pattern of offending were causes for concern.

[42] In passing sentence the judge said that he had pleaded guilty to an exceptionally serious robbery in somebody's home. He was party to the use of a weapon because he was disturbed in the course of a burglary. He had the most appalling record relating to violence and dishonesty. The learned judge had no hesitation in concluding that he represented a significant risk of serious harm. This conclusion was reached because of the statutory assumption, his record and the facts of the offence. Full credit was given for his guilty plea.

[43] In the grounds of appeal it is submitted that the judge erred in concluding that the appellant represented a significant risk of serious harm to the public and, therefore, in imposing a sentence of IPP; and in ordering such a sentence (if otherwise appropriate) to run consecutively to a period of recall under s 116 of the 2000 Act.

[44] At the conclusion of the hearing we announced that the appeal was allowed to the extent that we quashed the sentence of IPP and substituted for it a sentence of four-and-a-half years' imprisonment to be served consecutively to the period of 300 days which the judge ordered to be served under s 116 of the 2000 Act. It was conceded, following an inquiry by the Registrar, that the appellant was not entitled to a reduction for days spent on remand and that the period of 300 days was the appropriate period.

[45] Not without some difficulty because of the way that the Police National Computer record was prepared and presented, we conducted an examination of the appellant's antecedents in an attempt to understand the circumstances of the previous robberies or attempted robberies. They were largely street robberies some accompanied by the threat of a weapon which, so it seems, he did not actually have. Two involved entry into a house when the appellant grabbed the occupants (82 years old in one case and 64 in the other) and on one occasion the victim suffered cuts and bruises to his right hand.

[46] It was conceded by Mr Robinson that s 229(3) applied. We therefore had to ask ourselves whether it would be unreasonable to conclude, after taking into account the matters set out in the section and *R v Lang* [2006] 2 All ER 410 particularly at [17](iii), (v) (*R v Lang* post-dated the sentence in this case), that there is a significant risk to members of the public of serious personal injury (whether physical or psychological) occasioned by the commission by the appellant of further specified offences. The difficulty we face is that the judge wrongly (as the respondent concedes), said that the appellant was a party to the use of a weapon because he was disturbed in the course of a burglary. If he had been a party to the use of a weapon, the sentence of IPP would have been unappealable. Since he was not, we have decided that, in all the circumstances, it would be unreasonable to draw the conclusion.

MOSS

[47] We turn finally to Moss, now aged 40. On 28 October 2005 at the Crown Court at Bournemouth the appellant pleaded guilty to two counts of robbery. On 19 January 2006 he was sentenced by Judge Wiggs on each count to IPP with a minimum term of six years minus the 83 days spent in custody on remand, to be served concurrently to each other. Having committed an offence before the expiry of a full term of an earlier sentence of imprisonment for robbery offences, he was ordered to return to custody to serve 180 of the remaining period of 252 days pursuant to s 116 of the 2000 Act, to be served before the sentence for the instant offences. Thus the total sentence was: a sentence of IPP pursuant to s 225 of the 2003 Act with a minimum term of five years and 282 days, consecutive to 180 days pursuant to s 116 of the 2000 Act.

[48] The lawfulness of making the sentence of IPP consecutive to the s 116 order was referred to the Full Court by the Registrar.

[49] Moss is a crack cocaine addict and commits offences to fund the habit.

[50] The facts of the first robbery were as follows. At around 2 am on 12 August 2005 Mr Houari, a taxi driver, took the appellant to Hamilton Road. Upon arrival the appellant asked Mr Houari to give him some money. When Mr Houari refused the request, the appellant produced a steak knife and demanded ten pounds Mr Houari gave him the money and the appellant left. The following day Mr Houari provided the police with closed circuit television stills of the inside of his taxi. On 17 August 2005 the appellant was arrested for unconnected matters and while in custody was arrested for the above offence. Upon arrest he was wearing the clothing described by Mr Houari.

[51] We turn to the other robbery. On 13 August 2005 Ms Daste was in a telephone box when the appellant opened the door and told her that he needed all her money. He shouted at her aggressively and she gave him a £2 coin. He then reached around her and took the rest of her money from her back pocket. After he had taken the money, he told her that she could use the telephone and left. On 19 August 2005 Ms Daste identified the appellant in a video identification parade. On 9 September the appellant admitted the offence in interview.

[52] The appellant had six previous convictions for 11 offences. His first offence was for aiding and abetting rape in 1985 for which he was sentenced to four years' youth custody. He was sentenced to two years' imprisonment for robbery in 1999 and to four years' imprisonment for robbery in 2002.

[53] The writer of the PSR understood that the court requested an investigation into dangerous offender provisions. In the writer's opinion the appellant did not fit into the category. The aiding and abetting rape was

committed some considerable time ago and there had been no further convictions of this nature. With regard to the offences of robbery, the appellant had been in possession of a weapon but had not used it. The risk of further offending by the appellant was directly related to his crack cocaine addiction. a

[54] There were a number of reports before the court the effect of which was that the most significant factor which would lead to him committing further offences was his addiction to drugs though he recognised that and was attempting to conquer his addiction. b

[55] In passing sentence the judge gave the appellant credit for his guilty pleas. The appellant had a number of previous convictions of relevance to the offences for which he was being sentenced: in 1985 he was sentenced to four years' youth custody for a very serious offence of rape, in 1999 he was sentenced to two years' imprisonment for a robbery of a mini-cab driver with a knife and in 2002 he was sentenced to four years' imprisonment for three robberies including one street robbery, one of a taxi driver with a knife and one of a woman with a knife. The judge relied on the case of *R v Lang* in deciding whether it was unreasonable to come to the view that there was no significant risk to members of the public of serious harm occasioned by the commission by the appellant of further such offences. The judge disagreed with counsel's submission that there was no evidence of serious harm in the appellant's offending. The robbery of a taxi driver at knife-point in the small hours of the morning which left him frightened to go to work was properly called 'serious harm'. The judge agreed with counsel's submission that if the appellant could keep away from drugs, there was no significant risk to the public. He concluded that there was a significant risk of relapse in the appellant's case and it was not therefore unreasonable to conclude that he was dangerous. A sentence of imprisonment for public protection had to be passed. With a record of offences of this kind, if these matters had been uncontested, the judge would have imposed concurrent sentences upon each count of nine years' imprisonment. Giving credit for his guilty plea, that would be reduced to six years. The judge then deducted the 83 days served in custody awaiting sentence from the six years, and ordered that in the event of the calculation of 83 days being wrong such period as he was found to have served in custody pending the sentence should be deducted from the sentence and regarded as already having been served. The appellant was liable to serve 252 days from his previous sentence he had been administratively re-called but this had to be ignored. The judge ordered that the appellant serve 180 days of that sentence before beginning the sentence for the present offences. c d e f g

[56] Judge Wiggs has sent a note to the Full Court (in response to the Registrar's request for an accurate record sheet) in which he states that he had intended the minimum term to be three years minus the time spent on remand. The judge had overlooked the need to halve the period (see [25] and following, above). h

[57] There is no challenge to the imposition of the sentence of IPP. As to the notional determinate term it is submitted that the starting point of nine years (from which the judge deducted three years to reflect the plea) was manifestly excessive and that the judge erred in principle in taking into account the appellant's previous convictions when setting the notional term. We disagree with the latter proposition. In deciding the period to be imposed for punishment and deterrence, the court is quite entitled to take into account previous serious convictions. We are concerned about the starting point of nine years. We were referred to *R v Jackson* [1995] 1 Cr App R (S) 259. The appellant, much younger j

than Moss, pleaded guilty to robbery. At a time when he was on licence from prison following a conviction for robbery, he called for a taxi and having directed the driver to stop, he pressed a metal object into the back of the driver's neck, said he had a gun and demanded money. He was sentenced to six years' imprisonment following a plea. The previous offence of robbery involved a threat with a knife to a young person at a bus station. The court decided that the proper sentence was one of four-and-a-half years' imprisonment. Not without some reluctance, we have reached the conclusion that the notional determinate sentence should have been one of five years. For reasons which we shall give below, the correct way of reflecting the 180 days is not to require the 180 days to be served before the sentence of IPP but to add the 180 days to the five years, making a total of five-and-a-half years or 66 months. This will be halved to 33 months from which will be deducted the 83 days spent on remand. The minimum term is therefore 33 months less 83 days.

THE GENERAL PRINCIPLES

[58] We were taken through the statutory provisions relevant to indeterminate sentences and it is agreed that there is no provision which forbids the imposition of consecutive indeterminate sentences or the imposition of an indeterminate sentence consecutive to another period of imprisonment. The situation has not changed since the decision in *R v Jones* [1962] 1 All ER 569, [1962] AC 635. Ashworth J giving the judgment of the Court of Criminal Appeal said ([1961] 3 All ER 668 at 675–676, [1962] AC 635 at 646–647):

> 'There remains the question of sentence. The learned judge in passing sentence said:
>
> "You have been found guilty now of two crimes, evil to a degree beyond all adjectives, and it is proper that you should serve your sentence for the first crime and that neither as a matter of fact nor of appearance should it cease to be operative. In these circumstances, I pass on you the sentence according to statute that you be sentenced to imprisonment for life and for the protection of the public I think firstly that it should be sentence to commence on the expiration of your existing sentence and secondly that it would be lamentable indeed if on the second sentence you did not serve a far longer time than on the first."
>
> It was contended before us that the form of the sentence was wrong in principle in that it amounted to a "sentence of life imprisonment less the unremitted portion of the sentence of fourteen years". Further, it was contended that the learned judge was in error in supposing that, if the sentence of life imprisonment were made to take effect at once, the sentence of fourteen years would merge with it and for practical purposes cease to operate. We were assisted on this point by the Attorney General, as amicus curiae, and he assured us that the two sentences would not merge, if the life sentence were made concurrent, and that the sentence of fourteen years would not be affected in any way. According to him, there was no practical difference whatever between a life sentence made concurrent and one made consecutive, but he submitted the view that it is undesirable to make the life sentence consecutive since it achieves no practical result.
>
> We have no doubt that the learned judge had power to make the life sentence consecutive to the earlier sentence of fourteen years, but we accept the Attorney General's submission that a consecutive sentence is

undesirable. Since the practical result would be the same in any event, we see no reason to allow the appeal against sentence, and it is dismissed. We would only add that our attention was called to several unreported judgments of this court in regard to life sentences. It is, in our view, difficult to reconcile all the observations contained in those judgments, but on the present occasion there is no need to attempt the task.'

[59] We share the view expressed in that case that it is undesirable to impose consecutive indeterminate sentences or order an indeterminate sentence to be served consecutively to another period of imprisonment. Common sense suggests that a sentence of life imprisonment or of IPP starts immediately on its imposition. Given the difficulties that may be encountered already in determining when a prisoner must be released or is eligible for parole, it seems to us to be much easier not to compound those difficulties by making indeterminate sentences consecutive to other sentences or periods in custody.

[60] We are supported in our conclusion by a passage in *R v Lang* [2006] 2 All ER 410 where Rose LJ said (at [20]) that it 'will not usually be appropriate to impose consecutive extended sentences'. (See also *R v S* [2005] EWCA Crim 3616 at [30], (2005) Times, 30 December.)

[61] We shall consider first the following situation: but for the undesirability of making indeterminate sentences consecutive to other terms, the judge would want the period before which the defendant will become eligible for parole to be consecutive to an existing sentence or to follow a period imposed under s 116 of the 2000 Act (return to prison where offence committed during original sentence). How does the judge ensure that the sentence includes the balance of the existing sentence or the s 116 period?

[62] The judge should increase the notional determinate term to reflect that balance or that period. The authority for so doing is *R v Haywood* [2000] 2 Cr App R (S) 418. The appellant had been sentenced to eight years' imprisonment for robbery etc and two days after being sentenced he attacked a prison officer. He pleaded guilty to wounding with intent (under s 18 of the Offences Against the Person Act 1861). The Recorder of Liverpool sentenced him to life imprisonment, as he was obliged to do and specified—

'the part to be served by reference to the period the appellant would have had to serve if the Recorder had imposed seven years' imprisonment consecutive, as he would have done but for section 2 [automatic life sentence].'

[63] The Recorder started with a term of 15 years and halved it and then (wrongly as the Court of Appeal said) reduced that period by the time spent in custody on remand (the appellant had never been in custody anyway for the robbery).

[64] In the words of Lord Bingham CJ (at 432–433):

'In our judgment the Recorder took a logical and obviously sensible step ... This result is in no way unjust to the appellant who on any showing deserves a measure of punishment for this serious offence, and who clearly presents a continuing risk of danger to the public. We consider that the course which the Recorder adopted promotes the public policy underlying the Act and it furthermore avoided the obvious anomaly which would have arisen had the submissions of counsel been accepted.'

[65] If the Recorder had set the notional determinate term to reflect only the s 18 offence, then, in Lord Bingham's words, 'virtually nothing' would have been added to the sentence which the appellant was already serving, a result which Lord Bingham described as 'obviously absurd' (at 422). The principle in *R v Haywood* was cited with approval by Rose LJ in *R v Szczerba* [2002] 2 Cr App R (S) 387 at [33]. The statutory provision in *R v Haywood* equivalent to what is now s 82A of the 2000 Act (see [31], above) was s 28 of the 1997 Act. Given that the two provisions are very similar, the principles laid down in *R v Haywood* would also apply to s 82A.

[66] In *R v Szczerba* Rose LJ said ([2002] 2 Cr App R (S) 387 at [33]):

> 'There are, however, circumstances in which more than half may well be appropriate. Dr Thomas identified two examples. In [*R v Haywood* [2000] 2 Cr App R (S) 418] a life sentence was imposed on a serving prisoner for an offence committed in prison. In such a case the term specified can appropriately be fixed to end at a date after that on which the defendant would have been eligible for release on licence from his original sentence. This may involve identifying a proportion of the notional determinate term up to two-thirds. Another example is where a life sentence is imposed on a defendant for an offence committed during licensed release from an earlier sentence, who is therefore susceptible to return to custody under section 116 of the Powers of Criminal Courts (Sentencing) Act 2000. In such a case the specified period could properly be increased above one-half, to reflect the fact that a specified period cannot be ordered to run consecutively to any other sentence.'

[67] On our reading of *R v Haywood* the Recorder achieved the desired objective by increasing the notional determinate term and not by dividing that term by (up to) two-thirds rather than by a half to reach the minimum term. We think that increasing the notional determinate sentence is the better way. Indeed, for cases to which s 244 of the 2003 Act applies (see [29], above) the notional determinate sentence should be divided by half to arrive at the specified minimum term.

[68] In our view any s 116 period should be treated in the same way, that is by adding it to the notional determinate term which the judge would otherwise have set. As we understand it, a s 116 period attracts the early release provisions. A defendant sentenced to three years' imprisonment to be served following a one-year s 116 period will be released after two years. By adding the period to the notional determinate term and then halving it, the prisoner is in the same position as he would have been if the judge had passed a determinate term of the same length as the notional determinate term and made it consecutive to the s 116 period.

[69] There is one more practical problem which we should address. Assume that a judge is imposing concurrent indeterminate sentences for two or more offences with corresponding concurrent minimum terms. Assume that, if he had not passed indeterminate sentences he would have passed determinate custodial sentences for those offences consecutive to each other. How does he reflect in the notional determinate term the totality of the offending? The answer is, we believe, either to choose the same notional determinate term for all of the offences or take the most serious and make the notional determinate term reflect the totality of the offending. We return to the *O'Brien* case. The notional determinate term for the robbery should reflect the need to punish both the

assault with intent to rob and the robbery. That is why we increased the notional determinate sentence for the robbery in his case. This is in accordance with s 82A(3)(a) of the 2000 Act (set out at [31], above). *a*

[**70**] Finally we wish to say something about appeals. Given our view that it is not unlawful but merely undesirable to make consecutive indeterminate sentences or to make them consecutive to some other term or period of imprisonment, permission to appeal should not normally be granted on this ground only. Our reason for saying this is that if an appeal succeeds on this point only, then it is unlikely that the length of time which the prisoner will have to serve before being eligible for parole will be altered. In such circumstances there would be no practical point in giving permission to appeal. *b*

Applications for leave to appeal granted. Appeals allowed in part.

Vanessa Higgins Barrister.

R (on the application of Robinson) v Sutton Coldfield Magistrates' Court

[2006] EWHC 307 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

HALLETT LJ AND OWEN J

2 FEBRUARY 2006

Criminal law – Procedure – Evidence – Notice of intention to adduce bad character evidence made out of time – Justices granting applications to extend time limits – Whether discretion to be exercised only where exceptional circumstances – Crim PR 1.1, 35.4, 35.8.

The claimant was charged with an offence of assault and bailed to appear before the magistrates' court. He entered a plea of not guilty. On 14 April 2005, there was a standard pre-trial review hearing at which the prosecution stated that they were minded to introduce bad character evidence. The trial date was fixed for 16 June. By notices dated 13 June the prosecution applied to adduce that evidence. The notices were received by the magistrates' court on 14 June and by the claimant's solicitors on the eve of the trial. Crim PR 35.4[a] laid down time limits for giving the formal notices of such applications. As the prosecution had not complied with that rule they applied at the hearing for the justices to exercise their discretion under Crim PR 35.8[b] to extend time. The justices allowed the application and the prosecution adduced evidence of two previous convictions. The claimant was found guilty as the facts were not disputed. He applied for judicial review submitting, inter alia, that having regard to the overriding objective in Crim PR 1.1(e)[c] to 'deal with cases efficiently and expeditiously' it was crucial for there to be compliance with the time limits in the Crim PR. He argued that the court should only exercise its discretion to extend time under Crim PR 35.8 in exceptional circumstances, where it had been provided with sufficiently good reasons as to why the prosecution could not comply with the mandatory time limit.

Held – The time limits prescribed in the Crim PR had to be observed. The objective of the rules 'to deal with all cases expeditiously and efficiently' depended upon adherence to the timetable set out therein. However, by r 35.8, Parliament had given the court a discretionary power to shorten a time limit or to extend it after it had expired. In the exercise of that discretion the court had to take into account all the relevant considerations, including the furtherance of the overriding objective. The discretion was not to be fettered by a requirement that an extension should only be granted where there were exceptional circumstances. The considerations for the court were, first, the reason for the failure to comply; the court would ordinarily wish to know when the relevant inquiries had been initiated and in broad terms why they had not been completed within the time allowed. Any application for an extension would be closely

a Crim PR 35.4, so far as material, is set out at [10], below
b Crim PR 35.8, so far as material, is set out at [10], below
c Crim PR 1.1, so far as material, is set out at [12], below

scrutinised by the court. A party seeking an extension could not expect the indulgence of the court unless it clearly set out the reasons why it was seeking that indulgence. Secondly, the court had to be satisfied that there was no conceivable prejudice to the claimant, bearing in mind that he would be well aware of the facts of his earlier convictions. In the instant case, since the claimant had been on notice that there could be an application and had not sought an adjournment at trial, the justices had not erred in the exercise of their discretion to admit the evidence of bad character, notwithstanding the failure to comply with the rules. It was not a decision at which no reasonable bench of justices, properly directed could have arrived. Accordingly, the application would be dismissed (see [14]–[17], [39], below).

Notes

For evidence: bad character of defendants, see 11(3) *Halsbury's Laws* (4th edn) (2006 reissue) para 1505.

Cases referred to in judgments

Isgró v Italy App No 11339/85 (19 February 1991, unreported), ECt HR.
Lucà v Italy (2003) 36 EHRR 807, [2001] ECHR 33354/96, ECt HR.
Lüdi v Switzerland (1992) 15 EHRR 173, ECt HR.
R v Arnold (Kenneth) [2004] EWCA Crim 1293, [2005] Crim LR 56.
R v Campbell [2005] EWCA Crim 2078, [2005] All ER (D) 02 (Aug).
R v Sellick [2005] EWCA Crim 651, [2005] 1 WLR 3257.
R v Xhabri [2005] EWCA Crim 3135, [2006] 1 All ER 776.

Application for judicial review

The claimant, Paul Anthony Robinson, applied, with the leave of the single judge, for judicial review of the decisions of the justices sitting at Sutton Coldfield Magistrates' Court on 16 June 2005 whereby they acceded to applications by the prosecution to adduce evidence of the claimant's bad character and the statement of the complainant. The Crown Prosecution Service appeared as an interested party. The facts are set out in the judgment of Owen J.

Malcolm Bishop QC and *Osama Daneshyar* (instructed by *Manifold & Naser*, Birmingham) for Mr Robinson.
Philip Parker QC and *Patrick Darby* (instructed by the *Crown Prosecution Service*) for the Crown Prosecution Service.

HALLET LJ.

[1] Owen J will give the first judgment of the court.

OWEN J.

[2] On 16 June 2005, the claimant was convicted of an offence of assault occasioning actual bodily harm at the Sutton Coldfield Magistrates' Court. He now applies for judicial review of the decisions made by the magistrates in the course of the trial with the leave of the single judge.

THE FACTUAL BACKGROUND

[3] In December 2001, the complainant befriended the claimant when he was a serving prisoner through a radio programme called Jail Mail. She corresponded with him, and he moved in with her on his release in November 2003.

The claimant alleges that she soon became intimidated by the claimant because of his verbal and physical violence and his drinking. She left her home on 8 July 2004 and only returned when the claimant had himself left and been allocated a flat. Their relationship resumed, and on 23 October 2003 they were visiting friends together and returned to the claimant's flat in the early hours of the morning. The claimant was drunk and during an ensuing argument allegedly assaulted the complainant. He then fell asleep.

[4] She left at 4 pm the following day when the claimant was asleep. The complainant says that her injuries were photographed by a friend three days later on 26 October. She did not report the matter to the police until 19 November.

[5] The claimant was arrested and interviewed on 10 December. He was not represented. He said in interview that he had no recollection of the incident, nor could he recall seeing any injury on the complainant's face. He is also reported as saying that he could not say anything bad about Sarah (the claimant) and that she does not tell lies.

[6] The claimant was charged on 21 March 2005 and bailed to appear before the Sutton Coldfield Magistrates' Court. The first court hearing was on 23 March when he entered a plea of not guilty. On 14 April, there was a pre-trial review hearing in the course of which the parties were asked the standard case management questions, in particular, whether either party would seek to introduce hearsay or bad character evidence. The prosecution answered that question in the affirmative. The trial date was then fixed for 16 June.

[7] By notices dated 13 June, the prosecution applied first to adduce evidence of the claimant's bad character, and secondly gave notice of intention to adduce the statement of the complainant in evidence. The notices were received by the magistrates' court on 14 June and by the claimant's solicitors on 15 June: the eve of the trial.

[8] At the hearing on 16 June both applications were opposed but both were allowed. The prosecution therefore read the witness statement made by the complainant and adduced evidence of two previous convictions of the claimant. Having found that on the evidence there were no disputed facts, the court found the claimant guilty. He was committed to the Birmingham Crown Court for sentence, but has yet to be sentenced as the proceedings before the Crown Court were stayed pending the determination of this application.

[9] The claimant now seeks to quash the decisions to admit the claimant's previous convictions and to permit the prosecution to read the complainant's statement under s 116(2) of the Criminal Justice Act 2003.

GROUND 1—BAD CHARACTER

[10] There are two strands to the challenge to the decision to admit the bad character evidence. First, as is acknowledged by the interested party (the Crown Prosecution Service), there was a failure to comply with the rules as to the time for service of notice to adduce evidence of bad character, and it is submitted that the court ought not to have extended time. Secondly, it is submitted that when considering the application to extend time the court ought not to have taken account of the particulars of the previous convictions in question. As to the first, the Criminal Procedure Rules 2005, SI 2005/384 (the Crim PR), which came into effect on 4 April 2005, prescribed the form in which, and the time limit within which, the notice of intention to adduce bad character evidence should be given. Crim PR 35.4 is in the following terms:

'(1) A prosecutor who wants to introduce evidence of a defendant's bad character or who wants to cross-examine a witness with a view to eliciting that evidence, under section 101 of the Criminal Justice Act 2003 must give notice in the form set out in the Practice Direction to the court officer and all other parties to the proceedings.

(2) Notice under paragraph (1) must be given—(a) in a case to be tried in a magistrates' court, at the same time as the prosecutor complies or purports to comply with section 3 of the Criminal Procedure and Investigations Act 1996 . . .'

The remainder of sub-s (2) is not relevant. Crim PR 35.8 provides that:

'The court may—(a) allow a notice or application required under this rule to be given in a different form, or orally; or (b) shorten a time-limit under this rule or extend it even after it has expired.'

[11] Section 3 of the Criminal Procedure and Investigations Act 1996, to which reference is made in Crim PR 35.4, makes provision for the initial duty of the prosecution to disclose material: primary disclosure. It now transpires that in fact the primary disclosure, or rather compliance with the rules by notification to the defence that there was no material to disclose, was not given until early May: the 5th or the 9th. It appears that all parties were under the misapprehension that in fact there should have been compliance at an earlier date, but, in any event, it now seems clear that that date in early May was the date by which the application to adduce bad character evidence should have been made.

[12] Mr Bishop QC, who appears for the claimant, submits that failure to comply with the relevant rule is not to be lightly overlooked. He invited our attention to the overriding objective of the Crim PR. The rules lay down a comprehensive code designed to achieve the overriding objective of dealing with criminal cases justly by, inter alia:

'1.1(2) . . . (b) dealing with the prosecution and defence fairly; (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights . . . [and] (e) dealing with the case efficiently and expeditiously . . .'

[13] Mr Bishop submits that it is crucial that at this early stage in the life of the code a culture of non-compliance should not be permitted to take root. That is a proposition with which, for my part, I wholeheartedly agree. He further submits that the necessity of strict compliance is particularly apposite in proceedings in the magistrates' court where the large volume of routine cases may encourage a lax approach to the requirements of the code, and that, for reasons of public policy, the court should only exercise its discretion to extend time under Crim PR 35.8 in exceptional circumstances, where it has been provided with sufficiently good reasons as to why the prosecution could not comply with the mandatory time limit.

[14] The first point to be made is that time limits must be observed. The objective of the Crim PR 'to deal with all cases efficiently and expeditiously' depends upon adherence to the timetable set out in the rules. Secondly, Parliament has given the court a discretionary power to shorten a time limit or to extend it even after it has expired (see Crim PR 35.8). In the exercise of that discretion the court will take account of all the relevant considerations, including the furtherance of the overriding objective. I am not persuaded that the

discretion should be fettered in the manner for which the claimant contends, namely that the time should only be extended in exceptional circumstances.

[15] In this case there were two principal material considerations: first the reason for the failure to comply with the rules. As to that a party seeking an extension must plainly explain the reasons for its failure. Secondly, there was the question of whether the claimant's position was prejudiced by the failure.

[16] The reason advanced for the failure was that the police had made every effort to discover the facts of the previous convictions, but were not able to do so until 7 June. For my part, I have reservations as to the adequacy of that explanation. In my view a court would ordinarily wish to know when the relevant inquiries had been initiated, and in broad terms why they have not been completed within the time allowed. Any application for an extension will be closely scrutinised by the court. A party seeking an extension cannot expect the indulgence of the court unless it clearly sets out the reasons why it is seeking that indulgence. But importantly, I am entirely satisfied that there was no conceivable prejudice to the claimant, bearing in mind that he would have been well aware of the facts of his earlier convictions; secondly, that he was on notice on 14 April that there could be such an application; and thirdly, that there was no application for an adjournment on 16 June from which it is to be inferred that the claimant and his legal advisers did not consider their position to be prejudiced by the short notice.

[17] In those circumstances I am not persuaded that the justices erred in the exercise of their discretion to admit the evidence of bad character, notwithstanding the failure to comply with the rules. This was not a decision at which no reasonable bench of magistrates properly directed could have arrived.

[18] The second limb of the challenge to the decision to admit the evidence of bad character is that in considering the application to extend time the justices took account of the details of the convictions in question. As to that, Mr Bishop points to the evidence from the claimant's solicitor, Mr Mohammed Naser, who had the conduct of the case before the magistrates' court. At paras 40–43 of his witness statement he says:

> '40. The Prosecution then made their second application to admit bad character. The first hurdle was to convince the Court that it was right that the application should be heard out of time.'

Then:

> '41. The Court Clerk permitted the Court to receive the actual particulars of the Defendant's previous convictions and also advised the Court that they must bear in mind the serious nature of the offence when considering whether they should permit a Prosecution application out of time.
>
> 42. I submitted that the Court should not have details of the Defendant's convictions when considering an application out of time. The Court should limit itself to hearing reasons as to why my application is out of time.
>
> 43. The Court Clerk insisted that her advice was correct and gave the previous convictions to the Court to consider.'

[19] The first point made in response by Mr Parker QC, who appeared for the interested party is that there is in fact no evidence that the justices took the details of the conviction into account when deciding to grant an extension of time. That is acknowledged by Mr Bishop whose complaint is essentially as to the appearance of unfairness. He does not assert that the justices in fact took these

matters into consideration when arriving at their decision, nor are there any grounds for doing so.

[20] Mr Parker relies on para 8 of the document headed 'information to assist the Administrative Court', which was annexed to the acknowledgment of service filed on behalf of the respondent. It is in the following terms:

> 'The application was dependent on the circumstances of the commission of the previous convictions . . . to which the application related and that information was not received by the CPS until the 7th June 2005 from the police. The court was told that the police had made every effort to discover the facts of the previous convictions but had not been able to do so until that date.
>
> The court allowed the application for the bad character application to be considered "out of time", and in doing so stated:
>
> **We consider that the CPS submitted the application as soon as they could and therefore allowed the application for bad character to be made.**'

[21] It is clear that the justices must have been aware of the facts of the conviction and in that context Mr Parker invited our attention to the prescribed form of application to adduce evidence of bad character, which has to be completed both with details of the convictions that it is sought to adduce, and where appropriate with the application to extend time. But there is an important distinction to be made between being aware of the facts of a conviction and taking those facts into account in arriving at a decision as to whether or not to extend time. It is the type of situation with which justices are familiar. Where an application is made to adduce bad character evidence before a magistrates' court, the justices will, of necessity, hear details of the conviction in order to rule on the application. If the application fails they will put the convictions out of mind when they hear the case. The fact that they know the details of the previous convictions does not disqualify them from discharging their role as fact finders in the trial.

[22] Thus, in my judgment, it cannot be inferred from the knowledge of the facts of the conviction, that the justices took those facts into account in considering the application to extend time. I find nothing in the material before us to indicate that they took those facts into account in arriving at their decision, and accordingly, in my judgment, that limb of the challenge also fails.

[23] In those circumstances it is not necessary to rule on the supplementary argument advanced by Mr Parker that if the justices had in fact taken account of the facts of the convictions, they were entitled so to do as they were entitled to consider the strength of the application when considering whether or not to exercise their discretion.

GROUND 2—HEARSAY

[24] I turn then to the second limb of the application: the hearsay argument. It is submitted on behalf of the claimant that the justices erred in permitting the prosecution to adduce the evidence of the complainant by reading her witness statement dated 19 November 2004. In that statement the complainant gave no indication that she was unwilling or reluctant to give evidence, but in a further statement, made on 6 June 2005, shortly before the trial, she said:

'I do not wish to come to court to provide that evidence [the evidence contained in her original statement] personally though, through fear of Paul locating me by my appearance at court.

Since the assault, I have taken great steps to establish a new life and to make a break from Paul. This has involved me going into a woman's refuge and moving more than once in an attempt to become untraceable to Paul.

I have attempted to break off all ties with the friends that I had, that were friends common to both Paul and myself, unless they were friends I could trust, to my knowledge this has been successful.

I have gone to the lengths of not providing the Police with a contact address, I only contact them by phone just in case my location becomes known through their paperwork.

I know that the courts and the police would do all they could to help and protect me, but Paul and his friends will be at court and once I leave the court there is no one that can stop them following me and finding my location.

I am still fearful of Paul and as a single person have both myself and my son to think about.'

Under s 116(1) of the 2003 Act:

'In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter, (b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and (c) any of the five conditions mentioned in subsection (2) is satisfied.'

The relevant condition of sub-s (2) is as follows:

'(e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

(3) For the purposes of subsection (2)(e) "fear" is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.

(4) Leave may be given under subsection (2)(e) only if the court considers that the statement ought to be admitted in the interests of justice, having regard—(a) to the statement's contents, (b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence), (c) in appropriate cases, to the fact that a direction under section 19 of the Youth Justice and Criminal Evidence Act 1999 (c 23) (special measures for the giving of evidence by fearful witnesses etc) could be made in relation to the relevant person, and (d) to any other relevant circumstances.'

[25] According to para 12 of the 'Information to assist the Administrative Court' in granting the application, the court stated that:

'The application was made under S116(2)(e) [of the 2003 Act].

Considering the above information we are satisfied that the complainant is in fear of the offender and for that reason she has decided not to attend court to give evidence.

> We have considered S116(4): Special measures are not appropriate in this case in view of the fears of the complainant. We are of the opinion that it is in the interests of justice for the statement to be admitted in evidence in view of the serious nature of the offence, the photographic evidence, evidence of a recent complaint, and the interview of the offender, which is not disputed.'

[26] It is submitted on behalf of the claimant that the magistrates' court ought to have scrutinised the extent, nature and the basis for the alleged fear and, in the light of those findings, to have addressed the question of whether satisfactory measures could have been put in place to assuage the complainant's fears. Mr Bishop argues that according to her statement her fear was of being followed from the court by the claimant, or his friends, so enabling him to discover her current address. He suggests that that fear could have been overcome by arrangements being made by the police to transport her to and from the court in such a manner as to ensure that her address was not revealed.

[27] It is submitted that in considering whether to allow the statement to be read, the justices should have considered the effect of its being admitted on the overall fairness of the trial. That is plainly correct. Mr Bishop goes on to submit that the effect of admitting the evidence was to deprive the claimant of the opportunity of testing the sole or main evidence against him and that in consequence he was denied a fair trial. In support of that proposition he directed our attention to the Strasbourg jurisdiction under art 6(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which provides: 'Everyone charged with a criminal offence has the following minimum rights . . . (d) to examine or have examined witnesses against him'.

[28] He drew attention in particular, to the decision in *Lucà v Italy* (2003) 36 EHRR 807 and to para 40 (at 815–816), which is in the following terms:

> 'As the Court has stated on a number of occasions [see, among other authorities, *Isgró v Italy* App No 11339/85 (19 February 1991, unreported) at para 34 and *Lüdi v Switzerland* (1992) 15 EHRR 173 at 200 (para 47)], it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Art.6(1) and 3(d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Art.6.'

[29] The relevant Strasbourg decisions were analysed in detail in *R v Sellick* [2005] EWCA Crim 651, [2005] 1 WLR 3257 in which the judgment of the court was given by Waller LJ who drew the following propositions from his analysis (at [50]):

> '(i) The admissibility of evidence is primarily for the national law. (ii) Evidence must *normally be* produced at a public hearing and as a *general rule* article 6(1) and 3(d) of the Convention require a defendant to be given a

proper and adequate opportunity to challenge and question witnesses. (iii) It is not necessarily incompatible with article 6(1) and 3(d) of the Convention for depositions to be read and that can be so even if there has been no opportunity to question the witness at any stage of the proceedings. Article 6(3)(d) is simply an illustration of matters to be taken into account in considering whether a fair trial has been held. The reasons for the court holding it necessary that statements should be read and the procedures to counterbalance any handicap to the defence will all be relevant to the issue, whether, where statements have been read, the trial was fair. (iv) The quality of the evidence and its inherent reliability, plus the degree of caution exercised in relation to reliance on it, will also be relevant to the question whether the trial was fair.' (My emphasis.)

[30] Waller LJ went on to consider the question of whether there was a fifth proposition to be distilled from the Strasbourg jurisprudence. At paras [51]–[53] of his judgment he said this:

'The question is whether there is a fifth proposition to the effect that where the circumstances justify the reading of the statement where the defendant has had no opportunity to question the witness at any stage of the trial process, the statement must not be allowed to be read if it is the sole or decisive evidence against the defendant. Certainly at first sight para 40 of [*Lucà v Italy*] seems to suggest that in whatever circumstances and whatever counterbalancing factors are present if statements are read then there will be a breach of article 6 of the Convention, if the statements are the sole or decisive evidence. Furthermore there is some support for that position in the previous authorities. But neither *Lucà v Italy* nor any of the other authorities were concerned with a case where a witness, whose identity was well known to a defendant, was being kept away by fear, although we must accept that the reference to Mafia-type organisations and the trials thereof in para 40 of *Lucà v Italy* shows that the court had extreme circumstances in mind.

[52] The question we have posed to ourselves is as follows. If the European court were faced with the case of an identified witness, well known to a defendant, who was the sole witness of a murder, where the national court could be *sure* that that witness had been kept away by the defendant, or by persons acting for him, is it conceivable that it would hold that there were no "counterbalancing" measures the court could take which would allow that statement to be read. If care had been taken to see that the quality of the evidence was compelling, if firm steps were taken to draw the jury's attention to aspects of that witness's credibility and if a clear direction was given to the jury to exercise caution, we cannot think that the European court would nevertheless hold that a defendant's article 6 rights had been infringed. In such a case, as it seems to us, it is the defendant who has denied himself the opportunity of examining the witnesses, so that he could not complain of an infringement of article 6(3)(d), and the precautions would ensure compliance and fairness in compliance with article 6(1). We for our part see no difficulty in such a clear case.

[53] More difficulty arises in cases where it is not quite so clear cut, but the court believes, to a high degree of probability, that identified witnesses are being intimidated for and on behalf of the defence, and where the court is sure to the criminal standard of proof that witnesses cannot be traced and brought before the court (Butterfield J's state of mind on Lee in the instant

case). In our view, having regard to the rights of victims, their families, the safety of the public in general, it still cannot be right for there to be some absolute rule that, where compelling evidence is the sole or decisive evidence, an admission in evidence of a statement must then automatically lead to a defendant's article 6 rights being infringed. That would lead to a situation in which the more successful the intimidation of the witnesses, the stronger the argument becomes that the statements cannot be read. If the decisive witnesses can be "got at" the case must collapse. The more subtle and less easily established intimidation provides defendants with the opportunity of excluding the most material evidence against them. Such an absolute rule cannot have been intended by the European court in Strasbourg.' (My emphasis.)

[31] In his skeleton argument Mr Bishop advanced a proposition distilled from paras [51] and [52] of Waller LJ's judgment namely, if the court is satisfied that a witness is in fear of giving evidence because of intimidation by or on behalf of the defendant, the admission of that evidence without cross-examination does not necessarily infringe the defendant's art 6 right to a fair trial. That distillation appears to me fairly to reflect the relevant passages in the judgment, but it has always to be borne in mind that as Waller LJ observed at para [38] of his judgment in *R v Sellick*: 'the question whether Article 6 has been infringed is very fact sensitive.'

[32] I also bear in mind the words of caution to be found in the judgment of Leveson J in the Court of Appeal (Criminal Division) in *R v Arnold (Kenneth)* [2004] EWCA Crim 1293:

'[30] We cannot leave this case without sounding a word of caution. The reference in *Lucà v Italy* to the not infrequent occurrence of the phenomenon of frightened witnesses being unwilling to give evidence in trials concerning Mafia-type organisations is echoed across a wider range of serious crime in this country. Counsel both confirmed that this problem was becoming commonplace and the experience of the members of this court concerned with the conduct of criminal trials is likewise. Inevitably, applications under s 23 will follow but this judgment should not be read as a licence for prosecutors. Very great care must be taken in each and every case to ensure that attention is paid to the letter and spirit of the convention and judges should not easily be persuaded that it is in the interests of justice to permit evidence to be read. Where that witness provides the sole or determinative evidence against the accused, permitting it to be read may well, depending on the circumstances, jeopardise infringing the defendant's art 6(3)(d) rights; even if it is not the only evidence, care must be taken to ensure that the ultimate aim of each and every trial, namely, a fair hearing, is achieved.'

[33] But in this context we were also referred to another decision of the Court of Appeal (Criminal Decision) in *R v Campbell* [2005] EWCA Crim 2078, [2005] All ER (D) 02 (Aug) in which the court held (see digest) that:

'There was no principle that where evidence represented the sole substantial evidence in the case against the defendant, it should never be admissible under s 23 of the 1988 Act because the interests of justice test could never be satisfied. Provided that all the requirements of the provisions were fully and properly considered, it could not be right, where compelling evidence was the sole or decisive evidence, that the admission in evidence

had to lead automatically to a defendant's right to a fair trial under art 6 of the European Convention on Human Rights being infringed.'

As Lord Phillips LCJ said in *R v Xhabri* [2005] EWCA Crim 3135 at [44], [2006] 1 All ER 776 at [44]: 'Article 6(3)(d) does not give a defendant an absolute right to examine every witness whose testimony is adduced against him. The touchstone is whether fairness of the trial requires this.'

[34] What then were the factors relevant to the determination of the application before the justices? Firstly there was evidence before the justices in the complainant's second statement, to which I have already made reference, that she is in fear of the defendant. As a consequence of his behaviour to her she has gone into a women's refuge, and moved more than once in an attempt to become untraceable. Her fear has resulted in her breaking off all ties with friends common to her and the claimant. It has resulted in her feeling unable to give her address to the police lest it be revealed accidentally. Secondly, they were entitled to consider the serious nature of the case. The interests of justice require that serious assaults in which injury is caused are resolved by a trial where it is possible to hold a trial that is fair to both sides, rather than being dismissed or discontinued without a trial on the merits because the victim does not give evidence through fear. Thirdly, there was photographic evidence, the admissibility of which was not challenged, that showed that the complainant had injuries to the face and neck that were consistent with the assault described in her statement. It supported her account of how her injuries were sustained.

[35] Fourthly, when interviewed under caution the claimant admitted that he was at his flat with the complainant at the time that she alleged that the assault took place, and that he was drunk. He was the only other person present, and accordingly if the complainant sustained injuries on that occasion, then he was the only person who could have inflicted them. It is also to be noted in this context that the essence of the case was put to the defendant in interview and he had the opportunity to comment upon it. Finally, in interview the claimant admitted that the complainant was someone who did not lie, and who would not have made a statement alleging that he had assaulted her if he had not done so. He conceded that he could not say whether he had or had not committed the offence. He accepted that she had left on the afternoon of the following day and had never seen him since.

[36] Those were all matters that were expressly taken into account by the justices in arriving at their decision to admit her evidence in that form: see para 12 at [25], above. The justices were also obliged to consider what, if any, special measures could be put into place to assuage the complainant's fears. It can be seen from the information that they had provided that they did so.

[37] The arrangements upon which Mr Bishop now seeks to rely are not special measures within the relevant sections of the Youth Justice and Criminal Evidence Act 1999. Whilst in retrospect it might have been sensible to have made inquiries as to what, if any, other arrangements could have been made to convey the complainant both to and from court so as to insure her against the risk of the defendant tracing her, I do not consider that the justices can be criticised for failing to embark upon such an investigation when that question was not raised before them.

[38] In my judgment the justices were entitled to exercise their discretion in the way that they did on the information before them. It cannot be said that the balance that they struck between the interests of the defendant and of the

complainant was a balance at which no reasonable tribunal could have arrived. It follows that I do not consider that their decision rendered the trial process unfair. It therefore also follows that I would dismiss this application.

HALLET LJ.

[39] I agree for the reasons given by Owen J. I also wish to associate myself with his observations on the duty of all parties to comply with the provisions of the Criminal Procedure Rules 2005, SI 2005/384 and the duty of a court to scrutinise, with care, any failure by the parties to comply with those rules.

Application dismissed.

Dilys Tausz Barrister.

R (on the application of Gillan and another) v Metropolitan Police Commissioner and another

[2006] UKHL 12

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD HOPE OF CRAIGHEAD, LORD SCOTT OF FOSCOTE, LORD WALKER OF GESTINGTHORPE AND LORD BROWN OF EATON-UNDER-HEYWOOD

25, 26 JANUARY, 8 MARCH 2006

Police – Powers – Power to stop, search and detain – Searching for articles of a kind which could be used in connection with terrorism – Senior police officer issuing authorisation – Secretary of State confirming authorisation – Whether authorisation and confirmation lawful – Whether exercise of search powers lawful – Human Rights Act 1998, Sch 1, Pt I, arts 5, 8, 10, 11 – Terrorism Act 2000, ss 44, 45, 46.

The claimants were each stopped and searched by police officers under s 45[a] of the Terrorism Act 2000. Under that section the power to stop and search could be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism and could be exercised whether or not the constable had grounds for suspecting the presence of such articles. There was no requirement that the constable have a reasonable suspicion that the person stopped and searched was a terrorist. Each search lasted less than 30 minutes and nothing incriminating was found. The exercise of the power required that there be an authorisation in place under s 44[b] of the 2000 Act and the appropriate authorisation had been given by an assistant commissioner of the Metropolitan Police. Section 44(3) provided that an authorisation could be given only if the person giving it considered it 'expedient for the prevention of acts of terrorism'. Section 46[c] of the 2000 Act required that an authorisation be confirmed by the Secretary of State. The relevant code of practice to the Police and Criminal Evidence Act 1984, issued by the Secretary of State, provided that the intrusion on the liberty of the person stopped or searched had to be brief and that detention for the purposes of a search had to take place at or near the location of the stop. The claimants applied for judicial review, seeking, inter alia, declarations that the authorisation given under s 44 of the 2000 Act had been unlawful. Their claims were dismissed by the Divisional Court and the Court of Appeal. They appealed to the House of Lords, submitting, inter alia, (i) that 'expedient' in s 44(3) had to be interpreted as permitting an authorisation to be made only if the decision maker had reasonable grounds for considering that the powers were necessary and suitable, in all the circumstances, for the prevention of terrorism; (ii) that the authorisation had contravened the right to liberty and security guaranteed by art 5[d] of the European Convention for the Protection of Human Rights and

a Section 45 is set out at [8], below

b Section 44 is set out at [6], below

c Section 46, so far as material, provides: '(3) The person who gives an authorisation shall inform the Secretary of State as soon as is reasonably practicable. (4) If an authorisation is not confirmed by the Secretary of State before the end of the period of 48 hours beginning with the time when it is given—(a) it shall cease to have effect at the end of that period . . .'

Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998); (iii) that the stop and search power involved an interference with the rights for respect of a person's private life, freedom of expression and freedom of assembly and association arising under arts 8[e], 10[f] and 11[g] of the convention and were insufficiently justified; and (iv) that the stop and search power did not meet the convention requirement of lawfulness.

Held – (1) Section 44(3) of the 2000 Act was not to be interpreted as permitting an authorisation to be made only if the decision maker had reasonable grounds for considering that the powers were necessary and suitable, in all the circumstances, for the prevention of terrorism. 'Expedient' had a meaning quite distinct from 'necessary'. Examination of the statutory context showed that the authorisation and exercise of the power were very closely regulated, leaving no room for the inference that Parliament did not mean what it said. There was every indication that Parliament had appreciated the significance of the power but had thought it an appropriate measure to protect the public against the grave risks posed by terrorism, provided the power was subject to effective constraints. The constraints were: (i) an authorisation could be given only if the person giving it reasonably considered it expedient for the prevention of acts of terrorism; (ii) it could be given only by a very senior police officer; (iii) it could not extend beyond the boundary of a police force area and need not extend so far; (iv) it was limited to a period of 28 days and need not be for so long; (v) it had to be reported to the Secretary of State forthwith; (vi) it lapsed after 48 hours if not confirmed by the Secretary of State; (vii) the Secretary of State could abbreviate the term of an authorisation or cancel it with effect from a specified time; (viii) a renewed authorisation was subject to the same confirmation procedure; (ix) the powers conferred on a constable by an authorisation could only be exercised for articles of a kind which could be used in connection with terrorism; (x) there was provision for reports on the working of the 2000 Act to be made to Parliament at least once a year; and (xi) any misuse of the power to authorise or confirm or search would expose the authorising officer, the Secretary of State or the constable to corrective legal action. The effect of s 44(3) was that an authorisation could be given if, and only if, the person giving it considered it likely that the stop and search powers would be of significant practical value and utility in seeking to achieve the prevention of acts of terrorism. In the instant case there was no material before the House to justify the conclusion that the authorisation or confirmation had been unlawful (see [13]–[15], [19], [38], [58]–[60], [65], [70], [71], below).

(2) A person stopped and searched in accordance with the procedure prescribed by the 2000 Act and the code, in the absence of special circumstances, was not deprived of his liberty within the autonomous meaning of that

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d Article 5, so far as material, is set out at [21], below

e Article 8, so far as material, is set out at [27], below

f Article 10, so far as material, provides: '(1) Everyone has the right to freedom of expression ... (2) The exercise of these freedoms ... may be subject to such ... restrictions ... as are prescribed by law and necessary in a democratic society, in the interest of national security ... or public safety ...'

g Article 11, so far as material, provides: '(1) Everyone has the right to freedom of peaceful assembly ... (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety ...'

expression in art 5(1) of the convention. Where a person was stopped and searched under ss 44 and 45 of the 2000 Act the procedures would ordinarily be relatively brief. He would not be arrested, handcuffed, confined or removed to any different place. He could only be regarded as being detained in the sense of kept from proceeding or kept waiting (see [25], [38], [58], [70], [71], below); *Guzzardi v Italy* (1980) 3 EHRR 333 and *HL v UK* (2004) 81 BMLR 131 considered.

(3) The exercise of the stop and search power, duly authorised and confirmed, and exercised in order to search for articles of a kind which could be used in connection with terrorism was proportionate under art 8(2) of the convention. If the power, properly exercised, were to restrict the rights protected by arts 10 and 11, the restriction could be expected to fall within the heads of justification provided in arts 10(2) and 11(2) (see [28]–[30], [38], [58], [70], [71], below).

(4) The stop and search regime met the test which any interference with or derogation from a convention right had to meet if a violation were to be avoided, which was whether the exercise of power by public officials, as it affected members of the public, was governed by clear and publicly-accessible rules of law. The public were not to be made vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. The 2000 Act informed the public that the stop and search powers were, if duly authorised and confirmed, available and defined and limited the powers with considerable precision. The code, which was a public document, described the procedures in detail. Anyone stopped and searched had to be told by the constable all he needed to know and in exercising the power the constable was not free to act arbitrarily. Although the constable did not need to have any suspicion before stopping and searching a member of the public, that could not, realistically, be interpreted as a warrant to stop and search people who were obviously not terrorist suspects. It was to ensure that a constable was not deterred from stopping and searching a person whom he did suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion. Accordingly the appeals would be dismissed (see [34], [35], [37], [38], [58], [69]–[71], [93], below).

Decision of the Court of Appeal [2005] 1 All ER 970 affirmed.

Notes

For counter-terrorist powers: authorisation to stop and search vehicles, their occupants and their contents and to stop and search pedestrians, see 11(1) *Halsbury's Laws* (4th edn) (2006 reissue) para 427, and for the rights to liberty and security of the person, respect for private life, freedom of expression and freedom of association and assembly, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 127–129, 150, 158–161.

For the Human Rights Act 1998, Sch 1, Pt I, arts 5, 8, 10, 11, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 705, 707.

For the Terrorism Act 2000, ss 44, 45, 46, see 12(2) *Halsbury's Statutes* (4th edn) (2005 reissue) 310, 312, 313.

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R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary [2004] EWCA Civ 1639, [2005] 1 All ER 473, [2005] QB 678, [2005] 2 WLR 789; *affg* [2004] EWHC 253 (Admin), [2004] All ER 874.
R (on the application of Munjaz) v Ashworth Hospital Authority [2005] UKHL 58, (2005) 86 BMLR 84, [2005] 3 WLR 793.
R (on the application of ProLife Alliance) v British Broadcasting Corp [2002] EWCA Civ 297, [2002] 2 All ER 756, [2004] 1 AC 485, [2002] 3 WLR 1080.
R (on the application of Saadi) v Secretary of State for the Home Dept [2002] UKHL 41, [2002] 4 All ER 785, [2002] 1 WLR 3131.
R (on the application of the Countryside Alliance) v A-G [2005] EWHC 1677 (Admin), (2005) Times, 3 August.
R (on the application of W) v Metropolitan Police Comr [2005] EWHC 1586 (Admin), [2005] 3 All ER 749, [2005] 1 WLR 3706; *rvsd* [2006] EWCA Civ 458, [2006] 3 All ER 458.
R (on the application of Wilkinson) v Responsible Medical Officer, Broadmoor Hospital [2001] EWCA Civ 1545, (2001) 65 BMLR 15, [2002] 1 WLR 419.
Raimondo v Italy (1994) 18 EHRR 237, ECt HR.
Rainys v Lithuania App Nos 70665/01 and 47375/01 (7 April 2005, unreported), ECt HR.
Raninen v Finland (1998) 26 EHRR 563, ECt HR.
Reyntjens v Belgium (1992) 73 DR 136, E Com HR.
Riera Blume v Spain (2000) 30 EHRR 632, ECt HR.
Secretary of State for the Home Dept v Rehman [2001] UKHL 47, [2002] 1 All ER 122, [2003] 1 AC 153, [2001] 3 WLR 877.
Sener v Turkey (2003) 37 EHRR 723, ECt HR.
Sheldrake v DPP, A-G's Ref (No 4 of 2002) [2004] UKHL 43, [2005] 1 All ER 237, [2005] 1 AC 264, [2004] 3 WLR 976.

Sidabras v Lithuania (2006) 42 EHRR 104, ECt HR.
Silver v UK (1983) 5 EHRR 347, ECt HR.
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Storck v Germany App No 61603/00 (16 June 2005, unreported), ECt HR.
Sunday Times v UK (1979) 2 EHRR 245, [1979] ECHR 6538/74, ECt HR.
SW v UK (1996) 21 EHRR 363, ECt HR.
T v Secretary of State for the Home Dept [1996] 2 All ER 865, sub nom *T v Immigration Officer* [1996] AC 742, [1996] 2 WLR 766, HL.
Von Hannover v Germany (2004) 16 BHRC 545, ECt HR.
Vorsina v Russia App No 66801/01 (5 February 2004, unreported), ECt HR.
Westminster Bank Ltd v Minister of Housing and Local Government [1970] 1 All ER 734, [1971] AC 508, [1970] 2 WLR 645, HL.
X v Iceland App No 6825/74 (1976) 5 DR 86, E Com HR.
X v Sweden (1976) 7 DR 123, E Com HR.
X v UK App No 3868/68 (1970) 34 CD 10, E Com HR.
Zamora, The [1916] 2 AC 77, PC.
Zana v Turkey (1998) 4 BHRC 241, ECt HR.
Zdanoka v Latvia (2005) 41 EHRR 659, ECt HR.

Appeals

The claimants Kevin Gillan and Pennie Quinton appealed with permission of the House of Lords Appeal Committee given on 25 January 2005 from the decision of the Court of Appeal (Lord Woolf CJ, Buxton and Arden LJJ) on 29 July 2004 ([2004] EWCA Civ 1067, [2005] 1 All ER 970) dismissing their appeal from the decision of the Divisional Court (Brooke LJ and Maurice Kay J) on 31 October 2003 ([2003] EWHC 2545 (Admin), [2003] All ER (D) 526 (Oct)) dismissing their applications brought against the Metropolitan Police Commissioner and the Secretary of State for the Home Department for judicial review of the lawfulness of their being stopped and searched on 9 September 2003 by police officers relying on an authorisation made under s 44 of the Terrorism Act 2000 by an Assistant Commissioner of the Metropolitan Police and confirmed by the Secretary of State under s 46 of the 2000 Act. The facts are set out in the opinion of Lord Bingham of Cornhill.

Rabinder Singh QC, Rajiv Menon and *Gareth Wong* (instructed by *Liberty*) for the appellants.

John McGuinness QC and *Jonathan Hall* (instructed by the *Directorate of Legal Services, Metropolitan Police Service*) for the commissioner.

Philip Sales and *Philip Coppel* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Their Lordships took time for consideration.

8 March 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, it is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected

of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle. But it is not an absolute rule. There are, and have for some years been, statutory exceptions to it. These appeals concern an exception now found in ss 44–47 of the Terrorism Act 2000. The appellants challenge the use made of these sections and, in the last resort, the sections themselves. Since any departure from the ordinary rule calls for careful scrutiny, their challenge raises issues of general importance.

[2] The first appellant, Mr Gillan, was a PhD student studying in Sheffield when, on 9 September 2003, he came to London to protest peacefully against an arms fair being held at the ExCel Centre, Docklands, in east London. He was riding his bicycle near the centre when he was stopped by two male police officers. They searched him and his rucksack and found nothing incriminating. They gave him a copy of the Stop/Search Form 5090 which recorded that he was stopped and searched under s 44 of the 2000 Act. The search was said to be for 'Articles concerned in terrorism'. The whole incident lasted about twenty minutes.

[3] The second appellant, Ms Quinton, was an accredited freelance journalist and went to the centre on 9 September 2003 to film the protests taking place against the arms fair. She was stopped by a female police officer near the centre and asked to explain why she had appeared out of some bushes. Ms Quinton was wearing a photographer's jacket and carrying a small bag and a video camera. She explained she was a journalist and produced her press passes. The officer searched her, found nothing incriminating, and gave her a copy of form 5090. This recorded that the object and grounds of the search were 'P.O.T.A.', which was no doubt intended to be a reference to the 2000 Act. The form showed the length of the search as five minutes, but Ms Quinton estimated that it lasted for thirty.

I. THE LEGISLATION

[4] The 2000 Act, enacted in July 2000, was a substantial measure intended to overhaul, modernise and strengthen the law relating to the growing problem of terrorism. It supplemented existing criminal law statutes such as the Explosive Substances Act 1883 and the Aviation and Maritime Security Act 1990. It replaced some earlier statutes such as the Prevention of Terrorism (Temporary Provisions) Act 1989 as amended. It contained, in s 1, a far-reaching definition of terrorism:

> '(1) In this Act "terrorism" means the use or threat of action where—(a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
>
> (2) Action falls within this subsection if it—(a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
>
> (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

a (4) In this section—(a) "action" includes action outside the United Kingdom, (b) a reference to any person or to property is a reference to any person, or to property, wherever situated, (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and (d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other b than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.'

In Pt V of the 2000 Act, which contains the provisions at issue in these appeals, c 'terrorist' is defined, in s 40, to mean a person who has committed an offence under certain specified sections of the Act, or who 'is or has been concerned in the commission, preparation or instigation of acts of terrorism'.

[5] Sections 41–43 of the 2000 Act, all under the sub-heading 'Suspected terrorists', provide for arrest without warrant, the search of premises and the search of persons by a constable. In each case there must be reasonable suspicion d that the person subject to the arrest or search is a terrorist. Sections 44–47, under the sub-heading 'Power to stop and search', are not subject to that requirement. These sections provide for a three-stage procedure.

[6] The first stage is that of authorisation, which is governed by s 44. Omitting amendments made in 2001 which do not bear on the issue before the House, the e section provides:

'(1) An authorisation under this subsection authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search—(a) the vehicle; (b) the driver of the vehicle; (c) a passenger in the vehicle; (d) anything in or on the vehicle or carried by the driver or a f passenger.

(2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search—(a) the pedestrian; (b) anything carried by him.

(3) An authorisation under subsection (1) or (2) may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.

g (4) An authorisation may be given—(a) where the specified area or place is the whole or part of a police area outside Northern Ireland other than one mentioned in paragraph (b) or (c), by a police officer for the area who is of at least the rank of assistant chief constable; (b) where the specified area or place is the whole or part of the metropolitan police district, by a police h officer for the district who is of at least the rank of commander of the metropolitan police; (c) where the specified area or place is the whole or part of the City of London, by a police officer for the City who is of at least the rank of commander in the City of London police force; (d) where the specified area or place is the whole or part of Northern Ireland, by a member j of the Police Service of Northern Ireland who is of at least the rank of assistant chief constable.

(5) If an authorisation is given orally, the person giving it shall confirm it in writing as soon as is reasonably practicable.'

By s 46(1), (2), an authorisation takes effect when given and expires when it is expressed to expire, but may not be for longer than 28 days.

[7] The second stage is confirmation, governed by s 46(3)–(7). The giver of an authorisation must inform the Secretary of State as soon as is reasonably practicable. If the Secretary of State does not confirm the authorisation within 48 hours of the time when it was given, it then ceases to have effect (without invalidating anything done during the 48-hour period). When confirming an authorisation the Secretary of State may substitute an earlier, but not a later, time of expiry. He may cancel an authorisation with effect from a specified time. Where an authorisation is duly renewed, the same confirmation procedure applies. The Secretary of State may not alter the geographical coverage of an authorisation, but may no doubt withhold his confirmation if he considers the area covered to be too wide.

[8] The third stage involves the exercise of the stop and search power, which is governed by s 45. This provides:

> '(1) The power conferred by an authorisation under section 44(1) or (2)—(a) may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and (b) may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind.
>
> (2) A constable may seize and retain an article which he discovers in the course of a search by virtue of section 44(1) or (2) and which he reasonably suspects is intended to be used in connection with terrorism.
>
> (3) A constable exercising the power conferred by an authorisation may not require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves.
>
> (4) Where a constable proposes to search a person or vehicle by virtue of section 44(1) or (2) he may detain the person or vehicle for such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle is stopped.
>
> (5) Where—(a) a vehicle or pedestrian is stopped by virtue of section 44(1) or (2), and (b) the driver of the vehicle or the pedestrian applies for a written statement that the vehicle was stopped, or that he was stopped, by virtue of section 44(1) or (2), the written statement shall be provided.
>
> (6) An application under subsection (5) must be made within the period of 12 months beginning with the date on which the vehicle or pedestrian was stopped.'

These powers are additional to the other powers conferred on a constable by law (see s 114). Section 47 makes it an offence punishable by imprisonment or fine or both to fail to stop when required to do so by a constable, or wilfully to obstruct a constable in the exercise of the power conferred by an authorisation under s 44(1) or (2).

[9] In dispensing with the condition of reasonable suspicion, s 45(1)(b) departs from the ordinary and salutary rule found in provisions such as s 1 of the Police and Criminal Evidence Act 1984 (PACE), s 47 of the Firearms Act 1968, s 23 of the Misuse of Drugs Act 1971 and (as noted above) ss 41–43 of the 2000 Act itself. But such departure is not without precedent. A similar (although more specific and more time-limited) departure is found in s 60 of the Criminal Justice and Public Order Act 1994, where incidents involving serious violence are reasonably believed to be imminent. More pertinently, because addressed to the prevention of terrorism, a similar departure was made in s 13A of the 1989 Act, inserted by

s 81 of the 1994 Act just mentioned. As originally enacted, that section contained provisions very similar to those in ss 44(1), (3) and (4), 45(1) and (5) and 47(1) and (2) of the 2000 Act, but that Act did not (until amended in 1996) apply to the stopping or searching of pedestrians or make any provision for confirmation by the Secretary of State. It is also noteworthy that s 45(1)(b) is not the only provision of the 2000 Act which dispenses with the condition of reasonable suspicion: Sch 7 to the Act makes detailed provision for the stopping and questioning of those embarking and disembarking at ports and airports, without reasonable suspicion, supplemented by a power to detain for a period of up to nine hours.

II. CODE A

[10] By s 66 of PACE, as amended, the Secretary of State must issue codes of practice in connection with the exercise by police officers of statutory powers to search, detain and question. They are under a duty to have regard to any relevant provisions of a code. In criminal and civil proceedings the contents of any code must be taken into account in determining a question to which such code is relevant. Code A, in the version effective from 1 April 2003 and in force in September 2003, related to powers of stop and search. It is a public document.

[11] In paras 1.2 and 1.3 Code A provided:

> 'The intrusion on the liberty of the person stopped or searched must be brief and detention for the purposes of a search must take place at or near the location of the stop.
>
> 1.3 If these fundamental principles are not observed the use of powers to stop and search may be drawn into question. Failure to use the powers in the proper manner reduces their effectiveness. Stop and search can play an important role in the detection and prevention of crime, and using the powers fairly makes them more effective.'

Paragraphs 2.19–2.23 summarised the statutory provisions governing authorisation and confirmation. Paragraphs 2.24–2.26 continued:

> 'When an authorisation under section 44 is given, a constable in uniform may exercise the powers: (a) only for the purpose of searching for articles of a kind which could be used in connection with terrorism (see paragraph 2.25); (b) whether or not there are any grounds for suspecting the presence of such articles.
>
> 2.25 The selection of persons stopped under section 44 of Terrorism Act 2000 should reflect an objective assessment of the threat posed by the various terrorist groups active in Great Britain. The powers must not be used to stop and search for reasons unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities).
>
> 2.26 The powers under sections 43 and 44 of the Terrorism Act 2000 allow a constable to search only for articles which could be used for terrorist purposes. However, this would not prevent a search being carried out under

other powers if, in the course of exercising these powers, the officer formed reasonable grounds for suspicion.' *a*

Paragraph 3.5 provided:

'There is no power to require a person to remove any clothing in public other than an outer coat, jacket or gloves except under section 45(3) of the Terrorism Act 2000 (which empowers a constable conducting a search under section 44(1) or 44(2) of that Act to require a person to remove headgear and footwear in public) and under section 60AA of the Criminal Justice and Public Order Act 1994 (which empowers a constable to require a person to remove any item worn to conceal identity). A search in public of a person's clothing which has not been removed must be restricted to superficial examination of outer garments. This does not, however, prevent an officer from placing his or her hand inside the pockets of the outer clothing, or feeling round the inside of collars, socks and shoes if this is reasonably necessary in the circumstances to look for the object of the search or to remove and examine any item reasonably suspected to be the object of the search. For the same reasons, subject to the restrictions on the removal of headgear, a person's hair may also be searched in public (see paragraphs 3.1 and 3.3).' *b c d*

Certain steps were required by para 3.8 to be taken before the search:

'Before any search of a detained person or attended vehicle takes place the officer must take reasonable steps to give the person to be searched or in charge of the vehicle the following information: (a) that they are being detained for the purposes of a search; (b) the officer's name (except in the case of enquiries linked to the investigation of terrorism, or otherwise where the officer reasonably believes that giving his or her name might put him or her in danger, in which case a warrant or other identification number shall be given) and the name of the police station to which the officer is attached; (c) the legal search power which is being exercised; and (d) a clear explanation of: (i) the purpose of the search in terms of the article or articles for which there is a power to search; and (ii) in the case of powers requiring reasonable suspicion (see paragraph 2.1(a)), the grounds for that suspicion; or (iii) in the case of powers which do not require reasonable suspicion (see paragraph 2.1(b), and (c)), the nature of the power and of any necessary authorisation and the fact that it has been given.' *e f g*

Officers conducting a search were required by para 3.9 to be in uniform. The code continued: *h*

'3.10 Before the search takes place the officer must inform the person (or the owner or person in charge of the vehicle that is to be searched) of his or her entitlement to a copy of the record of the search, including his entitlement to a record of the search if an application is made within 12 months, if it is wholly impracticable to make a record at the time. If a record is not made at the time the person should also be told how a copy can be obtained (see section 4). The person should also be given information about police powers to stop and search and the individual's rights in these circumstances. *j*

3.11 If the person to be searched, or in charge of a vehicle to be searched, does not appear to understand what is being said, or there is any doubt about the person's ability to understand English, the officer must take reasonable steps to bring information regarding the person's rights and any relevant provisions of this Code to his or her attention. If the person is deaf or cannot understand English and is accompanied by someone, then the officer must try to establish whether that person can interpret or otherwise help the officer to give the required information.'

A record was required to be made at the time or as soon as practicable:

'4.1 An officer who has carried out a search in the exercise of any power to which this Code applies, must make a record of it at the time, unless there are exceptional circumstances which would make this wholly impracticable (e.g. in situations involving public disorder or when the officer's presence is urgently required elsewhere). If a record is not made at the time, the officer must do so as soon as practicable afterwards. There may be situations in which it is not practicable to obtain the information necessary to complete a record, but the officer should make every reasonable effort to do so.'

III. THE ISSUES

[12] The appellants' applications for judicial review were dismissed by the Queen's Bench Divisional Court (Brooke LJ and Maurice Kay J: [2003] EWHC 2545 (Admin), [2003] All ER (D) 526 (Oct)). The Court of Appeal (Lord Woolf CJ, Buxton and Arden LJJ) made no order on the appellants' claims against the commissioner and dismissed their claims against the Secretary of State (see [2004] EWCA Civ 1067, [2005] 1 All ER 970, [2005] QB 388). The appellants' case has changed shape somewhat as it has progressed through the courts. It was presented to the House under four main heads.

A *Construction*

[13] The argument centred on the expression 'expedient' in s 44(3). The appellants pointed to the Divisional Court's description of these stop and search powers as 'extraordinary' and as 'sweeping and far beyond anything ever permitted by common law powers' (see [2003] All ER (D) 526 (Oct) at [44]), a description echoed by the Court of Appeal ([2005] 1 All ER 970 at [8], [2005] QB 388), and suggested that Parliament could not have intended to sanction police intrusion into the freedom of individuals unless it was necessary that the police have such a power. Reliance was placed on the principle of legality articulated in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 411–412, 412, [2000] 2 AC 115, 130, 131. Reliance was also placed on Home Office circular 038/2004 (July 2004) (*Authorisations of Stop and Search Powers under Section 44 of the Terrorism Act*) addressed to chief officers of police, which emphasised that 'Powers should only be authorised where they are absolutely necessary to support a force's anti-terrorism operations'. The appellants submitted that s 44(3) should be interpreted as permitting an authorisation to be made only if the decision-maker has reasonable grounds for considering that the powers are necessary and suitable, in all the circumstances, for the prevention of terrorism.

[14] I would for my part reject this argument for one short and simple reason. 'Expedient' has a meaning quite distinct from 'necessary'. Parliament chose the

first word, also used in s 13A of the 1989 Act, not the second. There is no warrant for treating Parliament as having meant something which it did not say. But there are other reasons also for rejecting the argument. It is true, as already recognised, that s 45(1)(b), in dispensing with the condition of reasonable suspicion, departs from the normal rule applicable where a constable exercises a power to stop and search. One would therefore incline, within the permissible limits of interpretation, to give 'expedient' a meaning no wider than the context requires. But examination of the statutory context shows that the authorisation and exercise of the power are very closely regulated, leaving no room for the inference that Parliament did not mean what it said. There is indeed every indication that Parliament appreciated the significance of the power it was conferring but thought it an appropriate measure to protect the public against the grave risks posed by terrorism, provided the power was subject to effective constraints. The legislation embodies a series of such constraints. First, an authorisation under s 44(1) or (2) may be given only if the person giving it considers (and, it goes without saying, reasonably considers) it expedient 'for the prevention of acts of terrorism'. The authorisation must be directed to that overriding objective. Secondly, the authorisation may be given only by a very senior police officer. Thirdly, the authorisation cannot extend beyond the boundary of a police force area, and need not extend so far. Fourthly, the authorisation is limited to a period of 28 days, and need not be for so long. Fifthly, the authorisation must be reported to the Secretary of State forthwith. Sixthly, the authorisation lapses after 48 hours if not confirmed by the Secretary of State. Seventhly, the Secretary of State may abbreviate the term of an authorisation, or cancel it with effect from a specified time. Eighthly, a renewed authorisation is subject to the same confirmation procedure. Ninthly, the powers conferred on a constable by an authorisation under s 44(1) or (2) may only be exercised to search for articles of a kind which could be used in connection with terrorism. Tenthly, Parliament made provision in s 126 for reports on the working of the 2000 Act to be made to it at least once a year, which have in the event been made with commendable thoroughness, fairness and expertise by Lord Carlile of Berriew QC. Lastly, it is clear that any misuse of the power to authorise or confirm or search will expose the authorising officer, the Secretary of State or the constable, as the case may be, to corrective legal action.

[15] The principle of legality has no application in this context, since even if these sections are accepted as infringing a fundamental human right, itself a debatable proposition, they do not do so by general words but by provisions of a detailed, specific and unambiguous character. Nor are the appellants assisted by the Home Office circular. This may well represent a cautious official response to the appellants' challenge, and to the urging of Lord Carlile that these powers be sparingly used. But it cannot, even arguably, affect the construction of s 44(3). The effect of that subsection is that an authorisation may be given if, and only if, the person giving it considers it likely that these stop and search powers will be of significant practical value and utility in seeking to achieve the public end to which these sections are directed, the prevention of acts of terrorism.

B *Authorisation and confirmation*

[16] At 1.00 pm on 13 August 2003 Assistant Commissioner Veness of the Metropolitan Police (an officer of the rank required by s 44(4)(b) of the 2000 Act) gave an authorisation under s 44(4) of that Act. It covered the whole of the

Metropolitan Police District and was expressed to have effect for 28 days, until 11.59 pm on 9 September, a time some hours after the appellants were stopped and searched. It was confirmed by the Secretary of State on 14 August 2003. Such authorisations had been made continuously for successive periods since s 44 came into force on 19 February 2001, and when this authorisation expired just before midnight on 9 September it was renewed by a further authorisation, also confirmed by the Secretary of State, continuing until 6 October.

[17] The appellants' first ground of attack on the authorisation and confirmation was based on their geographical coverage. This, they said, was excessive: even if there was justification for conferring such exceptional powers in areas of central London offering the most spectacular targets for terrorist violence, there could be no need for them in the dormitory suburbs of outer London, which offered no such targets. This is not, in my opinion, an unattractive submission, but it founders on two major obstacles. First, the assistant commissioner in his witness statement, having addressed the terrorist threat to the United Kingdom in general and London in particular in August–September 2003, expressly said: '(I was particularly conscious that the number and range of particular terrorism targets in London was numerous and geographically spread throughout the entire Metropolitan Police District).' This aspect was also addressed in the witness statement of Catherine Byrne, a senior Home Office civil servant, on behalf of the Secretary of State:

> '17. In this context it is also simply impracticable to attempt to differentiate between some parts of the Metropolitan Police area and others. As I have already indicated potential targets within the London area are not limited to central London, but exist throughout the metropolitan area. Moreover, the powers under sections 44 and 45 of the 2000 Act are aimed not simply at disrupting any attempted attack "at the last possible moment" but are intended to enable police forces, where appropriate, to ensure that any attempted attack is disrupted at an early stage, and certainly well before any serious harm could be done to members of the public or to property. It must also be remembered that the powers under sections 44 and 45 of the 2000 Act are simply one element of the strategy adopted by the Metropolitan Police (in conjunction with the City of London police) to combat the risk posed by terrorists. This is a point made in the reasons supporting both authorisations made by the Commissioner. Further, the powers under sections 44 and 45 of the 2000 Act play a legitimate part in focussed intelligence gathering operations. These can be directed either for the purpose of disrupting identified risks or (equally legitimately) as a means of obtaining information that can lead to the identification of potential risks.'

There is no evidence of any kind to contradict or undermine this testimony. Secondly, as both these witness statements make clear, the assistant commissioner and the Secretary of State independently paid attention to secret security intelligence when making the judgments which they respectively did. An offer to explore this evidence before the Divisional Court hearing, subject to procedural safeguards, was made to the appellants but not taken up. In the result, therefore, the House has before it what appear to be considered and informed evaluations of the terrorist threat on one side and effectively nothing save a measure of scepticism on the other. There is no basis on which the respondents' evidence can be rejected. This is not a question of deference but of what in

A v Secretary of State for the Home Dept, X v Secretary of State for the Home Dept [2004] UKHL 56 at [29], [2005] 3 All ER 169 at [29], [2005] 2 AC 68, was called 'relative institutional competence'. a

[18] The appellants' second, and main, ground of attack was directed to the succession of authorisations which had had effect throughout the Metropolitan Police District since February 2001, continuing until September 2003. It was, they suggested, one thing to authorise the exercise of an exceptional power to b counter a particular and specific threat, but quite another to authorise what was, in effect, a continuous ban throughout the London area. Again this is not an unattractive submission. One can imagine that an authorisation renewed month after month might become the product of a routine bureaucratic exercise and not of the informed consideration which ss 44 and 46 clearly require. But all the c authorisations and confirmations relevant to these appeals conformed with the statutory limits on duration and area. Renewal was expressly authorised by s 46(7). The authorisations and confirmations complied with the letter of the statute. The evidence of the Assistant Commissioner and Catherine Byrne does not support, and indeed contradicts, the inference of a routine bureaucratic exercise. It may well be that Parliament, legislating before the events of d September 2001, did not envisage a continuous succession of authorisations. But it clearly intended that the s 44 powers should be available to be exercised when a terrorist threat was apprehended which such exercise would help to address, and the pattern of renewals which developed up to September 2003 (it is understood the pattern has since changed) was itself a product of Parliament's principled refusal to confer these exceptional stop and search powers on a e continuing, countrywide basis. Reporting on the operation of the 2000 Act during the years 2002 and 2003, Lord Carlile (para 86) found that ss 44 and 45 remained necessary and proportional to the continuing and serious risk of terrorism, and regarded London as 'a special case, having vulnerable assets and relevant residential pockets in almost every borough'. f

[19] There is no material before the House to justify the conclusion that the authorisation of 13 August and the confirmation of 14 August 2003, or either of them, were unlawful.

C *The Human Rights Act 1998 and the European Convention* g

[20] The appellants addressed argument on arts 5, 8, 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). It is necessary to consider these articles separately.

h

Article 5

[21] So far as relevant to this appeal, art 5 provides:

j

> *'Right to liberty and security*
>
> 1. Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law . . . (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law . . .'

It is unnecessary to recite the other sub-heads of exception: they provide an exhaustive list of the cases in which, in accordance with a procedure prescribed by law, a person may be deprived of his liberty (*Ireland v UK* (1978) 2 EHRR 25 at 87 (para 194)), but none of the other exceptions is capable of applying here. Reference must, however, be made to art 2 of the Fourth Protocol to the convention (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969). This protocol has not been ratified by the United Kingdom, but has been relied on by the European court when considering what amounts to a deprivation of liberty under art 5. Article 2 of the Fourth Protocol is entitled 'Freedom of Movement' and provides in para 1: 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement . . .'

[22] It is clear that the giving of an authorisation by a senior officer and its confirmation by the Secretary of State cannot, of themselves, infringe the convention rights of anyone. Thus the threshold question is whether, if a person is stopped and searched in accordance with the procedure prescribed by ss 44–45 and Code A, he is 'deprived of his liberty' within the autonomous meaning of that expression in art 5(1). The appellants contend that he is so deprived, even if only for a short time, since the police officer has the power to require compliance with the procedure; a member of the public will not feel that his compliance is voluntary; the officer has a power to detain, which he may or may not exercise (see s 45(4)); reasonable force may be used to enforce compliance (see s 114(2)); and non-compliance is criminally punishable. Thus a member of the public has no effective choice but to submit, for as long as the procedure takes. The respondents for their part do not, I think, contend that compliance with the procedure is in any meaningful sense voluntary; but they submit that viewed objectively, and in the absence of special circumstances, the procedure involves a temporary restriction of movement and not anything which can sensibly be called a deprivation of liberty.

[23] The House was referred to a mass of authority relied on to show that one or other of these approaches should be preferred. There is, however, no European decision on facts closely analogous with the present, and it is not in my view helpful to consider whether a stop and search under s 45 is more closely analogous with, for instance, the case of a man forcibly compelled to submit to a blood test (*X v Austria* (1979) 18 DR 154: held, deprivation of liberty) or with that of a ten-year-old girl kept at a police station for two hours for questioning, for part of the time in an unlocked cell (*X v Germany* (1981) 24 DR 158: held, no deprivation of liberty). The Strasbourg jurisprudence is closely focused on the facts of particular cases, and this makes it perilous to transpose the outcome of one case to another where the facts are different. Still more perilous is it, in my opinion, to seek to transpose the outcome of Canadian cases decided under a significantly different legislative regime.

[24] The task of the House is eased by the substantial agreement of the parties on the correct approach in principle. Perhaps the clearest exposition of principle by the Strasbourg court is to be found in *Guzzardi v Italy* (1980) 3 EHRR 333, an exposition repeatedly cited in later cases. The case concerned an applicant who, pending his criminal trial, was subject for over 16 months to a form of internal exile on an island off the coast of Sardinia. He was specially supervised in an area of 2·5 square kilometres. He was held to have suffered a deprivation of his liberty. The Commission reached this conclusion (at 362 (para 90)) because of the small area in which the applicant had been confined, the almost permanent supervision

to which he had been subject, the all but complete impossibility of his making social contacts and the length of his enforced stay. The Italian government challenged this analysis on a number of grounds (para 91). The court observed:

> '92. The Court recalls that in proclaiming the "right to liberty", paragraph 1 of Article 5 is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 which has not been ratified by Italy. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.
>
> 93. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends.'

The court continued (at 364):

> '95. The Government's reasoning (see para 91 above) is not without weight. It demonstrates very clearly the extent of the difference between the applicant's treatment on Asinara and classic detention in prison or strict arrest imposed on a serviceman. Deprivation of liberty may, however, take numerous other forms. Their variety is being increased by developments in legal standards and in attitudes; and the Convention is to be interpreted in the light of the notions currently prevailing in democratic States.'

The court went on to review the special features of the applicant's situation, and held:

> 'It is admittedly not possible to speak of "deprivation of liberty" on the strength of any one of these factors taken individually, but cumulatively and in combination they certainly raise an issue of categorisation from the viewpoint of Article 5. In certain respects the treatment complained of resembles detention in an "open prison" or committal to a disciplinary unit.'

[25] It is accordingly clear, as was held in *HL v UK* (2004) 81 BMLR 131 at 162 (para 89), that—

> 'in order to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question.'

I would accept that when a person is stopped and searched under ss 44–45 the procedure has the features on which the appellants rely. On the other hand, the procedure will ordinarily be relatively brief. The person stopped will not be arrested, handcuffed, confined or removed to any different place. I do not think,

in the absence of special circumstances, such a person should be regarded as being detained in the sense of confined or kept in custody, but more properly of being detained in the sense of kept from proceeding or kept waiting. There is no deprivation of liberty. That was regarded by the Court of Appeal as 'the better view' ([2005] 1 All ER 970 at [46], [2005] QB 388), and I agree.

[26] If, however, a stop and search carried out in accordance with ss 44–45 and Code A, in the absence of special circumstances, does involve a deprivation of liberty, it is necessary to consider (as the Court of Appeal did) (a) whether that deprivation is in accordance with the law and, if so, (b) whether it is a lawful detention in order to secure the fulfilment of an obligation prescribed by law. Whether the deprivation is in accordance with the law and whether the relevant obligation is prescribed by law are questions separately considered at [31]–[35], below. If not, and if there is a deprivation of liberty, the appellants must succeed, for the respondents cannot rely on the exception. But if, for purposes of the argument at this stage, compliance with the law be assumed, the respondents in my opinion bring themselves within the exception, for the public are in my opinion subject to a clear obligation not to obstruct a constable exercising a lawful power to stop and search for articles which could be used for terrorism and any detention is in order to secure effective fulfilment of that obligation.

Article 8

[27] Article 8(1) provides that 'Everyone has the right to respect for his private and family life, his home and his correspondence'. By art 8(2):

> 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety . . . for the prevention of disorder or crime . . . or for the protection of the rights and freedoms of others.'

[28] The appellants contended that exercise of the s 45 stop and search power necessarily involves an interference with the exercise of the art 8(1) right, and therefore had to be justified under art 8(2). The respondents did not accept that there would necessarily be such interference, but accepted that there might, as where (for instance) an officer in the course of a search perused an address book, or diary, or correspondence. I have no doubt but that the respondents' concession is rightly made. I am, however, doubtful whether an ordinary superficial search of the person can be said to show a lack of respect for private life. It is true that 'private life' has been generously construed to embrace wide rights to personal autonomy. But it is clear convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the convention, which is, after all, concerned with human rights and fundamental freedoms, and I incline to the view that an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach that level.

[29] If, again, the lawfulness of the search is assumed at this stage, there can be little question that it is directed to objects recognised by art 8(2). The search must still be necessary in a democratic society, and so proportionate. But if the exercise of the power is duly authorised and confirmed, and if the power is exercised for the only purpose for which it may permissibly be exercised (ie to search for articles of a kind which could be used in connection with terrorism: s 45(1)(a)),

it would in my opinion be impossible to regard a proper exercise of the power, in accordance with Code A, as other than proportionate when seeking to counter the great danger of terrorism.

Articles 10 and 11

[30] The power to stop and search under ss 44–45 may, if misused, infringe the convention rights to free expression and free assembly protected by arts 10 and 11, as would be the case, for example, if the power were used to silence a heckler at a political meeting. I find it hard to conceive of circumstances in which the power, properly exercised in accordance with the statute and Code A, could be held to restrict those rights in a way which infringed either of those articles. But if it did, and subject always to compliance with the 'prescribed by law' condition discussed below, I would expect the restriction to fall within the heads of justification provided in arts 10(2) and 11(2).

D *Lawfulness*

[31] The expressions 'prescribed by law' in arts 5(1), 5(1)(b), 10(2) and 11(2) and 'in accordance with the law' in art 8(2) are to be understood as bearing the same meaning. What is that meaning?

[32] The appellants relied on a number of authorities such as *Malone v UK* (1984) 7 EHRR 14 at 39–41 (paras 66–68), *Huvig v France* (1990) 12 EHRR 528, *Hafsteinsdóttir v Iceland* App No 40905/98 (8 June 2004, unreported) (paras 51, 55, 56) and *Enhorn v Sweden* (2005) 19 BHRC 222 at 237–238 (para 36), to submit that the object of this requirement is to give protection against arbitrary interference by public authorities; that 'law' includes written and unwritten domestic law, but must be more than mere administrative practice; that the law must be accessible, foreseeable and compatible with the rule of law, giving an adequate indication of the circumstances in which a power may be exercised and thereby enabling members of the public to regulate their conduct and foresee the consequences of their actions; that the scope of any discretion conferred on the executive, which may not be unfettered, must be defined with such precision, appropriate to the subject matter, as to make clear the conditions in which a power may be exercised; and that there must be legal safeguards against abuse. These requirements, the appellants argued, were not met in the present case. They acknowledged, of course, that ss 44–47 of the 2000 Act were adequately accessible to the public. But they contended that 'law' in this context meant not only the 2000 Act but also the authorisation and confirmation, and these were not accessible. Thus a member of the public would know that the s 44 power to stop and search could be conferred on the police, but would not know at any given time or in any given place whether it had been. He could not know whether, if he went to Battersea Park, he would be liable to be stopped and searched. Nor, if stopped and searched, could he know whether the constable was authorised to stop and search him. When, unknown to a member of the public, the power had been conferred on a constable, the constable's discretion to stop and search was broad and ill-defined, requiring no grounds of suspicion and constrained only by the condition that the power could be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism.

[33] The respondents did not, I think, challenge the principles advanced by the appellants, which are indeed to be found, with minor differences of expression, in many decisions of the Strasbourg court. But they strongly challenged the

appellants' application of those principles to the present facts. They did not accept that the authorisation and confirmation were 'law' in this context. They pointed to the court's acceptance in *Malone v UK* (1984) 7 EHRR 14 at 40–41 (para 67), a case concerned with the covert interception of telephonic communications, that—

> 'the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly.'

The court had recognised that in some fields legal rules could not be laid down with total precision (*Bronda v Italy* (1998) 33 EHRR 81 at 100–101 (para 54)) and that a measure of vagueness was inevitable if excessive rigidity was to be avoided (see *Kuijper v Netherlands* App No 64848/01 (3 March 2005, unreported)). There were, moreover, strong reasons for not publishing the details of authorisations, which would by implication reveal those places where such measures had not been put in place, thereby identifying vulnerable targets, and could undermine the ability of the police to use such powers effectively in cases where they suspected that terrorists might be operating and wished to conduct random stopping and searching in a particular area in the hope of catching them without giving them warning in advance. The respondents contended that the constable's discretion was closely constrained by the sole purpose for which the power could be properly exercised. An improper authorisation and confirmation were susceptible to challenge by judicial review. An improper stop and search would expose the constable to claims in tort for wrongful imprisonment, trespass to the person and goods, and breach of convention rights.

[34] The lawfulness requirement in the convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly-accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a convention right must meet if a violation is to be avoided.

[35] The stop and search regime under review does in my opinion meet that test. The 2000 Act informs the public that these powers are, if duly authorised and confirmed, available. It defines and limits the powers with considerable precision. Code A, a public document, describes the procedure in detail. The 2000 Act and the code do not require the fact or the details of any authorisation to be publicised in any way, even retrospectively, but I doubt if they are to be regarded as 'law' rather than as a procedure for bringing the law into potential effect. In any event, it would stultify a potentially valuable source of public protection to require notice of an authorisation or confirmation to be publicised prospectively. The efficacy of a measure such as this will be gravely weakened if potential offenders are alerted in advance. Anyone stopped and

searched must be told, by the constable, all he needs to know. In exercising the power the constable is not free to act arbitrarily, and will be open to civil suit if he does. It is true that he need have no suspicion before stopping and searching a member of the public. This cannot, realistically, be interpreted as a warrant to stop and search people who are obviously not terrorist suspects, which would be futile and time-wasting. It is to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion. It is not suggested that the constables in these cases exercised their powers in a discriminatory manner (an impossible contention on the facts), and I prefer to say nothing on the subject of discrimination.

IV. THE EXERCISE OF THE POWERS IN THIS CASE

[36] In summarising the facts at [2] and [3], above, I have deliberately omitted reference to matters mentioned by the respective appellants in their witness statements which, if accepted, might show that the stop and search powers were improperly exercised in their cases. This is an aspect which, because of the course these proceedings have taken, has not been explored in sworn evidence by the appellants, or tested in cross-examination, or made the subject of any evidence by the officers who conducted the searches. It is a matter which the appellants may, if so advised, pursue in county court proceedings which they have already issued. It is a matter which the House cannot fairly resolve at this stage in these proceedings. I therefore express no opinion upon it.

[37] I would accordingly dismiss both appeals and invite the parties to make written submissions on costs within 14 days.

LORD HOPE OF CRAIGHEAD.

[38] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for the same reasons I too would dismiss both appeals. I should like however to add a few words on the two aspects of the case that seem to me to be the most troublesome.

[39] They both relate to the discrimination issue to which my noble and learned friend Lord Brown of Eaton-under-Heywood very properly draws attention in his speech. How does the fact that it is likely to be difficult in practice to detect discriminatory use of the power square with the principle of legal certainty that requires that the use of such powers must be in accordance with the law if they are to be compatible with the convention rights (see the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998))? And how in practice is discriminatory use of the power to be prevented, given the nature of the terrorist threats that it is designed for? I should like to take these questions in the reverse order, because the answer that I would give to the first question has a close bearing on the problem that is raised by the second.

DISCRIMINATION

[40] The extent of the stop and search power in s 45 of the Terrorism Act 2000 is defined in sub-s (1) of that section. This subsection provides (a) that it may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and (b) that it may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind.

It is combined with a power to detain the person or vehicle that the constable proposes to search, but only for such time as is reasonably required to permit the search to be carried out at or near the place where the person is stopped (see s 45(4)). The power may only be exercised in an area or at a place specified in an authorisation given under s 44(1) or (2), and an authorisation may be given only if the person giving it considers it expedient for the prevention of acts of terrorism. An authorisation must be confirmed by the Secretary of State within 48 hours, failing which it ceases to have effect (see s 46(4)).

[41] One has only to observe the huge numbers of people moving every day through this country's transport network to appreciate the fact that it would be wholly counter-productive for the police to be compelled to exercise the s 44 power in these circumstances on a basis that was a purely random one. Those they might wish to stop for very good reasons would slip through the net as the process of random selection was being conducted. A brief study of the selection process would be enough to guide the terrorist as to how to organise his movements so that he could remain undetected. A system that is to be effective has to be flexible. Precise rules cannot be laid down in advance. Much has to be left to the discretion of the individual police officer.

[42] Common sense tells us that the nature of the terrorist threat will play a large part in the selection process. Typically terrorist acts are planned, organised and perpetrated by people acting together to promote a common cause rather than by individuals. They will have a common agenda. They are likely to be linked to sectors of the community that, because of their racial, ethnic or geographical origins, are readily identifiable. That was true of sectarian violence during the troubles in Northern Ireland, as Simon Brown LJ pointed out in *European Roma Rights Centre v Immigration Officer at Prague Airport* [2003] EWCA Civ 666 at [86], [2003] 4 All ER 247 at [86], sub nom *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport*. In that passage he was contemplating the use of stop and search powers following a terrorist outrage. It is certainly true today, as the current wave of international terrorism is linked to groups that have an Islamic fundamentalist background.

[43] What then if it is found that the police are using the s 44 power more frequently to stop Asians than other racial groups in the community? Does this amount to direct discrimination contrary to domestic law, as Mr Rabinder Singh QC suggested from time to time in the course of his argument? The issue does not arise directly in this case, of course, because neither of the appellants is of Asian origin. But it cannot be overlooked, especially in view of the concern that the House expressed in the *European Roma Rights* case about the fact that all Roma applicants were being routinely treated, simply because they were Roma, with more suspicion and subjected to more intensive and intrusive questioning than non-Roma. As Baroness Hale of Richmond said (at [97]), the setting up of an operation to meet the challenge of dealing with an influx of asylum seekers from one comparatively easily identified racial or ethnic group required enormous care if it was to be done without discrimination. The evidence showed that the operation that was being conducted in that case was inherently and systematically discriminatory and unlawful.

[44] The decision in the *European Roma Rights Centre* case reminds us that if a person discriminates on racial grounds the reason why he does so is irrelevant. The use of the s 44 power on racial grounds is not exempt [from] being treated as discriminatory simply because of the purpose for which it is being exercised. It is

no answer to say that the time and place for the exercise of the s 44 power was selected in response to the threat of a terrorist outrage, any more than it was to say that the procedures that were being operated at Prague airport were designed to deal with an influx through that airport of asylum seekers of Roma origin. Nor is it an answer to say that a decision as to when and where to exercise the power was based on common sense, as Lord Brown points out (at [88], below). The whole point of making it unlawful for a public authority to discriminate on racial grounds is that impressions about the behaviour of some individuals of a racial group may not be true of the group as a whole. Discrimination on racial grounds is unlawful whether or not, in any given case, the assumptions on which it was based turn out to be justified.

[45] Where then does this leave the police officer when he is deciding whom to stop and search in the exercise of the s 44 power? The key must surely lie in the point which Baroness Hale made in her speech in the *European Roma Rights Centre* case (at [82]), that the object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group. That was the trap into which the immigration officers fell at Prague airport, as the evidence showed that all Roma were being treated in the same way simply because they were Roma. So a police officer who stops and searches a person who appears to be Asian in the exercise of the s 44 power must have other, further, good reasons for doing so. It cannot be stressed too strongly that the mere fact that the person appears to be of Asian origin is not a legitimate reason for its exercise.

[46] Times and places will vary, of course, and the numbers and mixture of people of different races and ethnic backgrounds that one sees using buses, railways and the London Underground may not be typical of the places where authorisations are given throughout the country. But a decision to use the s 44 power will in practice always be based on more than the mere fact of a person's racial or ethnic origin if it is to be used properly and effectively, especially in places where people are present in large numbers. The selection process will be more precisely targeted, even if in the end it is based more on a hunch than on something that can be precisely articulated or identified. Age, behaviour and general appearance other than that relating to the person's racial or ethnic background will have a part to play in suggesting that a particular person might possibly have in his possession an article of a kind which could be used in connection with terrorism. An appearance which suggests that the person is of Asian origin may attract the constable's attention in the first place. But a further selection process will have to be undertaken, perhaps on the spur of the moment otherwise the opportunity will be lost, before the power is exercised. It is this further selection process that makes the difference between what is inherently discriminatory and what is not.

[47] On balance, therefore, I think that it is not inevitable that stopping persons who are of Asian origin in the exercise of the s 44 power will be found to be discriminatory. But the risk that it will be employed in a discriminatory fashion cannot be discounted entirely. No more can the risk that the power will be used on occasions, as the appellants claim but has yet to be established by evidence, for a purpose that has nothing to do with the prevention of acts of terrorism. These thoughts lead to the problem of satisfying the test of legal certainty. This must be done if the use of the s 44 power is not to be open to the objection that it is, by its very nature, arbitrary.

LEGAL CERTAINTY

[48] The sight of police officers equipped with bundles of the Stop/Search Form 5090 which is used to record the fact that a person or vehicle was stopped by virtue of s 44(1) or (2) has become familiar in Central London since the suicide bombings that were perpetrated on 7 July 2005 and the attempts to repeat the attacks two weeks later. They can be seen inside the barriers at stations on the London Underground, watching people as they come through the barriers and occasionally stopping someone who attracts their attention and searching them. Most people who become aware of the police presence are there because they want to use the transport system. The travelling public are reassured by what they see the police doing at the barriers. They are in the front line of those who would be at risk if there were to be another terrorist outrage. But those who are singled out, stopped and searched in this way may well see things differently. They may find the process inconvenient, intrusive and irritating. As it takes place in public, they may well also find it embarrassing. This is likely to be the case if they believe, contrary to the facts, that they are being discriminated against on grounds of race. These features of the process give rise to this question: are the limits on the use of the power sufficient to answer a challenge that the convention rights of the person who is searched are being violated because its use is unforeseeable and arbitrary?

[49] From that person's perspective the situation is one where all the cards are in the hands of the police. It is they, and not the general public, who know that an authorisation is in force and the area that it relates to. It is they who decide when and where within that area they should exercise the power that has been given to them. It is they who decide which persons or which vehicles should be stopped and searched. Section 44(1) and (2) makes it clear that the power may be exercised only by a constable in uniform. Section 45(1)(a) provides that the power may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism. But no criterion is laid down in the statute or in any published document as to the precise state of mind that the constable must be in before the power can be exercised.

[50] Section 45(1)(b) provides that the power may be exercised whether or not the constable has grounds for suspecting the presence of articles of a kind which could be used in connection with terrorism. The definition of the word 'terrorism' for the purposes of the 2000 Act is a wide one, and the matter is left to the judgment of each individual police officer. The first indication that members of the public are likely to get that they are liable to be stopped and searched is when the order to stop is given. Those who are well informed may get some indication as to what is afoot when they see the police with bundles of forms in their hands looking in their direction. But for most people the order to stop will come as a surprise. Unless they are in possession of articles of the kind that the constable is entitled to search for, they may well wonder why they have been singled out for the treatment that they are being subjected to.

[51] There is, of course, a strong argument the other way. If the stop and search procedure is to be effective in detecting and preventing those who are planning to perpetrate acts of terrorism it has to be like this. Advertising the time when and the places where this is to be done helps the terrorist. It impedes the work of the security services. Sophisticated methods of disguise and concealment may be used where warnings are given. Those involved in terrorism can be expected to take full advantage of any published information as to when and

where the power is likely to be exercised. So the police need to be free to decide when and where the use of the procedure is to be authorised and whom they should stop on the spur of the moment if their actions are to be a step ahead of the terrorist. Must this system be held to be unlawful under convention law, as Mr Rabinder Singh QC submitted it should, on the ground that it is arbitrary?

[52] The question whether the process is in accordance with the law for the purposes of the convention is not answered merely by a finding that it is lawful under domestic law. That is only the first stage in the analysis (see *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2000] 4 All ER 15 at 29–30, [2001] 2 AC 19 at 38). There are two further questions that must be answered. One is whether, assuming that the process is lawful under domestic law, it nevertheless fails to comply with the general requirements of the convention as to the quality of the law in question. These requirements are based on the principle that any restrictions on the rights and freedoms of the individual must be prescribed by law in a way that is sufficiently accessible and sufficiently precise to enable the individual to foresee the consequences. The other is whether, assuming again that the two previous criteria are met, the process is nevertheless open to criticism on the ground that it is arbitrary. The appellants submit that the criterion of foreseeability is not met because the powers are widely drawn, and because the public does not have access to the authorisations which are not published. They also submit that, because it is so difficult to detect an improper or discriminatory use of it, the power that is given to the constable is arbitrary.

[53] The criterion of lawfulness can be examined in four stages. First there is the legislation. Next, there is the general guidance that is given by Code A as to how the powers under s 44 are to be exercised. Then there are the authorisations themselves, whose issue is a necessary preliminary to the exercise of the s 44 power and which the Secretary of State must confirm. Finally, and crucially, there is the exercise of the power by the police officers who are authorised to make use of it.

[54] Guidance as to how the question should be approached is provided by the Strasbourg authorities. The European court recognised in *Kuijper v Netherlands* App No 64848/01 (3 March 2005, unreported) pp 13–14, that legislation may have to avoid excessive rigidity if it is to keep pace with changing circumstances. It may be couched in terms which, because they are to a greater or lesser extent vague, must be left to interpretation and application to the facts by the courts. In *Huvig v France* (1990) 12 EHRR 528 at 544–545 (paras 33–34), the court also recognised the value, in the context of telephone tapping, of regulatory control, including supervision by the courts if need be, even though it was found to be lacking in that case in the absence of legislation or case law. In *Malone v UK* (1984) 7 EHRR 14 at 40–41 (para 67), the court said that the requirement of foreseeability did not mean that an individual had to be able to foresee when his communications were likely to be intercepted by the authorities. Nevertheless the law had to be sufficiently clear in its terms to give citizens an adequate indication of the circumstances in which and the conditions on which the authorities were empowered to resort to this.

[55] I think that one can draw together the guidance to be found in these authorities, and in the others to which Lord Bingham has referred, in this way. The use of the s 44 power has to be seen in the context of the legislation that provides for it. The need for its use at any given time and in any given place to be authorised, and for the authorisation to be confirmed within 48 hours,

provides a background of law that is readily accessible to the citizen. It provides a system of regulatory control over the exercise of the power which enables the person who is stopped and searched, if he wishes, to test its legality in the courts. In that event the authorisation and the confirmation of it will of necessity, to enable the law to be tested properly, become relevant evidence. The guidance in para 2.25 of Code A warns the constable that the power is to be used only for reasons connected with terrorism, and that particular care must be taken not to discriminate against members of minority ethnic groups when it is being exercised. It is no more precise than that. But it serves as a reminder that there is a structure of law within which the power must be exercised. A constable who acts within these limits is not exercising the s 44 power arbitrarily.

[56] As the concluding words of para 67 of the decision in *Malone v UK* (1984) 7 EHRR 14 at 40–41 indicate, the sufficiency of these measures must be balanced against the nature and degree of the interference with the citizen's convention rights which is likely to result from the exercise of the power that has been given to the public authority. The things that a constable can do when exercising the s 44 power are limited by the provisions of s 45(3) and (4). He may not require the person to remove any clothing in public except that which is specified, and the person may be detained only for such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle has been stopped. The extent of the intrusion is not very great given the obvious importance of the purpose for which it is being resorted to. In my opinion the structure of law within which it is to be exercised is sufficient in all the circumstances to meet the requirement of legality.

[57] It should be noted, of course, that the best safeguard against the abuse of the power in practice is likely to be found in the training, supervision and discipline of the constables who are to be entrusted with its exercise. Public confidence in the police and good relations with those who belong to the ethnic minorities are of the highest importance when extraordinary powers of the kind that are under scrutiny in this case are being exercised. The law will provide remedies if the power to stop and search is improperly exercised. But these are remedies of last resort. Prevention of any abuse of the power in the first place, and a tighter control over its use from the top, must be the first priority.

LORD SCOTT OF FOSCOTE.

[58] My Lords, I have had the advantage of reading in advance the opinion of my noble and learned friend Lord Bingham of Cornhill and am in full agreement with his reasons for concluding that these appeals should be dismissed. I want to add just a few words of my own.

[59] Lord Bingham, at [14] and [15], above, has rejected the appellants' contention that the adjective 'expedient' in s 44(3) of the Terrorism Act 2000 should be construed as meaning 'necessary and suitable in all the circumstances'. This construction, say the appellants, is required in order to comply with the principle of legality. The stop and search powers of the police where a s 44 'authorisation' is in place are exercisable without the need for a prior reasonable suspicion that the object of the search is engaged in any wrongful conduct and, therefore, interfere with 'fundamental notions of liberty and privacy of the individual' (see para 40 of the appellants' case). Parliament, it is argued, cannot have intended the general words of subsection (3) to permit the infringement of fundamental common law liberties. 'Expedient' should be read as 'necessary'.

[60] My Lords, I would reject this argument for all the reasons given by Lord Bingham and would add that the adjective 'expedient' was deployed in Pt V of the 2000 Act ('Counter-Terrorist Powers') not only in s 44(3) but also in s 48(2). In s 44(3) the adjective was used to describe the only purpose for which stop and search authorisations could be given. In s 48(2) the adjective was used to describe the only purpose for which an authorisation enabling a police officer 'to prohibit or restrict the parking of vehicles on a [particular] road specified in the authorisation' could be given. A s 48 parking authorisation may only be given 'if the person giving it considers it expedient for the prevention of acts of terrorism'. It is not remotely arguable that a power to impose parking restrictions interferes with fundamental notions of liberty or privacy; nor can it be supposed that the word 'expedient' can have a stricter construction in s 44(3) than it has in s 48(2). Parliament's use of the same language in s 48(2) as in s 44(3) reduces greatly, in my opinion, the weight of the appellants' argument on construction. I am therefore in respectful agreement with what Lord Bingham has said at [15], above and, in particular, with the last sentence of that paragraph.

[61] The appellants, in challenging the validity of the stop and search authorisation in reliance on which the police officers stopped and searched them, contend that the authorisation, and its confirmation by the Home Secretary, constituted an excessive and disproportionate response to the threat of terrorist activity in London at that time. They say that the authorisation and confirmation went outside the boundaries of a reasonable response to that threat.

[62] The problem, to my mind, with a challenge of this character is that an assessment of the reasonableness of the response requires an assessment of the degree of seriousness of the terrorist threat to which the authorisation was a response. This latter assessment will in most cases require some knowledge of the intelligence material on which the police and the Home Secretary relied when making their own assessment of that threat and of what should be done in response to it. The appellants have not contended that the giving of a s 44 authorisation could never be a proportionate response to a threat of terrorist activity. They accept, and indeed contend, that a balance must be struck between, on the one hand, the degree of interference with ordinary liberties brought about by police exercising their s 44 stop and search powers and, on the other hand, the degree of risk to the public posed by the terrorist threat as it appears from the available intelligence material.

[63] The appellants say that when this balance is struck the giving of the authorisation can be judged to be a disproportionate response. I disagree for two reasons. First, the interference with the fundamental rights of individuals brought about by a police power to stop and search without the need for reasonable suspicion of wrongdoing is not, in my opinion, of overwhelming weight. It is not an interference of the same order as, for example, an indefinite detention on undisclosed grounds. A stop and search will often be very annoying to the person concerned, and may sometimes produce a feeling of humiliation or a perception of victimisation or discrimination; but any invasion of privacy will be shortlived and any deprivation of liberty will usually be no more than theoretical. These are the matters that must go into one side of the scale when the balance is struck. What goes into the other side of the scale must depend on the intelligence material that has been relied on as justifying, or requiring, the giving of the authorisation. I would not, speaking for myself, expect a challenge to the validity of a s 44 stop and search authorisation, based on the alleged

disproportionate nature of that response to a perceived threat of terrorism, to be able to succeed without the court having had an opportunity to review the intelligence material that had been relied on.

[64] In the present case the Divisional Court did not have that opportunity (see [2003] EWHC 2545 (Admin), [2003] All ER (D) 526 (Oct)). It is common ground that prior to the Divisional Court hearing the Home Secretary offered the appellants a procedure (involving the use of a special advocate) whereby the Divisional Court could review in closed session the underlying intelligence material on the basis of which the Home Secretary had confirmed the authorisation. But the offer was not taken up and the relevant evidence, given by Catherine Byrne, a senior civil servant in the Home Office, was of an unspecific character (see paras 11–18 of her witness statement). In that state of the evidence the Divisional Court could not reasonably have concluded that the authorisation was a disproportionate response to the threat of terrorist activity in London appearing from the available intelligence material. Nor could the Court of Appeal and nor, in my opinion, can your Lordships. What the position would have been had the underlying intelligence material been reviewed it is impossible to tell.

[65] I would therefore reject the challenge to the validity of the authorisation and its confirmation by the Home Secretary.

[66] The appellants say also that, even if the authorisation and its confirmation were valid, the stopping and searching to which each of them was subjected was unlawful. Section 45 of the Act makes clear that the exercise of the s 44 stop and search power 'may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism' (see sub-s (1)(a)). It follows that if the s 44 stop and search power is used for some other purpose, its use is unlawful. Each of the appellants has formed the view that he/she was stopped and searched for public order reasons not connected with terrorism but with protests and disturbances that the police apprehended might occur at the Docklands arms fair. Each of them has commenced county court proceedings claiming damages in tort. These contentions raise issues of fact which can be resolved in the county court proceedings but cannot assist the appellants on this appeal.

[67] Having had the advantage of reading in advance the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood I would like to associate myself with his comments about random searches. Whether a stop and search is random depends on whether the question is asked from the point of view of the searcher or that of the searched. From the point of view of the person searched the police officer's choice of him or her to be subjected to a search may seem entirely random, or may seem absurd or discriminatory or vindictive. But from the point of view of the police officer, it is difficult to see how the choice could ever be a random one. A policy of stopping and searching every tenth person is not a random search; it is a search that follows a pattern. The pattern would allow the police officer no room for judgment as to who to stop and search. It would therefore be a pattern designed to minimise the chances of achieving the statutory purpose of combating terrorism. In the real world a police officer will always have some reason for selecting a particular individual as a person to be stopped and searched. The reason does not have to be based on grounds for suspicion (see s 45(1)(b)). It may be based, as Lord Brown has said, on no more than a professional's intuition. Or it may be because the person

selected conforms to some extent in the mind of the police officer to a stereotype of a person who might possibly be in possession of articles 'which could be used in connection with terrorism' (see s 45(1)(a)).

[68] Lord Brown has raised the question whether an exercise of the s 44 power more frequently with regard to persons of Asian appearance than to others can be reconciled with the requirements of domestic discrimination law. This issue was not addressed by counsel but, speaking for myself, I do not think that domestic discrimination law would invalidate what otherwise would be a lawful use of stop and search powers conferred by the 2000 Act. If and to the extent that a use of stop and search powers for the statutory purpose expressed in s 45(1) might require some degree of stereotyping in the selection of the persons to be stopped and searched and arguably, therefore, some discrimination, that use would, I think, be validated by the statutory authority of the 2000 Act (see ss 41(1)(a) and 42 of the Race Relations Act 1976, as amended). I do not, therefore, share the concerns of my noble and learned friend about the implications of *European Roma Rights Centre v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 1 All ER 527, sub nom *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1.

[69] I would dismiss these appeals.

LORD WALKER OF GESTINGTHORPE.

[70] My Lords, I am in full agreement with the opinion of my noble and learned friend Lord Bingham of Cornhill, which I have had the privilege of reading in draft. For the reasons given by Lord Bingham I would dismiss these appeals.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[71] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. So completely do I agree with it that much of what I had intended to say now seems superfluous. The appeal does, however, raise points of real constitutional importance and on one particular aspect of it I would still like to express certain thoughts of my own.

[72] Sections 44 and 45 of the Terrorism Act 2000 allow police officers in certain circumstances to stop and search members of the public innocently going about their business (whether in a vehicle or on foot) without the officer having to have any grounds whatever for suspecting the person of the least wrongdoing. Those two sections, together with the other relevant legislation, are to be found in Lord Bingham's opinion and it is quite unnecessary to set them out afresh.

[73] Put shortly, these provisions enable an authorisation to be given (if considered expedient for the prevention of acts of terrorism) which in turn confers upon police officers the power to stop and search vehicles, their drivers, passengers and contents, and also pedestrians. The power may be exercised only to search for articles of a kind useful in connection with terrorism (which the constable can then retain if he reasonably suspects that such was their intended use), but it is exercisable irrespective of whether the constable has grounds for suspecting the presence of articles of that kind.

[74] Given the exceptional (although, as Lord Bingham has explained, neither unique nor particularly novel) nature of that power (often described as the power of random search, requiring for its exercise no reasonable suspicion of wrongdoing), it is unsurprisingly hedged about with a wide variety of restrictions

and safeguards. Those most directly relevant to the way in which the power impacts upon the public on the ground are perhaps these. It can be used only by a constable in uniform (s 44 (1) and (2)). It can be used only to search for terrorist-connected articles (s 45(1)(a)). The person searched must not be required to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves (s 45(3)). The search must be carried out at or near the place where the person or vehicle is stopped (s 45(4)). And the person or vehicle stopped can be detained only for such time as is reasonably required to permit such a search (s 45(4)). Unwelcome and inconvenient though most people may be expected to regard such a stop and search procedure, and radically though it departs from our traditional understanding of the limits of police power, it can scarcely be said to constitute any very substantial invasion of our fundamental civil liberties. Nevertheless, given, as the respondents rightly concede, that in certain cases at least such a procedure will be sufficiently intrusive to engage a person's art 8 right to respect for his private life (see the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)), and given too that this power is clearly open to abuse—the inevitable consequence of its exercise requiring no grounds of suspicion on the police officer's part—the way is clearly open to an argument that the scheme is not properly compliant with the convention requirement that it be 'in accordance with the law'.

[75] For this requirement to be satisfied, Mr Rabinder Singh QC correctly reminds your Lordships, not only must the interference with the convention right to privacy have some basis in domestic law (as here clearly it does in the 2000 Act); not only must that law be adequately accessible to the public (as here clearly it is—unlike, for example, the position in *Malone v UK* (1984) 7 EHRR 14); not only must the law be reasonably foreseeable, to enable those affected to regulate their conduct accordingly (a requirement surely here satisfied by the public's recognition, from the very terms of the legislation, that drivers and pedestrians are liable to be subjected to this form of random search and of the need to submit to it); but there must also be sufficient safeguards to avoid the risk of the power being abused or exercised arbitrarily.

[76] As I understand the appellants' argument, it is upon this final requirement that it principally focuses: this power, submits Mr Singh, is all too easily capable of being used in an arbitrary fashion and all too difficult to safeguard against such abuse. True, he acknowledges, if the power is in fact abused in any particular case the police officer concerned will be liable to a civil claim for damages (and, no doubt, to police disciplinary action). But, he submits, it will usually be impossible to establish a misuse of the power given that no particular grounds are required for its apparently lawful exercise. Assume, for example, that a police officer in fact exercises this power for racially discriminatory reasons of his own, how could that be established? There are simply no effective safeguards against such abuse, no adequate criteria against which to judge the propriety of its use. Certainly it is provided by para 2.25 of Code A (a published code issued under s 66 of the Police and Criminal Evidence Act 1984) that: 'Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers.' But, say the appellants, there is simply no way of policing that instruction with regard to the exercise of so wide a random power. No way, that is, submits Mr Singh, unless it is by stopping and searching literally everyone (as, of course, occurs at airports and on entry to certain other specific buildings)

or by stopping and searching on a strictly numerical basis, say every tenth person. Only in one or other of these ways, the appellants' argument forces them to contend, could such a power as this be exercisable consistently with the principle of legal certainty: there cannot otherwise be the necessary safeguards in place to satisfy the convention requirement as to 'the quality of the law' (a concept explored in a number of the Strasbourg authorities, as, for example in *Huvig v France* (1990) 12 EHRR 528 at 542–545 (paras 29–35)).

[77] I would reject this argument. In the first place it would seem to me impossible to exercise the s 44 power effectively in either of the ways suggested. Imagine that following the London Underground bombings last July the police had attempted to stop and search everyone entering an underground station or indeed every tenth (or hundredth) such person. Not only would such a task have been well nigh impossible but it would to my mind thwart the real purpose and value of this power. That, as Lord Bingham puts it (at [35], above), is not—

> 'to stop and search people who are obviously not terrorist suspects, which would be futile and time-wasting [but rather] to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion.'

It is to be hoped, first, that potential terrorists will be deterred (certainly from carrying the tools of their trade) by knowing of the risk they run of being randomly searched, and, secondly, that by the exercise of this power police officers may on occasion (if only very rarely) find such materials and thereby disrupt or avert a proposed terrorist attack. Neither of these aims will be served by police officers searching those who seem to them least likely to present a risk instead of those they have a hunch may be intent on terrorist action.

[78] In his 2001 review of the operation of the Prevention of Terrorism (Temporary Provisions) Act 1989 (amended as explained by Lord Bingham at [9], above) and the Northern Ireland (Emergency Provisions) Act 1996, Mr John Rowe QC said this of the power to stop and search those entering or leaving the United Kingdom with a view to finding out whether they were involved in terrorism:

> 'The "intuitive" stop
>
> 37. It is impossible to overstate the value of these stops . . .
>
> 38. I should explain what I mean by an "intuitive stop". It is a stop which is made "cold" or "at random"—but I prefer the words "on intuition"—without advance knowledge about the person or vehicle being stopped.
>
> 39. I do not think such a stop by a trained Special Branch officer is "cold" or "random". The officer has experience and training in the features and circumstances of terrorism and terrorist groups, and he or she may therefore notice things which the layman would not, or he or she may simply have a police officer's intuition. Often the reason for such a stop cannot be explained to the layman.'

[79] Later in his review Mr Rowe noted of the more general stop and search powers originally contained in ss 13A and 13B of the 1989 Act that 'these powers were used sparingly, and for good reason'. I respectfully agree that the s 44 power (as it is now) should be exercised sparingly, a recommendation echoed

throughout a series of annual reports on the 2000 Act by Lord Carlile of Berriew QC, the independent reviewer of the terrorist legislation appointed in succession to Mr Rowe—see most recently para 106 of his 2005 report, suggesting that the use of the power 'could be cut by at least 50 per cent without significant risk to the public or detriment to policing'. To my mind, however, that makes it all the more important that it is targeted as the police officer's intuition dictates rather than used in the true sense randomly for all the world as if there were some particular merit in stopping and searching people whom the officers regard as constituting no threat whatever. In short, the value of this legislation, just like that allowing people to be stopped and searched at ports, is that it enables police officers to make what Mr Rowe characterised as an intuitive stop.

[80] Of course, as the Privy Councillor Review Committee chaired by Lord Newton of Braintree noted in its December 2003 report on the Anti-Terrorism, Crime and Security Act 2001:

> 'Sophisticated terrorists change their profile and methods to avoid presenting a static target. For example, al Qaeda is reported to place particular value on recruiting Muslim converts because they judge them to be less likely to be scrutinised by the authorities.'

It seems to me inevitable, however, that so long as the principal terrorist risk against which use of the s 44 power has been authorised is that from Al Qa'ida, a disproportionate number of those stopped and searched will be of Asian appearance (particularly if they happen to be carrying rucksacks or wearing apparently bulky clothing capable of containing terrorist-related items).

[81] Is such a conclusion inimical to convention jurisprudence or, indeed, inconsistent with domestic discrimination law? In my judgment it is not, provided only that police officers exercising this power on the ground pay proper heed to para 2.25 of Code A:

> 'The selection of persons stopped under section 44 of Terrorism Act 2000 should reflect an objective assessment of the threat posed by the various terrorist groups active in Great Britain. The powers must not be used to stop and search for reasons unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities).'

Ethnic origin accordingly can and properly should be taken into account in deciding whether and whom to stop and search provided always that the power is used sensitively and the selection is made for reasons connected with the perceived terrorist threat and not on grounds of racial discrimination.

[82] A salutary reminder of the need for sensitivity in the exercise of this power is to be found in the June 2005 report by Mr Gil-Robles, the Council of Europe Commissioner for Human Rights, following his visit to the United Kingdom in November 2004 ((2005) 41 EHRR SE9 at 122):

> '33. Whilst strong measures may prove necessary to counter serious terrorist threats, their impact on certain communities should be an

important consideration when deciding to adopt such measures and every effort must be made to avoid the victimisation of the vast majority of innocent individuals. What is essential is that the measures themselves are proportionate to the threat, objective in their criteria, respectful of all applicable rights and, on each individual application, justified on relevant, objective, and not purely racial or religious, grounds.

34. The use of extended stop and search powers under anti-terror legislation raises all of these issues. I was informed by the Commission for Racial Equality that there was a 36 per cent increase in the number of Asians stopped over the course of 2002/3 under s.44 of the Terrorism Act 2000 compared to a 17 per cent increase for Whites. Between the adoption of the Act and 2002/3, there was a 300 per cent increase in the number of Asians stopped. The maintenance of good community relations is clearly difficult under such circumstances. The Government has, however, shown considerable sensitivity to these concerns and the need to maintain a constant dialogue with the leaders of Muslim communities.'

No suggestion is to be found there, one notes, that the s 44 power, despite being exercised more frequently with regard to Asians than others (and certainly not on a purely random basis), necessarily involves a violation of the convention either for want of legal certainty or on any other ground.

[83] How then is this approach to be reconciled with the requirements of domestic discrimination law, and in particular with the decision of the House of Lords in *European Roma Rights Centre v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 1 All ER 527, sub nom *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1? This I confess to have found substantially the most difficult question arising on this appeal. Tempting though it is to leave it unaddressed (as largely it was in argument) this would seem to me ultimately unhelpful given not least the explicit reference made in the *European Roma Rights Centre* case to the use of police stop and search powers.

[84] It is perhaps convenient to remind your Lordships of what essentially was decided in the *European Roma Rights Centre* case. The Prague operation was designed largely to stop people travelling from the Czech Republic to this country to seek asylum here. The vast majority of those who had done so in the past and could be expected to do so in future were Roma and realistically therefore it was Roma applicants at whom the scheme was principally targeted. British immigration officers at Prague airport were concerned to refuse leave to enter the United Kingdom to anyone who either admitted an intention to claim asylum on arrival or, more likely, avowed some other reason for coming but in fact harboured that intention. The House of Lords reversed the decision of the majority in the Court of Appeal ([2003] EWCA Civ 666, [2003] 4 All ER 247, [2004] QB 811: myself and Mantell LJ, Laws LJ dissenting) and found the operation to be unlawful because Roma, being inherently more likely than non-Roma to make false applications for entry, were routinely treated with more suspicion and subjected to more intense and intrusive questioning than others.

[85] Baroness Hale of Richmond said ([2005] 1 All ER 527 at [89]) that the immigration officers should have been instructed—

'to treat all would-be passengers in the same way, only subjecting them to more intrusive questioning if there was specific reason to suspect their

intentions from the answers they had given to standard questions which were put to everyone.'

—and added (at [90]):

'It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong . . .'

[86] Lord Steyn said (at [37]) that '[t]he reasoning of the majority of the Court of Appeal in this case had at first glance the attractiveness of appearing to be in accord with common sense', setting out in this regard the following passage from my own judgment below:

'. . . because of the greater degree of scepticism with which Roma applicants will inevitably be treated, they are more likely to be refused leave to enter than non-Roma applicants. But this is because they are less well placed to persuade the immigration officer that they are not lying in order to seek asylum. That is not to say, however, that they are being stereotyped. Rather it is to acknowledge the undoubtedly disadvantaged position of many Roma in the Czech Republic. Of course it would be wrong in any individual case to assume that the Roma applicant is lying, but I decline to hold that the immigration officer cannot properly be warier of that possibility in a Roma's case than in the case of a non-Roma applicant. If a terrorist outrage were committed on our streets today, would the police not be entitled to question more suspiciously those in the vicinity appearing to come from an Islamic background?'

Lord Steyn however, then quoted with approval from an article by Mr Rabinder Singh QC, 'Equality: The Neglected Virtue' [2004] EHRLR 141, p 154, which, he said, 'convincingly exposed the flaw in the reasoning of the majority':

'It is clear that there was less favourable treatment. It is also clear that it was on racial grounds. As all the judges acknowledged, the reason for the discrimination is immaterial: in particular, the absence of a hostile intent or the presence of a benign motive is immaterial. What the majority view amounts to is, on analysis, an attempt to introduce into the law of direct discrimination the possibility of justification. But Parliament could have provided for that possibility—as it has done in the context of allegations of indirect discrimination—and has chosen not to do so . . . [T]he danger in the majority's reasoning is that it is capable of application outside the limited areas with which the Court was concerned. For example, it could be applied in the context of police stop and search powers. Simon Brown L.J. expressly gives an example from just that context. This is potentially very damaging to race relations law going beyond what may have been perceived to be the problem in the Roma case itself.'

Lord Steyn agreed with that analysis and concluded (at [38]) that the Prague airport scheme was 'inherently and systematically discriminatory on racial grounds against Roma, contrary to s 1(1)(a) of the [Race Relations Act 1976]'.

[87] Lord Bingham and Lord Hope agreed with Baroness Hale's reasoning on the discrimination issue. Lord Carswell, whilst recognising (at [112]) that—

> 'many people would regard it as nothing more than an application of ordinary common sense to treat Romani applicants in that way [ie with a greater degree of scepticism than others], given the officers' regular experience of dealing with them (and assuming in the officers' favour that they were doing no more than attempting conscientiously to ascertain which applications were genuine)'

—similarly concluded (at [113]) that the officers must—

> 'treat all applicants, whatever their racial background, alike in the method of investigation which they carry out until in any individual case sufficient reason appears to prolong or intensify the examination.'

[88] In short, each of the three reasoned speeches on this issue acknowledged the apparent common sense underlying the immigration officers' approach. Why, one must therefore ask, if it was adjudged right to override the dictates of common sense in that case should police officers be allowed to use their common sense in exercising the s 44 power?

[89] I have not found it altogether easy to distinguish between on the one hand the greater scepticism logically felt by immigration officers towards Roma than non-Roma applicants (held in the *European Roma Rights Centre* case to have been unlawfully discriminatory) and on the other hand the greater preparedness which police officers understandably have to stop and search those of Asian appearance (as Mr Gil-Robles noted) given the perceived source of the main terrorist threat today. The difficulty in making this distinction is, indeed, apparent from Mr Rabinder Singh's article published in response to my own reference in that case to the use of police powers in a terrorist context.

[90] The only basis I can see for a distinction (and I do not pretend to find it entirely satisfactory) is if one assumes that in the *European Roma Rights Centre* case the immigration officers had not sufficiently had regard to each Roma applicant as an individual, rather merely than as a stereotypical member of the group (see Baroness Hale's speech at [74]). It would, of course, have been wrong for immigration officers to have treated every Roma applicant identically irrespective of how his answers to questions put to him affected the interviewing officer's view as to the genuineness of his particular application. But that surely, so far from according with common sense, would have been not merely wrong but also silly. Nevertheless the House appears to have concluded that this was indeed the immigration officers' approach and on that basis struck down the scheme.

[91] Clearly nothing which your Lordships are saying on the present appeal would support that kind of an approach to the stop and search power. It is one thing to accept that a person's ethnic origin is part (and sometimes a highly material part) of his profile; quite another (and plainly unacceptable) to profile someone solely by reference to his ethnicity. In deciding whether or not to exercise their stop and search powers police officers must obviously have regard to other factors too.

[92] Of course it is important, indeed imperative, not to imperil good community relations, not to exacerbate a minority's feelings of alienation and victimisation, so that the use of these supposed preventative powers could tend

actually to promote rather than counter the present terrorist threat. I repeat, therefore, as Lord Carlile has consistently done in his annual reports, that these stop and search powers ought to be used only sparingly. But I cannot accept that, thus used, they can be impugned either as arbitrary or as 'inherently and systematically discriminatory' (Lord Steyn's characterisation of the Prague operation) simply because they are used selectively to target those regarded by the police as most likely to be carrying terrorist connected articles, even if this leads, as usually it will, to the deployment of this power against a higher proportion of people from one ethnic group than another. I conclude rather that not merely is such selective use of the power legitimate; it is its *only* legitimate use. To stop and search those regarded as presenting no conceivable threat whatever (particularly when that leaves officers unable to stop those about whom they feel an instinctive unease) would itself constitute an abuse of the power. Then indeed would the power be being exercised arbitrarily.

[93] For these reasons, in addition to those given by Lord Bingham and by my noble and learned friend Lord Hope of Craighead whose opinion I have also now had the opportunity to read in draft, I too would dismiss both these appeals.

Appeals dismissed.

Dilys Tausz Barrister.

SmithKline Beecham plc and others v Apotex Europe Ltd and others

[2006] EWCA Civ 658

COURT OF APPEAL, CIVIL DIVISION

SIR ANDREW MORRITT C, JACOB AND MOORE-BICK LJJ

28–30 MARCH, 23 MAY 2006

Injunction – Interlocutory – Undertaking as to damages – Cross-undertaking as to damages – Enforcement of undertaking – By whom and for whose benefit undertaking enforceable – Restitution – Claim in restitution by members of group not subjects of interim undertaking – Whether claim in restitution existing.

The claimants, members of the GSK group of companies, manufactured a pharmaceutical product, Seroxat, widely used for the treatment of psychiatric disorders. GSK was the proprietor of a patent which claimed a process for producing paroxetine hydrochloride anhydrate, the active ingredient in Seroxat. The defendants were a generic pharmaceuticals company, distributor and parallel importer. Following revocation proceedings brought by the defendants, the claimants commenced infringement proceedings against the defendants alleging infringement of its patented process and applied for an interim injunction restraining the defendants from disposing of, or offering to dispose of, any pharmaceutical preparation containing paroxetine hydrochloride anhydrate in the United Kingdom. In fact the paroxetine was manufactured and supplied by two other companies (the Canadian companies), neither of whom was a claimant in the revocation proceedings nor formal defendant in the infringement proceedings. In the course of the proceedings the judge granted an injunction, subject to the claimants' cross-undertaking in damages. At trial, the judge dismissed the action and revoked the patent. However, he continued the injunction until the effective hearing of a further application, on the basis of a further cross-undertaking. Both cross-undertakings referred only to the loss of the defendants or 'the Apotex Parties' which did not include the Canadian companies. The claimants indicated that they would not seek to maintain the interim injunction during the pendency of an appeal but, one day before inevitable discharge of the injunction, the Canadian companies applied to be joined as defendants, with the presumed objective of giving those parties the benefit of the cross-undertaking with retrospective effect. On appeal, the Court of Appeal reversed the judge's revocation but held that the patent had not been infringed. The defendants sought to enforce the undertaking in favour of the Canadian companies, submitting that the cross-undertakings could be enforced by them or for their benefit on the grounds, inter alia, that the Canadian companies were entitled to recover the losses they had sustained by virtue of a restitutionary cause of action, that the first defendant was entitled to claim the losses of the Canadian companies as 'third party' losses and that the claimants were estopped by convention from denying that the Canadian companies were entitled to claim their own losses under the cross-undertakings. The judge struck out the restitution claim and those parts of the points of claim that depended on argument relating to third party loss but held that the estoppel issue was arguable and had to go to trial. The defendants and the Canadian companies appealed,

upon the issues of restitution and third party loss; GSK cross-appealed on the issue of estoppel. The Canadian companies' claim in restitution was founded on the basis that GSK had made more money than they would have done if there had been no injunction.

Held – (1) There was no rational basis for a third party to have a claim in restitution in respect of benefits which had accrued to a 'wrongful' injunctor. A party who was granted an interim injunction but who ultimately lost at the full trial was not regarded as a wrongdoer because he had obtained an interim injunction. Where an injunction was granted, there were often non-parties who were affected; some would benefit, others would lose but the court would not put the clock back so as to undo all winnings and restore all losses caused to all who were affected by the wrong injunction in circumstances where what was really being claimed under the guise of restitution were damages. The judge was right to strike out the claim in relation to this issue in the instant case. Moreover, with respect to third party loss, a party identified in a cross-undertaking as one who the injunctor would compensate could not claim compensation for others who were adversely affected by the injunction. The undertaking was given to the court and there was therefore no contract between the parties, and the established principles of loss could not be expanded to cover that kind of third party loss. Accordingly, the appeal would be dismissed (see [25], [30], [41]–[44], [85], [86], [97], [126], [127], below); *Rodger v Comptoir d'Escompte de Paris* (1871) LR 3 PC 465, *Palimport v Ciba Geigy* (23 December 1974, unreported), *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128 and *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417 considered.

(2) The basis of the plea for estoppel was not sustainable. An inter partes estoppel could not operate so as to expand or contract the effect of a court order; estoppel could not be used as a key element of a claim nor create a legal relationship when there was none at the outset; and in the instant case the material pleaded was an inadequate basis to justify estoppel in any event. The cross-appeal would therefore be allowed (see [103], below).

Decision of Lewison J [2006] 2 All ER 53 affirmed in part.

Notes

For undertaking as to damages, see 24 *Halsbury's Laws* (4th edn reissue) para 982.

Cases referred to in judgments

Allied Irish Bank v Ashford Hotels Ltd, Ashford Hotels Ltd v Higgins [1997] 3 All ER 309, CA.

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, [1975] AC 396, [1975] 2 WLR 316, HL.

Arkadelphia Milling Co v St Louis Southwestern Railway Co (1919) 249 US 134, US SC.

Baird Textiles Holdings Ltd v Marks & Spencer plc [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737.

Berkeley Administration Inc v McClelland [1996] IL Pr 772, CA.

Chiron Corp v Organon Teknika Ltd (No 10), Chiron Corp v Murex Diagnostics Ltd (No 10) [1995] FSR 325.

CMS Dolphin Ltd v Simonet [2001] 2 BCLC 704.

Eyre v Woodfine (1790) Cro Eliz 278, 78 ER 533.

Greenwood County v Duke Power Co (1939) 107 F 2d 484, US Ct of Apps (4th Cir).
Hadley v Baxendale (1854) 9 Exch 341, 156 ER 145, [1843–60] All ER Rep 461, Exch Ct.
Hillgate House Ltd v Expert Clothing Service & Sales Ltd [1987] 1 EGLR 65.
Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry [1974] 2 All ER 1128, [1975] AC 295, [1974] 3 WLR 104, HL.
Indian Endurance (No 2), The, Republic of India v India Steamship Co Ltd [1997] 4 All ER 380, [1998] AC 878, [1997] 3 WLR 818, HL.
Jones (F C) & Sons (a firm) (trustee of the property of) v Jones [1996] 4 All ER 721, [1997] Ch 159, [1996] 3 WLR 703, CA.
Kleinwort Benson Ltd v Lincoln City Council [1998] 4 All ER 513, [1999] 2 AC 349, [1998] 3 WLR 1095, HL.
Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1993] 3 All ER 417, [1994] 1 AC 85, [1993] 3 WLR 408, HL.
Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512, [1991] 2 AC 548, [1991] 3 WLR 10, HL.
Lokumal (K) & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt [1985] 2 Lloyd's Rep 28, CA.
Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1989] 3 All ER 14, [1990] 1 QB 391, [1989] 3 WLR 563, CA.
Miller v Jackson [1977] 3 All ER 338, [1977] QB 966, [1977] 3 WLR 20, CA.
Minnesota Mining and Manufacturing Co v Johnson and Johnson Ltd [1976] RPC 671, CA.
Moses v Macferlan (1760) 2 Burr 1005, 97 ER 676, [1558–1774] All ER Rep 581.
National Australia Bank Ltd v Bond Brewing Holdings Ltd [1991] 1 VR 386, Vic SC.
Nocton v Lord Ashburton [1914] AC 932, [1914–15] All ER Rep 45.
Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd, The Vistafjord [1988] 2 Lloyd's Rep 343.
NWL Ltd v Woods, NWL Ltd v Nelson [1979] 3 All ER 614, [1979] ICR 867, [1979] 1 WLR 1294, HL.
Palimport v Ciba Geigy (23 December 1974, unreported), Israel SC.
Panatown Ltd v Alfred McAlpine Construction Ltd [2000] 4 All ER 97, [2001] 1 AC 518, [2000] 3 WLR 946, HL.
R v Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd (Primecrown Ltd intervening) [1999] RPC 705.
Rodger v Comptoir d'Escompte de Paris (1871) LR 3 PC 465.
Searose Ltd v Seatrain (UK) Ltd [1981] 1 All ER 806, [1981] 1 WLR 894.
Sympson v Juxon (1625) Cro Jac 699.
United Motors Service Inc v Tropic-aire Inc (1932) 57 F 2d 479, US Ct of Apps (8th Cir).
Westdeutsche Landesbank Girozentrale v Islington London BC [1996] 2 All ER 961, [1996] AC 669, [1996] 2 WLR 802, HL.
Woolwich Building Society v IRC (No 2) [1992] 3 All ER 737, [1993] AC 70, [1992] 3 WLR 366, HL.
Z Ltd v A [1982] 1 All ER 556, [1982] 1 QB 558, [1982] 2 WLR 288, CA.

Appeal and cross-appeal

The defendants, (1) Apotex Europe Ltd, (2) Neolab Ltd and (3) Waymade Healthcare plc, and Apotex Inc (a company incorporated under the laws of Canada) and Apotex Pharmachem Inc (formerly named Brantford Chemicals) (a company incorporated under the laws of Canada) (the Canadian companies) appealed from

the decision of Lewison J on 26 July 2005 ([2005] EWHC 1655 (Ch), [2006] 2 All ER 53), inter alia, striking out the Canadian companies' claim in restitution and the claim in relation to third party loss. The claimants, (1) SmithKline Beecham plc, (2) GlaxoSmithKline UK Ltd and (3) Glaxo Group Ltd cross-appealed from the judge's refusal to strike out the claim by the Canadian companies based on estoppel. The facts are set out in the judgment of Jacob LJ.

Nicholas Strauss QC, Alain Choo Choy and *Thomas Mitcheson* (instructed by *Taylor Wessing*) for the appellants.

Andrew Waugh QC, Marcus Smith and *Geoffrey Pritchard* (instructed by *Simmons & Simmons*) for the respondents.

Cur adv vult

23 May 2006. The following judgments were delivered.

JACOB LJ (giving the first judgment at the invitation of Sir Andrew Morritt C).

[1] This is an appeal and cross-appeal from a judgment of Lewison J of 26 July 2005 ([2005] EWHC 1655 (Ch), [2006] 2 All ER 53). Mr Nicholas Strauss QC advanced the argument for the appellants (including the Canadian companies mentioned below) and Mr Andrew Waugh QC that of the respondents (collectively GSK).

THE FACTS

[2] GSK were between them the owners and exclusive licensees of patent no 2,297,550. This covered a process for making a particular form of paroxetine hydrochloride. GSK sold paroxetine hydrochloride as a pharmaceutical under the trade mark Seroxat on a very large scale. Its principal ultimate customer was the Department of Health.

[3] At various times from November 2001 to the autumn of 2002 the 'defendants' as I shall collectively call Apotex Europe Ltd, Neolab Ltd and Waymade Healthcare Ltd each evinced an intention to sell paroxetine hydrochloride in the United Kingdom, an intention of which GSK became aware. Everyone knew that the particular product envisaged was to be made in Canada and imported. In correspondence with solicitors for the defendants GSK contended that the manufacture would involve the use of the patented process and so the importation into and sale in the United Kingdom of the product would infringe the patent pursuant to s 60(1)(b) of the Patents Act 1977.

[4] The defendants first began litigation by starting, on 9 October 2002, an action for revocation of the patent. GSK responded immediately with an infringement action within which they applied for an interim injunction. In due course the actions proceeded together and were heard together, essentially as an infringement action with defences of non-infringement and invalidity. The action for revocation in effect became a counterclaim.

[5] The only parties to the two actions were GSK and the defendants. The latter are all English companies. The companies who were to manufacture in Canada, namely Apotex Pharmachem Inc (formerly Brantford Chemicals Inc (who made the bulk chemical) and Apotex Inc (the formulators), were not parties. I call them collectively 'the Canadian companies'.

[6] Until determination of the application for an interim injunction, from 29 October 2002 until 28 November 2002, the defendants undertook to the court not in the United Kingdom to deal in any pharmaceutical preparation containing

paroxetine hydrochloride. There was no prohibition on mere importation or keeping. In return GSK gave a cross-undertaking, the precise form of which was in substance the same as that which was to replace it save that it referred to the undertaking rather than the injunction.

[7] On 28 November, when a first instance judge, I granted an interim injunction substantially in the same terms as the defendants' prior undertaking ([2002] EWHC 2556 (Pat), [2002] All ER (D) 436 (Nov)). GSK gave the following cross-undertaking:

> 'AND UPON the Claimants agreeing to comply with any order this court may make if the court later finds that this order for an injunction has caused loss to the Defendants and decides that the Defendants should be compensated for that loss.'

[8] On 8 December 2003 Pumfrey J held the patent not infringed and invalid. The interim injunction was continued briefly pending a hearing on 18 December to determine the final form of order. There was a cross-undertaking in damages given by GSK. Although differently worded yet again, it was in substance the same as that which had run until judgment.

[9] Two days before that hearing, GSK told the defendants they would not ask for an interim injunction pending appeal. The day before the hearing the Canadian companies applied to be joined as defendants in the action. Although the witness statement in support did not say so, the real objective behind this was to obtain a ruling that such joinder would have retrospective effect so that they would be entitled to claim on the cross-undertaking.

[10] The hearing was on 18 December 2003. Pumfrey J ordered an inquiry as to damages on the cross-undertaking, ordered points of claim by the 'Apotex parties' (ie the defendants) and subsequent pleadings. However he also stayed the inquiry pending determination of the application to join the Canadian companies.

[11] On appeal the patent was held valid but not infringed ([2004] EWCA Civ 1568, [2005] FSR 524). So the Court of Appeal left the relevant part of his order intact. The cross-undertaking remained enforceable.

[12] Procedurally things then rather went awry, neither side complying with the order of Pumfrey J or the Rules of Court. Notwithstanding the stay of the inquiry, draft points of claim were served on GSK. These named both the defendants and the Canadian companies as 'claimants on the cross-undertaking'. The draft included claims by the Canadian companies in their own right as well as claims by the defendants not only for themselves but for the Canadian companies. When GSK's solicitors pointed out the draft included claims by the Canadian companies, the solicitors (by then) both for the defendants and the Canadian companies, said in a letter of 6 April:

> 'In our clients' Points of Claim, we have set out the Canadian companies' claim, inter alia, under the "slip-rule" and as a matter of estoppel. These claims are made under the existing cross-undertaking and it is for the Judge to decide on the enquiry whether they are made out. These arguments are quite separate from and free standing of the application to join the Canadian companies as parties to the action (the "Parties' Application"). Accordingly, the Parties' Application will not be determinative of whether the Canadian companies are entitled to claim damages as alleged, and there would

a therefore be no merit in having the Parties' Application dealt with separately and in advance of the enquiry as a preliminary issue.'

And in the same letter:

'Our client does raise a separate claim for restitution which should, strictly speaking, have been pursued by way of a separate action. Since however this claim depends upon the outcome of the Canadian companies' entitlement under the cross-undertaking and is closely related therefore to the other issues raised by the enquiry, we consider it appropriate for this claim to be tried at the same time as the claims for damages made under the cross-undertaking. This is why we have included the restitutionary claim within the Points of Claim, and we invite your clients formally to confirm that they agree to this course being taken. If your clients insist we will issue a fresh claim form in this regard and seek to have the restitutionary claim formally joined into the enquiry. We note that in such circumstances your clients could not prevent the initiation of proceedings and therefore once again there seems little merit in trying to have that issue dealt with separately.'

[13] GSK never formally responded to the invitation made in the second paragraph. What it did was to apply for an order for determination of preliminary points, namely:

'(a) whether [the Canadian companies or either or them] can recover any sums on the enquiry on the cross-undertaking ordered by Pumfrey J on 18th December 2003 (including any sum by way of restitution) (the basis upon which recovery is claimed having been identified in paragraphs 11–13, 16–17, 32–36, 39–40, 46–49 and 50–56 of the Points of Claim dated 11th March 2005), and

(b) whether [Apotex Europe] can recover any sums in respect of any loss suffered by [the Canadian companies or either of them] by reason of the interim injunctions granted in these proceedings (as referred to in paragraph 38 of the Points of Claim dated 11th March 2005), and

(c) whether Neolab, Apotex Europe or Apotex Inc can recover any sums in respect of any payments which would have been payable under clause 2.6(1) of the Neolab Supply Agreement (as Pleaded in paragraphs 41 to 45 of the Points of Claim dated 11th March 2005) . . .'

[14] Quite why GSK went about it this way was never explained. After all neither the defendants nor the Canadian companies even had permission to serve a pleading. No doubt the general idea was to get the other claims determined at the same time as the Canadian companies' application to be joined under the slip rule. But, for that, joinder of the Canadian companies was necessary for reasons other than the slip rule—they were advancing a positive case as claimants. What should have happened is that the stay be lifted, the draft pleading be converted to a served pleading with a concurrent application to join the Canadian companies both on the basis of the slip rule application and on the basis that they were claimants in their own right. Then GSK's application would have been on a proper procedural basis.

[15] What actually happened was that Pumfrey J refused to order the preliminary points. Instead he ordered that—

'[GSK's] application for the hearing of the preliminary issues be refused and instead it be directed that the question of whether the case as pleaded in the draft amended Points of Claim raises triable issues in relation to the [Canadian companies] is to be determined according to the criteria under CPR Parts 3.4 and 24 . . .'

[16] So when the matter came before Lewison J it was in an odd state. He described it this way:

'[1] I have to decide three applications. The first is an application to amend a "cross-undertaking in damages" embodied in two orders for interim injunctions. The application is made under the slip rule. The second is to join additional parties to the action in which the interim injunctions were granted, with the objective of giving those additional parties the benefit of the cross-undertaking, with retrospective effect. The third is an unusual application. I have to decide whether certain parts of a draft pleading, if served in the form in which they currently are, would be liable to be struck out as disclosing no reasonable cause of action; or plead a claim that has no reasonable prospect of success.'

[17] There were five points: (i) Whether the cross-undertakings could or should be amended under the 'slip' rule. The point here was the form of cross-undertakings was not in the form set out in CPR PD 25, para 5.1 which says that—

'any order for an injunction, unless the court orders otherwise, must contain: (1) an undertaking by the applicant to the court to pay any damages which the respondent(s) (*or any other party served with or notified of the order*) sustain which the court considers the applicant should pay . . .' (My emphasis.)

Note that the application was not made on the basis that the Canadian companies had been omitted as parties from the actions by mistake. (ii) Whether the claim that GSK was estopped from denying that the Canadian companies were entitled to claim their own losses under the cross-undertakings should be struck out. (iii) Whether the court should strike out the Canadian companies' claim that they are entitled to recover in restitution the losses they have sustained. (iv) Whether the claim that Apotex Europe was entitled to claim the losses of the Canadian companies as 'third party' losses under the cross-undertaking [sic]. (v) Whether the Canadian companies could or should be joined as defendants with retrospective effect.

[18] Lewison J ruled against the defendants and the Canadian companies on each of these points save for (ii), estoppel. That he held was arguable and had to go to trial. It was accepted before him that if the Canadian parties could not be joined as defendants with retrospective effect, the application for their joinder would not be pressed. When he so ruled the Canadian companies ceased to be parties in the proceedings, either as defendants or as counterclaimants or as respondents to GSK's application. Lewison J however did give them permission to appeal the joinder and slip rule applications along with the 'declaration' which he granted, namely:

'It is declared under the following claims in the draft amended Points of Claim have no real prospect of success and be struck out, namely those claims based on: (a) third party loss (para 38); (b) restitution (paras 50–56);

a and (c) the retention of sums which would be due from the 2nd Defendant to Apotex Inc under the profit-share agreement (paras 43 and 45(b)).'

This order itself contains something of nonsense—not only does it declare that the claims in the draft amended points of claim have no real prospect of success, it also purports to strike out paragraphs from the draft. You cannot strike out that b which was never in.

[19] Lewison J went on to order that fresh points of claim be served. These were to be confined to the only issue which he found arguable, namely the claim based on estoppel. Such a document was served containing much the same material as had been in the draft but with an allegation of estoppel by representation. Its viability is the subject of GSK's cross-appeal.

c [20] The Canadian companies decided not to appeal Lewison J's slip rule decision nor his decision that they could not be joined with retrospective effect. So when the appeal came on before us, the Canadian companies were no longer parties at all and were not seeking so to be. We asked Mr Strauss whether none the less he was appearing for the Canadian companies. He said he was. d We pointed out that he had a problem but none the less at that stage allowed the argument to proceed as though they were still in the case.

[21] In due course Mr Strauss offered an undertaking by the Canadian companies to issue such proceedings as were necessary to cover the claims made by them in their own right. I am content to consider the case on the basis that e such an application has been made and is opposed on the grounds that it is doomed to fail. I do so not least because it was GSK who embarked on this procedural chaos and in effect brought the Canadian parties in. However I wish to make two observations: (i) The procedural irregularity was not merely technical—it leads and has led to conceptual muddles, particularly in relation to the claim based on an estoppel. For once matters are seen in a proper procedural f state it is possible more clearly to discern that the Canadian companies have to base their claim on the estoppel relied upon. (ii) It is in any event wholly undesirable that in matters as weighty as this, things should not be on a proper footing. Treating or deeming a series of important procedural steps (including one as basic as making a company a party to the proceedings) to have happened g is, in principle, unsatisfactory. A P Herbert's Lord Mildew comes to mind: 'There is too much of this damned deeming.'

[22] Before us the appellants raise only points (iii) and (iv) namely restitution and third party loss. GSK cross appeal the estoppel point, (ii); the slip rule and joinder decisions are unchallenged.

h

THE NATURE OF A CROSS-UNDERTAKING

[23] Before turning to the points in issue it is necessary to explore the nature of a cross-undertaking in damages. This is largely uncontroversial and so can be taken shortly. The practice of requiring a cross-undertaking from a plaintiff who j sought an interlocutory (now called 'interim') injunction developed in the nineteenth century. The reason was that the court at the interlocutory stage did not know who the ultimate winner would be. So if an injunction was granted but the case ultimately failed, the person enjoined would have a remedy.

[24] The legal justification of the practice stems from the discretion of the court to grant or withhold an injunction given by what is now s 37 of the Supreme Court Act 1981 (repeating earlier enactments to the same effect):

'(1) The High Court may by order (whether interlocutory or final) grant an injunction . . . in all cases in which it appears to the court to be just and convenient to do so.'

The court in effect says to the plaintiff (now 'claimant') seeking an interim injunction: 'I will not grant you an interim injunction unless you give the cross-undertaking', see eg *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128 at 1150, [1975] AC 295 at 361 per Lord Diplock. It follows that the court cannot impose a cross-undertaking on a claimant against his will—it is the 'price' he must 'pay' for the grant of the injunction.

[25] A party who is granted an interim injunction but who ultimately loses the full trial is not regarded as a wrongdoer because he got an interim injunction. Sometimes, for convenience and want of a better term, the expression 'wrongful injunction' is used, but in truth there is nothing wrongful about it. The decision whether or not to grant it is made on the basis of a necessarily incomplete picture. The decision depends on all the circumstances of the case, generally whether or not damages to an ultimately victorious claimant would be an adequate remedy, whether the claimant can show a serious issue to be tried and so on. There is no need here to recite all the various considerations which may arise—*American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396 and the many other cases about grant or refusal of an interim injunction are discussed in all the books. Lord Diplock put it broadly in *NWL Ltd v Woods, NWL Ltd v Nelson* [1979] 3 All ER 614 at 625, [1979] ICR 867 at 880:

'In assessing whether what is compendiously called the balance of convenience lies in granting or refusing interlocutory injunctions in actions between parties of undoubted solvency the judge is engaged in weighing the respective risks that injustice may result from his deciding one way rather than the other at a stage when the evidence is incomplete.'

[26] But a number of particular considerations do call for mention in the context of this case. First is that the existence of the cross-undertaking in damages is a very material consideration in whether or not an injunction should be granted. The fact that an ultimately unsuccessful claimant will have to compensate the defendant for having 'wrongly' stopped his proposed activity is a major factor in assessing the balance of risk.

[27] Second is that the position of third parties or the public who may be affected by the injunction is a matter which the court can take into account in exercising its discretion. This is so in limited circumstances even for a final injunction, see eg *Miller v Jackson* [1977] 3 All ER 338, [1977] QB 966 and *Chiron Corp v Organon Teknika Ltd (No 10)*, *Chiron Corp v Murex Diagnostics Ltd (No 10)* [1995] FSR 325.

[28] Next is that third parties unconnected with the dispute ('neutrals') who may incur expense in complying with the order may specifically be covered by a cross-undertaking. This was first required by Robert Goff J in a freezing order case, *Searose Ltd v Seatrain (UK) Ltd* [1981] 1 All ER 806, [1981] 1 WLR 894. The practice in freezing order cases of requiring from the plaintiff an express undertaking to indemnify any third party affected by the order against all expenses reasonably incurred in complying with the order and all liabilities flowing from such compliance was endorsed by this court in *Z Ltd v A* [1982] 1 All ER 556, [1982] 1 QB 558.

[29] In this connection it may be noted that the form of order in the current Practice Direction is not without its difficulties—the trouble is that it uses the words 'other party' which could mean 'party to the action' or 'other person' more generally. The point is discussed by Mr Steven Gee QC in his article 'The undertaking in damages' [2006] LMCLQ 181—he was kind enough to send me an advance copy when he learned that I was a member of the court in this case. The Rules Committee would do well to look at this again. The difficulties do not arise in this case because the standard form of order was not used.

[30] But what is clear is that until this case, it has always been assumed that an outsider (as I will call a legal entity which is not a party to the proceedings) does not have a claim as of right against a party who obtained a 'wrongful' interim injunction which caused him expense or damage. The only possible exception to that is Lord Denning MR's statement that a party who gives notice of a freezing injunction to a bank or innocent third party enters into an implied contract whereby he will pay for the costs of that party complying with the order: see the *Z Ltd* case [1982] 1 All ER 556 at 564, [1982] 1 QB 558 at 575. The other members of the court (Eveleigh and Kerr LJJ) do not comment on this point—it is unnecessary to explore it further here for no contract claim is made.

[31] Next the court has jurisdiction to require a party seeking an interim injunction to give a cross-undertaking for the benefit of third parties affected by the injunction, see *Allied Irish Bank v Ashford Hotels Ltd, Ashford Hotels Ltd v Higgins* [1997] 3 All ER 309. This stems from the discretionary nature of the jurisdiction conferred by s 37 of the 1981 Act.

[32] Finally there are a limited amount of authorities on the principles of assessment of quantum on a cross-undertaking. Rather than consider them at this point it is more convenient to deal with them when dealing with the third party loss claim.

THE CANADIAN COMPANIES' CLAIM IN RESTITUTION

[33] This is founded on the basis that GSK made more money than they would have done if there had been no interim injunction. That must be so—GSK neither lost sales nor were forced to reduce their price by reason of competition. The Department of Health paid them more money, probably a lot more money, than they would have paid if there had been no injunction.

[34] It is at GSK's 'extra' money that the restitution claim is aimed. The Canadian companies say that it was made at their expense and so they should be entitled to a share of it. That share, they say, is to be calculated by reference to the profits they would have made but for the injunction. They submit that the law of restitution will give it to them. They say that the claim for 'lost' profits put this way is not a claim in damages, which they accept they cannot make.

[35] It is a far-reaching and novel contention. If right it would follow, for instance, that a very big trick indeed, amounting to a fundamental assumption, was missed in the *Hoffmann-La Roche* case [1974] 2 All ER 1128, [1975] AC 295. There the Crown sought an interlocutory injunction to restrain the defendants from charging more for their drugs than permitted by a statutory order which the defendants were contending was invalid. The question, debated all the way up to the House of Lords, was whether the Crown should have to give a cross-undertaking in damages as a condition of grant of the injunction. It was held not: that the Crown was essentially seeking to enforce what was prima facie the law and not protecting its proprietary interests. It was accepted, however that the Crown would be richer as a result of the injunction because the NHS would

pay less for the drugs. If a claim in restitution because of the 'wrongful' injunction lay, then the whole debate about whether the Crown should have to give a cross-undertaking was pointless—the Crown could be compelled by this alternative route to disgorge the benefit it had received by reason of the injunction.

[36] Mr Strauss did not shrink from that. He said that no one had considered restitution. Lord Diplock said ([1974] 2 All ER 1128 at 1150, [1975] AC 295 at 361):

> 'If (the plaintiff) should fail (to succeed at trial) the defendant may have suffered loss as a result of having been prevented from doing it while the interim injunction was in force; and any loss is likely to be damnum absque injuria for which he could not recover damages from the plaintiff at common law.'

So, submitted Mr Strauss, Lord Diplock was limiting himself to damages and was not considering a restitutionary claim. To my mind Lord Diplock can hardly have referred to a possible damnum absque injuria if he had thought that a substantial claim in fact lay. But I do accept that no one in that case specifically considered a possible claim in restitution and that it is not a binding authority to the effect that no such claim could lie.

[37] Likewise what I said in *R v Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd (Primecrown Ltd intervening)* [1999] RPC 705 at 712 does not explicitly exclude such a claim: 'There is no contract and no tort. The right to damages, if any, stems only from the cross-undertaking.' Nor was such a claim advanced in that case, though if Mr Strauss were right, it could have been. Similarly when Scott V-C said 'There is in my judgment no legally acceptable basis on which the benefit of an undertaking, to which a member of a group of companies is entitled, may be claimed on behalf of the group as a whole' (*Berkeley Administration Inc v McClelland* [1996] IL Pr 772 at 793 (para 71)), he was not expressly considering a claim in restitution by members of the group not subjects of the interim undertaking.

[38] With that I turn to Mr Strauss's more detailed argument. He began by reminding us that the law of restitution is still under development, pointing to a number of statements to that effect in *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961 at 980–981, 1004, [1996] AC 669 at 697, 722 per Lord Goff of Chieveley and Lord Woolf respectively, *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 759, 780–781, [1993] AC 70 at 172, 197 per Lord Goff and Lord Browne-Wilkinson respectively and *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513 at 530, 547–548, [1999] 2 AC 349 at 372, 393 per Lord Goff and Lord Lloyd of Berwick respectively. It is not necessary to set them all out here. Perhaps the best known of them is that of Lord Goff in the *Westdeutsche Bank* case:

> 'Claims in restitution are founded upon a principle of justice, being designed to prevent the unjust enrichment of the defendant (see *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512, [1991] 2 AC 548). Long ago, in *Moses v Macferlan* (1760) 2 Burr 1005 at 1012, 97 ER 676 at 681, Lord Mansfield said that the gist of the action for money had and received is that "the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money". It would be strange indeed if the courts lacked jurisdiction in such a case to ensure that justice could be fully achieved by means of an award of compound interest, where it

a is appropriate to make such an award, despite the fact that the jurisdiction to award such interest is itself said to rest upon the demands of justice. I am glad not to be forced to hold that English law is so inadequate as to be incapable of achieving such a result. In my opinion the jurisdiction should now be made available, as justice requires, in cases of restitution, to ensure that full justice can be done. The seed is there, but the growth has hitherto b been confined within a small area. That growth should now be permitted to spread naturally elsewhere within this newly recognised branch of the law. No genetic engineering is required, only that the warm sun of judicial creativity should exercise its benign influence rather than remain hidden behind the dark clouds of legal history.'

c **[39]** Mr Strauss accepted that the facts of these cases are far from the present case—he relied upon them to say that the general approach to restitution is not limited to particular issues about interest, mistake of law and the like. The key, he submitted, is the general approach to restitution which is a response to a 'call to justice'.

d **[40]** More specifically Mr Strauss then turned to the principles applicable when a court of appeal reverses a prior judgment, saying that they applied by analogy to the case of a 'wrongful' interim injunction. His general assertion was that the court has power to ensure that a litigant who has used its process to gain an advantage and then lost on appeal will be obliged by the court to disgorge that benefit to a party adversely affected. Moreover, he asserted, that power extends e to making the litigant disgorge that benefit to a third party who was adversely affected by the 'wrongful' order.

[41] I start with that last assertion. Mr Strauss could find no authority to support it. Not even his best case, the Israeli Supreme Court decision in *Palimport v Ciba Geigy* (23 December 1974, unreported), goes that far. I do not see how any f rational rule of restitution could. After all when an injunction is granted, there are often non-parties who are affected. Some will benefit, others will lose. Here, for instance, others besides GSK will have benefited. They will include those of GSK's customers who have gained from the higher price which resulted from the injunction, GSK's chemical suppliers and so on. It would be absurd to say that a restitutionary claim would lie against them. Yet if Mr Strauss were right, I can see g no reason why it would not. In particular they cannot be distinguished on the basis that they are not wrongdoers whereas the 'wrongful' injunctor was. For the injunctor is not a wrongdoer.

[42] Likewise there are likely to be 'losers'. Here, as it happens, the intention of Apotex Europe was to sell the Canadian companies' product. But the h injunction prevented sale by the defendants whoever made the product. In another case where the injunctee proposed to buy from one or more of a number of manufacturers outside the United Kingdom would they all have a right to 'restitution'? And would the intended carriers of the foreign manufacturers be able to say they lost trade and so have a claim? Putting it j generally, the court cannot put the clock back so as to undo all 'winnings' and restore all 'losses' caused to all who were affected by the 'wrong' injunction.

[43] There is another aspect of the suggested right of non-parties to a claim in restitution. It could only, even on Mr Strauss' case, apply to the 'unjust benefit' gained by the injunctor. That would be a pot limited in quantity. But the losses of non-parties might exceed that pot. What is to be done then? Some sort of apportionment between different claimants? On what principles would that

work? And, given that a claim in restitution would have at least a six-year limitation period, suppose an early claimant had used up the pot, what would be the position of a late one? All this shows that what is really being claimed under the guise of restitution is damages.

[44] The conclusion must be that there is no possible rational basis for a third party to have a claim in restitution in respect of benefits which accrue to a 'wrongful' injunctor.

[45] So it is not necessary to consider whether a party the subject of a 'wrongful' injunction or other order has an independent claim in restitution. In practice that is almost invariably an academic question because there will nearly always be a cross-undertaking in place. This is so not only for interim injunctions but in the case of final injunctions. In respect of these the court will normally only refuse a stay pending appeal if the successful injunctor is willing to give a cross-undertaking in damages should the appeal be successful, see the *3M* case, *Minnesota Mining and Manufacturing Co v Johnson and Johnson Ltd* [1976] RPC 671.

[46] However, because the point has been fully argued, and counsel's researches have extended far and wide, I think it worth exploring the question of whether there is a general restitutionary power which was simply overlooked in the past.

[47] I start with *Rodger v Comptoir d'Escompte de Paris* (1871) LR 3 PC 465. A judgment for a sum of money had been given but reversed on appeal. The money had been paid following judgment. The appeal court had ordered the return of the money and the question was whether there should also be interest on the money. Lord Cairns said, in reporting to Her Majesty (at 475–476):

> 'It is contended, on the part of the Respondents here, that the principal sum being restored to the present Petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the Petitioners. They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the Petitioners, and that the perfect judicial determination which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld.'

[48] This reasoning is not based on a general power to put any harm caused by a 'wrongful' order right—it is simply the application of the principal that if A has had the use of B's property, he must account for the benefit he has had from that use—its 'fruits'. The principle goes back at least to *Sympson v Juxon* (1625) Cro Jac 699. There a first instance judgment had wrongly given possession of land to the plaintiff. Upon successful appeal the defendant had his land restored

along with profits made meanwhile: 'for the plaintiff in the writ of error is to be restored to all that he lost.'

[49] The same principle was applied in *Trustee of the property of F C Jones & Sons (a firm) v Jones* [1996] 4 All ER 721, [1997] Ch 159. A bankruptcy order was made in 1984 (so under the Bankruptcy Act 1914). Under that Act the trustee in bankruptcy got title to all the assets of the bankrupt as of the date of the act of bankruptcy. So, the trustee owned the partnership assets. The wife drew £11,700 out of those assets and invested in potato futures. By November 1984, she had made £50,000 using that money. The trustee sought to recover that sum and succeeded. It was the fruit of his money. The case is not an example of the sort of wide, generalised, doctrine of restitution needed if the Canadian parties are to succeed here. (Actually, although Millett LJ said that equity had no role to play in that case, for myself I cannot see why—it looks like a plain case of a constructive trusteeship.)

[50] Mr Waugh sought to rely on *Hillgate House Ltd v Expert Clothing Service & Sales Ltd* [1987] 1 EGLR 65. Some landlords took possession after a successful, at first instance, forfeiture claim. The tenant succeeded on appeal and then brought a claim for the wrong of breach of the covenant for quiet enjoyment, relying on *Rodger*'s case. The claim failed. Browne-Wilkinson V-C first held that the lease had been in existence all the time, despite the 'wrong' order for forfeiture. But he went on to hold that since the acts complained of were done pursuant to a court order they could not give rise to a cause of action. He said (at 67):

> 'If the case were otherwise, there would, in my judgment, be very great confusion. People must be entitled to act in pursuance of a court order without being at risk that they are thereby acting unlawfully. Public policy requires it. I am not in any sense casting doubt on, or seeking to cut down, those cases to which I have been referred which indicate that where a judgment is reversed, the objective of the court should be to put back the litigants into the position in which they should all along have been had the law been properly appreciated—cases such as [*Rodger*'s case]. Those cases are concerned with reimbursing to the parties moneys lost as a result of the execution of the judgment by the payment of money. They are not cases, such as the present, in which it is sought to found a separate cause of action on the carrying out of the court order.'

I do not think the case assists in the debate. It tells us (again) that *Rodger*'s case enunciates an essentially restitutionary remedy. It adds this: that no action will lie in respect of the carrying out of a court order. The Canadian companies' claims are said to be in restitution, not in respect of the carrying out of the court order.

[51] As far as other common law courts are concerned, it seems clear that both the United States and Australian courts have clearly decided that there is no general principle of restitution available to a party harmed by a 'wrong' court order. In the United States, *Greenwood County v Duke Power* (1939) 107 F(2d) 484 clearly decides this. A 'wrongful' injunction granted at the behest of a power company had stopped the county from receiving or using Federal funds to build a rival power station. Upon reversal of the decision and dissolution of the injunction the county claimed for the profits made by the power company from the injunction and for its losses. Judge Parker said (at 487):

'The county's principal contention is that it is entitled to have restitution of the profits which it has lost and the power company has gained as a result of the injunctive orders; but we see no basis upon which any such relief can be granted. Restitution is awarded upon the principle that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby [authorities cited]. It cannot be awarded here because the county has lost nothing which the power company has received as a result of the injunctive orders of the court. The income received by the latter was received from the sale of power which it produced and had the right to sell. It received nothing from the county and nothing to which the county would have been entitled, or which it would have received, had the injunctive orders not been entered [authorities cited]. The most that can be said is that the suit and the injunctive orders issued therein damaged the county by delaying the construction of its project and that the power company's business profited by being freed of competition as a result of the delay; but to grant recovery on this basis would be to award damages on account of the suit and injunctive orders, which, as we have seen, cannot be done. The effect of the rule cannot be avoided by calling a claim for damages one for restitution.'

[52] Another United States case is *United Motors Service Inc v Tropic-aire Inc* (1932) 57 F 2d 479. The defendant said he had suffered damage in excess of that provided for by a bond put up by way of security as a term of the grant of an interim injunction in an action which ultimately failed. Judge Kenyon said (at 484):

'Restitution of the amount received under a decree, afterwards reversed, will be ordered in equity, and will sustain an action at law. But the condition of the restoration is always that the party against whom restitution is sought shall have received, by virtue of the decree, what he is asked to restore. There is no support in reason or authority for an extension of the doctrine of restitution to cover an award of damages, which the restorer never received, and so in no true sense could restore.'

And:

'There is nothing certain as to the amount of damages suffered by defendant by reason of the improvident granting of the preliminary injunction. Nothing was taken from it by the injunction and given to plaintiff. We see no room for the application of the doctrine of restitution here.'

[53] Mr Strauss sought to get some comfort from *Arkadelphia Milling Co v St Louis Southwestern Railway Co* (1919) 249 US 134. A 'wrongful' injunction had restrained a State Railroad Commission from enforcing certain shipping tariffs which it had fixed. Two frequent shippers were also enjoined as representative defendants. The injunction was directed against 'the Commissioners . . . the individual shippers named as defendants, and all other patrons of the road in the shipment of freight'. It was dissolved on appeal. So the injunction had compelled the 'patrons of the road' to overpay. The question was whether there could be a restitutionary claim on their behalf as a class. It was held there could. But this was because they were the class that were injuncted. The case does not establish

that third parties not subject to the injunction can bring a claim. Nor that a general restitutionary claim by a defendant who is enjoined will lie. The class was allowed to recover that which by reason of the injunction it had overpaid—a true restitution.

[54] Actually if one thinks about it, the reasoning in the *Arkadelphia Milling* case is rather against a general restitutionary claim. For if such a claim lay at the behest of anyone adversely affected by an injunction which had resulted in profits to the injunctor, the reasoning would have been quite different. It would have said just that, and had no need to go into the fact that the injunction was a class injunction.

[55] Finally as regards the United States position, if a restitutionary claim lay for every non-party who loses money or has to pay more as a result of a 'wrongful' injunction, whether interim or final, I would expect there to be masses of claims by way of class action run on a contingency fee basis. But no one has pointed to any such case.

[56] The point has also received detailed consideration in Australia. The leading case is *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386. Ex parte orders had been granted on the application of the defendant company's bankers appointing receivers and managers. In due course it was held that was wrongful. No cross-undertaking was given on the making of the order (as it was held should have been). The company sought a remedy against the banks for the 'wrongful' orders it had obtained. It was held that there was none.

[57] The Supreme Court of Victoria analysed the problem in detail. Kaye J said (at 576):

> 'It is therefore clear from the authorities to which I have referred that the practice followed for nearly 150 years of requiring a plaintiff seeking an interim or interlocutory injunction to give an undertaking as to damages has been based on the view that otherwise the defendant would be without remedy in the event of the order having been improperly made.'

Murphy J (at 582) concluded there was no remedy though he thought that if it were possible for the court to 'put right any wrong done [to] the appellants by the making of an order', it should do so. He specifically considered a restitutionary claim (at 588):

> 'Next, *restitutio in integrum* has been espoused as a principle by the appellants. The cases relied upon to support the assertion that it is just and equitable to award monetary compensation for any loss caused the appellants, do not in my view go this far in terms. It must be conceded that it is an established principle that it is just and equitable to allow interest upon money ordered to be repaid to a defendant who has been wrongly ordered to pay a capital sum to a plaintiff.' (Citing *Rodger*'s case at 475–476.)

But he went on to say (at 590):

> 'The fallacy in the appellants' case appears to me to rest in the fact that they cannot point to a right entitling them in equity to monetary compensation. What the respondents have done is come to the court seeking payment of an alleged debt, and in the course of such action have sought interlocutory equitable relief in support of that claim. The court has ruled that the interlocutory equitable relief sought was wrongly granted, and have set it

aside, but this did not constitute the breach or infringement of any recognisable right in equity which might have entitled the appellants/defendants to monetary compensation or might have obliged the respondents to put the appellants "in as good a position pecuniarily as that in which he was" (they were) "before the injury": [*Nocton v Lord Ashburton* [1914] AC 932 at 952, [1914–15] All ER Rep 45 at 51].'

And, a little later on the same page:

'Nowhere have the researches of counsel found a relevant precedent in which, in the absence of an undertaking, an award of monetary compensation has been made to compensate a defendant for loss occasioned [to] his property by the making of an erroneous order that has been subsequently set aside . . .'

[58] Brooking J began a particularly learned judgment thus (at 591):

'With all due respect to W. S. Gilbert's Lord Chancellor, in practice the law is not always the true embodiment of everything that's excellent. Mistakes are made from time to time.'

On the same page he said, after citing what I have quoted was said by Lord Cairns in *Rodger*'s case:

'The first question is that of the limits of the principle expressed by Lord Cairns in *Rodger's Case*. For the passage cannot be read as asserting that the court will always ensure, so far as possible, that no suitor suffers as a result of the act of the court a loss for which there is no redress. The law being what it is, and judges being what they are, many wrong judgments and orders are given and made. These can be corrected on appeal. But there are and must be limits to how far the courts will go in putting matters right on appeal.'

He said (at 592):

'But while the cases show that the courts will often, by way of setting things right on appeal, go beyond the mere substitution of the right judgment or order for the wrong one, it is not the law that the court will always ensure, so far as possible, that no suitor suffers as a result of the act of the court a loss for which there is no redress. Any such unlimited principle is inconsistent with the law's recognition of the torts of malicious abuse of process and malicious institution of proceedings, with their uncertain, but certainly limited, scope: [*Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1989] 3 All ER 14 at 49–50, [1990] 1 QB 391 at 469–470]. And any such unlimited principle would mean that an appellate court would be entitled or obliged to award compensation or damages whenever it set aside an erroneous judgment or order which had caused damage to the appellant which was not regarded for this purpose as too remote. Yet many final judgments or orders that may be set aside on appeal are apt to cause great damage to the unsuccessful party in circumstances where it is unthinkable that the appellate court should have power to award damages or compensation. An order winding up a corporation is about as drastic an order as one could imagine. Such an order will rarely be stayed pending an appeal, and great and irremediable damage may be done to the corporation by the order in the meantime. But I have never heard it

suggested that if a winding up order is set aside on appeal the appellate court may award damages or compensation against the party who obtained it. At the trial of an action a final injunction to prevent the commission of a nuisance may put the defendant out of business. May the court of appeal not only set aside the injunction but also award damages for the destruction of the defendant's business? A judgment for possession of business premises may mean financial disaster for the defendant who claims that his lease has not been duly determined. If there is no stay and the defendant succeeds on appeal, is he to be awarded damages on the principle that the court must take care that "no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court"?'

[59] Contrary to Mr Strauss's submission that the case was concerned only with a claim in damages, Brooking J addressed a restitutionary claim directly (at 593–594):

'The writ of restitution was provided by the law to give those who had judgments reversed or set aside the appropriate consequential remedy where by or under the judgment something had been taken from them. As I have said, the writ came to be rarely used for this purpose, the successful party obtaining instead an order of the court directed to the opposite party. Presumably these orders gave neither more nor less than might have been obtained by writ of restitution. In the more modern statements of the power of the court to do what is necessary to achieve justice when a decision is reversed on appeal, the notion of restitution or restoration remains.'

After discussion of cases he said:

'The authorities I have mentioned rest the power of the court to direct repayment or to award interest on the duty of courts to strive to arrive at a perfect judicial determination which will avoid injustice and to take care that no act of the court does injury to a suitor [citation] or on the need to get at justice [citation], or on the general jurisdiction of the courts to act rightly and fairly [citation], or on the need to do complete justice between the parties [citation] . . .'

[60] After review of further authorities he said (at 597–598):

'This survey shows that the principle on which the courts have for centuries acted is that when an erroneous judgment or order is overturned, whether by means of appeal or by any other procedure, the court will achieve a just result by requiring anything that has been taken from him by the other party by virtue of the wrong decision to be restored. Interest is for this purpose treated as the fruit of money and he who has had the use of money will not be heard to say that there were no fruits. The principle is, as it was in the reign of the first Elizabeth [*Eyre v Woodfine* (1790) Cro Eliz 278, 78 ER 533], one of restitution or restoration. The court is seeking to restore to one party what it has wrongly taken from him and given to the other. It does not seek to restore the successful party to his former position by awarding damages to compensate him for loss flowing from the erroneous judgment or order. There is no basis for an award of damages. No right of the party suffering loss has been infringed . . . Why is it that no application has ever been made, after a successful appeal in a case to this kind, to have the injury done to the suitor by the act of the court redressed on the principle

of *Rodger's Case* by an award of damages? The reason is clear. No right of the party ultimately successful has been infringed and the principle of *Rodger's Case* allows no more than the passing back to that party of what has been taken from him.'

[61] As the argument developed before us, it became clear that for restitution to work Mr Strauss needed to show that something had been taken from the Canadian companies and given to GSK by the injunction. He submitted that 'what had been taken from' the Canadian companies was 'a business opportunity' and that the injunction had in substance transferred that to GSK. So, he submitted, restitution entitled his clients to the fruits of that transferred business opportunity, namely that part of GSK's 'extra' profits which would have been made by [the] Canadian companies but for the injunction.

[62] He only found one case which he could suggest supported that view. This was the Israeli Supreme Court case I mentioned earlier as his 'best' case, *Palimport v Ciba Geigy* (23 December 1974, unreported). The plaintiff had succeeded at first instance in a patent infringement action and was granted a final injunction. There was no stay of injunction but it was discharged when an appeal was allowed. The defendant wanted recompense for the damage done whilst it was in force. It seems (for there is no reference to it) that the courts of Israel had not adopted the English practice settled in the *3M* case.

[63] The claim was made in restitution, not damages, as was pointed out by Sussman (Acting President):

> 'The appellant emphasizes and re-emphasizes that it is not suing for compensation for damages because an illegal injunction was obtained on tort grounds. It is not suing to ameliorate the damage which was caused to it, but rather it is suing for the restitution of profits which the respondent realized during such period of time in which [the appellant] was barred from supplying its goods to customers, and these customers had to buy from the Respondent. Needless to say, the two cases are different from one another.'

[64] Of particular importance is the fact that Israel has a special statutory provision about appeals. The Acting President mainly founded his judgment in favour of a restitutionary claim upon this statute. He developed the proposition that no claim in damages lay, referring, inter alia, to the article in the Law Quarterly Review by Gordon (1958) LQR 517. And went on to say:

> 'Justifiably and wisely, therefore, did the appellant refrain from attempting to attain the unattainable, compensation for a cause of action in tort. Enforcement of an injunction is not a wrong warranting damages. In contrast thereto, all agree that should a litigant be enriched following a court judgment which is reversed, such enrichment is unjust, and it owes restitution. With regard to this matter, section 18(a) of the Execution Law, 5727–1967 provides that, upon reversal of a judgment, the Chief Executioner is entitled "to order a return of the situation to that which existed prior to the execution," without requiring a judgment directing restitution. Nonetheless, the duty to make restitution is not anchored solely in the [Execution] Law. Pursuant to Regulation 427 [of the Regulations of Civil Procedure], filing an appeal does not stay execution of the judgment being appealed. As long as the court has not directed otherwise, the defendant must pay the debt as decreed, in accordance with the judgment. However, if the judgment is reversed on appeal, the cause of action, under which the

a plaintiff was awarded the money it collected, is stricken, and if [the plaintiff] does not return [such money], it is unjustly enriched. Pursuant to the general principles of unjust enrichment, a plaintiff who has collected [money] must make restitution. *See* Freedman, The Laws of Unjust Enrichment, section 198. "The first duty of the courts, as well as most important," so stated the King's Council in the matter of *Rodger v Comptoir* b *D'Escompte de Paris* (1871), "is to refrain from injuring a litigant", and in following such a rule, held in such case that, the plaintiff who had collected the amount adjudged to him must return to the defendant upon reversal of the judgment, not only [the amount] received, but also interest on the principal, as well as interest which was paid to him.'

c **[65]** With great respect I cannot accept that *Rodger*'s case justifies a general unjustified enrichment claim. The analysis in the *National Australia Bank* case shows why. The Acting President also relied upon the *Arkadelphia Milling* case. But he overlooked the class nature of the injunction which was what justified the class restitution claim. Nor does he deal with the *Greenwood* case, though (it appears from the judgment of Kahan J) it was cited.

d **[66]** The Acting President then allowed the restitution claim giving two reasons:

'First, I disagree, with all due respect, with the judge's opinion that the court will not restore a litigant to his previous situation where, as a result of an erroneous judgment, neither money nor a money equivalent was taken e from him. The laws of restitution are not so limited, and "the first and foremost duty of the court" is not to injure the litigant, discussed hereinabove, which also includes that the litigant should not be hurt in his pocket, in particular. In this context, I draw attention to the generality of the provision in section 18(a) of the Execution Law. The section does not refer f to the restitution of money, but to "the return of the situation as it was prior to the execution" of the judgment.'

That is based on the Execution Law of Israel which clearly cannot help the Canadian companies here.

[67] The second reason was: 'The appellant was also damaged as to a property g right, that is the reputation of her business.' After some analysis of this he said: 'There is no doubt that obtaining an injunction derogated from the goodwill of the appellant and caused an unjust enrichment of the respondent . . .' He rejected an argument that the profits of the respondent resulted from its own sales and not from blocking access to the market of the appellant and held that the claim in h unjust enrichment should go to trial.

[68] Kahan J explicitly held that restitution was not limited to infringement of a property right:

'With respect to reasons of judicial policy, I do not see any reason why we should restrict the laws of restitution to infringement of a property right. j To the contrary: there are weighty reasons existing against such a narrowing. The principle that we do not order compensation for damages caused as a result of a reversed judgment [deserves] all due respect and should not be tampered with. There are important reasons to do so, where a person who filed an action and prevailed in a judgment should not be obligated [to pay] compensation if the judgment is reversed, unless such person undertook to compensate the opposing party or committed the tort

> of malicious prosecution. However, there is no justification that one who was enriched at the expense of the opposing party following a reversed judgment should retain the profits realized in such a manner, profits which, but for such judgment, would not be his, but rather the opposing party's. In my opinion, the rationale that there was no infringement here of a property right of the plaintiff is meaningless. Is the right of a person to sell his merchandise to his customers and to derive profits therefrom not worthy of protection to the same degree as his right to hold movable or real property? Restricting the right of restitution to a [situation where] a property right was infringed upon only serves to remind us of the situation which used to exist in Israel (until the well-known *Or* judgment was handed down (9)), where damage to the pants [probably English as opposed to American usage would be "trousers"] of a person who was injured in an accident entitled him to compensation [for the pants], but not for his bodily injury. I am at a loss to understand the reason for restricting the right to restitution, and handing the profits to the Respondent, who acquired them at the expense of the appellant as a result of a judgment which has been reversed.'

[69] The judgments of Cohen and Kister JJ are largely based on Rabbinical law which is irrelevant to present considerations.

[70] I ask myself two questions: first is there a real prospect that the Israeli case would be followed here? And second, if so, would it be extended to non-parties to the original action? In asking the first question I am conscious that I may be too favourable to Mr Strauss, for on a strike-out claim it is the duty of the court to apply English law 'as it now stands' (*Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 at [39], [2002] 1 All ER (Comm) 737 at [39] per Sir Andrew Morritt V-C). Judge LJ was to the same effect (at [55]):

> 'However settled the law may appear to be, one of its strengths is that the possibility of development, or change, remains. In my view, even for the purposes of CPR 24.2, we must apply the law as it is, not as it *may* possibly one day become . . .'

[71] I have no doubt that it would not be so followed. Firstly it is clear that the analysis and citation of authority, though extensive, was not as detailed as that in the Australian case. Second for the reasons I have given, I do not think that either *Rodger*'s case or the *Arkadelphia Mining* case were correctly analysed. Third the case in part depends on the Israeli Execution Law which is irrelevant here. Fourth I cannot accept that a mere freedom to trade can fairly be regarded as property or anything in the nature of property and restitution remains based on restoring property or the fruits of property.

[72] In so holding I have taken into account the articles by Professor Friedmann of Tel Aviv University (1980) Col LR 504 and that in *Essays in the Law of Restitution* (1991) edited by Professor Andrew Burrows. Professor Friedmann is enthusiastic about the case (describing it as a 'landmark decision' in his contribution to the latter). But he seems to be alone—the principle the case is said to establish has not in practice been a seed which has taken root outside Israel.

[73] Even if that were wrong, I cannot envisage any extension to non-parties for all the reasons I mention above about limitation, multiple claims by different persons and so on. Nor does Professor Friedmann, for all his enthusiasm for the *Palimport* case, go that far. If one were to go that far, then I can see no stopping

point. Court orders, as I have already observed, can affect third parties beneficially or adversely. Litigation itself can have the same effect. For instance, it is the everyday experience of any litigation intellectual property lawyer that the very existence of litigation against a defendant can have a severe adverse affect on his sales—why buy or put in your catalogue a product which your supplier may be prevented from supplying? It is settled beyond doubt that no action lies, save for very limited exceptions in the nature of abuse of process, for recompense for damage caused by litigation itself (see *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1989] 3 All ER 14, [1990] 1 QB 391). That is so even in respect of a claim by a party who claims he was harmed by the litigation—so it is inconceivable that a non-party could have such a claim.

[74] What then of Mr Strauss's submission that the Canadian companies had a 'business opportunity' of which they were deprived? He says that, unlike other third parties they were in a special position, having their own process and plant, to exploit the market. I do not think that can be equated in any way with anything in the nature of property, what Professor Friedmann calls 'quasi-property' (see p 512 of the *Columbia Law Review* article). Cases in which courts have spoken of a 'business opportunity' have been quite different—the opportunity has been something in the nature of confidential information: see eg *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 at 733. Moreover the cases have been about the defendant taking and using the quasi-property for himself—thereby unjustly enriching himself at the plaintiff's expense. The Canadian companies' special process, assuming it was special, was not in itself something which was taken from them and given to GSK.

[75] I conclude the judge was right to strike out the claim. I reach this conclusion without the need to consider whether, as Mr Waugh contended, the Canadian companies, if they had applied to the court, could have had the benefit of the undertaking extended to them. I say this because I am not entirely sure that is so and this is not the place to debate in detail what would have happened if they had so applied.

[76] I elaborate a little. In *R v Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd (Primecrown Ltd intervening)* [1999] RPC 705 at 708–709 I said:

> 'I would add this, that in future applications of this sort it may be possible for significant third party customers to protect themselves against the effects of a "wrong" injunction by themselves applying to the court for a cross-undertaking to be given in respect of their losses arising from having to pay more than they would have to pay if competition had been permitted—see [*Allied Irish Bank v Ashford Hotels Ltd, Ashford Hotels Ltd v Higgins* [1997] 3 All ER 309].'

[77] The principles about who can successfully intervene and ask for such an undertaking and whether such an intervener can be put on terms as to costs or the like are far from worked out. They may need development on a case-by-case basis. I understand that the current practice of the Patents Court when an application for an interim injunction in respect of a pharmaceutical is sought is to require the patentee to give notice to the Department of Health of the application in case it wishes to seek such an undertaking. To date there has been no ruling on the point.

[78] One consideration which may matter is whether the person applying is himself a potential infringer. In many intellectual property cases there is a chain of potential infringers starting with the manufacturer (or importer) running

through middlemen to the ultimate consumer. That is so in patent cases unless the ultimate consumer can avail himself of the defence given by s 60(5)(a) of the 1977 Act—that his use is for a private and non-commercial purpose. Even keeping a patented product can infringe (s 60(1)(a)). So if the claimant picks on only one member of the chain as a target for an interim injunction, it might be said that he was artificially limiting his liability on the cross-undertaking and the others in the chain should have the benefit of one too, perhaps on terms as to costs if the action succeeds. On the other hand the position of non-infringers, such as third party foreign manufacturers may be different. I say no more for the present, for it was not argued by Mr Strauss that the Canadian companies would not have been granted a cross-undertaking if they had intervened.

[79] I should also mention some other arguments advanced by Mr Strauss. One was by way of appeal to policy considerations. He suggested that a claim in restitution had an advantage over a cross-undertaking regime. This was that a claimant would know where he stands—he cannot be ordered to pay more than the pot of 'extra' money he gains by the 'wrongful' injunction. By way of contrast, suggested Mr Strauss, if cross-undertakings had to be given not only to actual injunctees but third party interveners who might be adversely affected, liability could be extensive, going well beyond the value of the injunction. That, he suggested, could operate as an undesirable deterrent to a party in need of an interim injunction.

[80] I am not impressed by this. First there are all the difficulties which I have mentioned about multiple claims to a single pot. The so-called 'advantage' is fraught with practical difficulties on top of the intellectual difficulties. Second I cannot see that the 'deterrent' is necessarily a bad thing. A party who may have to recompense third parties significantly damaged by an interim injunction, is likely to weigh carefully whether he really has a case which he is likely to win at trial, as opposed to one which raises no more than a 'serious issue to be tried'.

[81] Another argument was based on the fact that a successful claimant in a patent action is entitled to elect the remedy of an account of profits made by the infringer rather than damages: see s 61(1)(d) and s 61(2) of the Act. Mr Strauss suggested that there ought to be some sort of symmetry—a 'wrongly' injuncted defendant ought similarly to be able to claim the profits made by the patentee if his action fails. I do not see why. That might even put the defendant in a better position than if he had never been sued. Moreover the appeal to symmetry works the other way as regards restitutionary claims by third parties. Here, for instance, if there had been no interim injunction but GSK had succeeded at trial, there is no way that the Canadian companies, as non-defendants, could have been required to disgorge their profits.

[82] Mr Strauss also made some appeal to the inherent jurisdiction of the court. But important and powerful though this is (see the article by my late father [1970] CLP 23) it cannot seriously be suggested it goes so far as to create positive legal rights for non-parties. The inherent jurisdiction is essentially procedural—a tool in the administration of justice—not part of substantive law creating free-standing rights for third parties of the kind claimed here.

THE THIRD PARTY LOSS CLAIM

[83] Lord Diplock, in the *Hoffmann-La Roche* case [1974] 2 All ER 1128 at 1150, [1975] AC 295 at 361, expressed the view, obiter, that quantification of compensation under a cross-undertaking should be on the basis of a breach of a notional contract between the parties to the effect that the injunctor would not

prevent the injunctee from doing the injuncted acts. That brings into play the rule in *Hadley v Baxendale* (1854) 9 Exch 341, 156 ER 145: briefly, the 'wrongful' injunctor will pay only for such damage as he could reasonably foresee would be caused to the injunctee by the injunction, either from his general knowledge of the circumstances or from his knowledge of the particular circumstances of the injunctee.

[84] In the *Primecrown* case [1999] RPC 705 at 714 I reviewed the rather exiguous authorities on the principle by which compensation is to be assessed and concluded that the notional breach of a notional contract basis may be too narrow in some cases. For present purposes that does not matter. What matters is that the entire discussion in the cases is about how the compensation which the injunctor has undertaken *to pay the injunctee* (or other party identified in the cross-undertaking) is to be assessed. Whether it is the contractual or wider basis, one must not lose sight of what it is that is being quantified.

[85] Founding himself on the basis of Lord Diplock's notional contract, Mr Strauss argued that a party identified in the cross-undertaking as one whom the injunctor will compensate (here particularly Apotex Europe) can claim compensation not only for having been himself prevented from doing the restrained acts but also for others who were adversely affected by the injunction. He relied particularly on *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417, [1994] 1 AC 85 and *Panatown Ltd v Alfred McAlpine Construction Ltd* [2000] 4 All ER 97, [2001] 1 AC 518.

[86] I think the argument fails for two reasons. First there is in fact no contract between the parties. The undertaking is given to the court—it is to compensate the parties identified in the undertaking. That is all. Second, even if there really had been a contract between the parties, the principles expounded in the cases do not and could not be expanded to cover this kind of third party loss.

[87] The first reason is incapable of much elaboration. Lewison J put it elegantly as follows ([2006] 2 All ER 53):

> '[82] . . . The principle [in the cases relied upon] is predicated on a breach of contract. No cause of action arises at all unless B has broken his promise. If B has not broken his promise, discussion of what the cause of action might encompass if he had done is pointless. So the first question must always be: what has B promised to do?
>
> [83] In the present case, GSK promised to abide by any order of the court requiring them to compensate the defendants (or the 'Apotex parties' as defined) for any loss that they had suffered. They did not promise to pay the defendants for loss that other people had suffered.'

[88] Putting it another way, the argument converts what is only a principle of assessment of compensation for breach of contract into *both* a notional breach of a notional contract *and* a method of assessment of breach. The cases relied upon are only about what damage can be claimed following a breach of contract.

[89] Turning to the second point, even if there had been a real breach of a real contract not to prevent the defendants from selling paroxetine, I do not see how the cases could establish a viable cause of action. Mr Strauss' argument runs this way. Suppose that GSK and the defendants had entered into such contract. GSK would have known that if they were to breach it, the Canadian manufacturing companies would be adversely affected. So Apotex Europe can claim for the losses of the Canadian companies in addition to (not by way of substitution for) its own losses by virtue of an exception to privity of contract.

[90] The *Linden Gardens* case and the *Panatown* case were cases where one party (B) had contracted with (A) to perform certain works to land and was in breach of that contract. In the *Linden Gardens* case by the time of breach A had transferred the land to C. In the *Panatown* case the land was already owned by C at the time of contract and B had also entered into a direct deed with C whereby it agreed to pay C in respect of [in effect] any breach of its contract with A. In each case B contended that A had suffered no damage (the land being no longer, or never having been, his).

[91] In the *Linden Gardens* case the benefit of the contract between A and B was, by its terms, non-assignable. Lord Browne-Wilkinson (with whom Lords Keith of Kinkel, Bridge of Harwich and Ackner agreed) said ([1993] 3 All ER 417 at 437, [1994] 1 AC 85 at 114–115):

> 'On the contrary, McAlpines had specifically contracted that the rights of action under the building contract could *not* without McAlpine's consent be transferred to third parties who became owners or occupiers and might suffer loss. In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case in which the rule provides "a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it".'

[92] Lord Griffiths, whilst agreeing with Lord Browne-Wilkinson, favoured a broader basis of liability. This was based on A's interest in the performance of the contract—he has not received what B contracted to provide and B must pay for that. The liability did not depend on any proprietary right ever having been vested in A. He put it this way ([1993] 3 All ER 417 at 422, [1994] 1 AC 85 at 97):

> 'In cases such as the present the person who places the contract has suffered financial loss because he has to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver. I therefore cannot accept that it is a condition of recovery in such cases that the plaintiff has a proprietary right in the subject matter of the contract at the date of breach.'

[93] The principles were further considered in the *Panatown* case. A majority of the House held that A had no claim for substantial damages. Their Lordships did not all reason the same way. But, whether one goes to the majority or minority speeches, I cannot find any basis which would justify a claim by Apotex Europe for the Canadian companies' losses.

[94] Specifically the broadest approach, based simply on a 'performance interest' which gives a contracting party an entitlement to sue the other contracting party for substantial damages suffered by a contemplated third party who is out of pocket by reason of the breach, could not apply here. Apotex Europe's performance interest was in itself not being restrained from selling paroxetine hydrochloride. It had no other 'performance interest'. There is no legal 'black hole' of the sort contemplated in the *Linden Gardens* case.

[95] Putting it another way, none of the speeches in either case begin to regard, as within the concept of 'performance interest', anyone who might be

adversely affected by a breach of contract. Here for example besides the Canadian companies, others have been affected by the injunction—employees or even potential employees of the Canadian companies, shareholders of the Canadian companies, suppliers of chemicals which would have been used to make the product and carriers.

[96] Mr Strauss seeks to put those parties on one side, arguing that the notional contract with Apotex Europe was not for their benefit whereas it was for the benefit of the Canadian companies. He says this is because the Canadian companies 'are most closely associated with Apotex Europe'. He frankly adds:

> 'We recognise that this argument sounds artificial, but that is not because there is anything wrong with it. It is because the law on both topics (the measure of compensation under a cross-undertaking and the recovery of third party loss), which have to be combined on this issue, is artificial.'

[97] I do not accept that the principles of law on either topic are artificial. What is artificial is this elaborate combination and extrapolation of those principles. I do not think the third party loss claim is viable. The judge was right to so hold.

ESTOPPEL

[98] I turn to GSK's cross-appeal from the judge's refusal to strike out the claim by the Canadian companies based on estoppel, although he had 'considerable sympathy' with Mr Waugh's submissions. His principal reason for taking this course was that he considered that going into the detailed documents relied upon would amount to conducting a 'mini-trial' which is not permitted by current practice under CPR Pt 24.

[99] Following this decision the judge required the Canadian parties to serve a pleading setting out their estoppel case. It was essentially the same as the relevant parts of the earlier draft amended points of claim. However I shall refer to the document as actually served—and consider this appeal as an appeal from a refusal to strike the document out. This has the merit of being procedurally orthodox. More than that, it most clearly brings out that the estoppel relied upon is essentially being used to justify the claim—as a sword and not a shield to use the classic phrase.

[100] There is no dispute as to the approach of the court at this stage. The judge summarised it thus:

> '[22] In order to defeat an application for summary judgment, the claim must be shown to have a real prospect of success; that is to say one that is more than merely arguable. But an application for summary judgment must not be allowed to become a mini-trial. The purpose of Pt 24 is to dispose of cases that are not fit for trial at all.'

There is no need to say more about the approach.

[101] The impugned pleading has five claimants, the defendants and the two Canadian companies. They are collectively described as 'Claimants on the Cross-Undertaking'. The key parts of the impugned pleading read:

> 'Estoppel
>
> 34. In support of its claim to compensation, Apotex Inc, will contend that SKB and GSK UK are estopped from denying that it is entitled to claim the benefit of the cross-undertaking as to damages contained in the Injunctions, and will further contend that the inquiry should proceed on the assumption

that it is so entitled. In support of this contention, Apotex Inc. will rely on the following facts and matters.

(a) At the time the Injunctions were ordered and throughout the period during which they were in force, there was a common assumption on the part of the Claimants on the Cross-Undertaking (including Apotex Inc.) and the Respondents on the Cross-Undertaking (i) that the Injunctions and the cross-undertakings as to damages contained in them applied to the manufacturer and/or intended supplier of the paroxetine hydrocholoride anhydrate proposed to be sold by Neolab and Waymade in the UK and/or (ii) that Apotex Inc. was to be treated as if it were a defendant to the action, without formal joinder.

(b) This common assumption is evidenced by or to be inferred from (amongst other things) (i) the correspondence between the parties' solicitors both before and during the proceedings, (ii) the parties' applications, disclosure, witness statements and skeleton arguments, and (iii) the judgments and orders in the Court in the proceedings, as further described in Schedule 9 to these Points of Claim.

(c) The making of that assumption on SKB and GSK UK's part is further evidenced by or to be inferred from a Glaxo-SmithKline press release dated 25 June 2003 in which it was stated that:

"GSK will continue vigorously to enforce [the anhydrate patent] against manufacturers who are believed to be infringing it. In this connection, proceedings against Apotex and others [ie the trial of this action] commenced in the UK High Court today. Pending the outcome of this case, Apotex have been prevented from launching a generic paroxetine product in the UK by an injunction awarded in November 2002 and upheld in the Court of Appeal judgment handed down in February 2003."

(d) Further or alternatively, by the correspondence, applications, witness statements and skeleton arguments written or produced on SKB and GSK UK's behalf as particularised in Schedule 9 to these Points of Claim, SKB and GSK UK represented to Apotex Inc., and thereby led Apotex Inc. to believe, that it was being treated as a defendant to the action.

(e) The parties dealt with each other (and, for the avoidance of doubt, communications passed between them) during the action on the basis of that assumption, and Apotex Inc. conducted itself during the action in reliance upon the said representation, as is apparent from the materials identified in sub-paragraph (b) above.

(f) Further, because of the said assumption and/or representation, Apotex Inc. did not apply to be joined as a defendant to the action and did not apply for an express cross-undertaking as to damages in respect of any loss which it might suffer as a result of the Injunctions.

(g) In the premises, it will inequitable [sic] to allow SKB and GSK UK to renege on the said common assumption and/or representation, and to deny that their cross-undertaking as to damages covers the loss caused by the Injunctions to Apotex Inc. as the manufacturer and/or supplier of the product and/or as a defendant to the action.

(h) In the premises, SKB and GSK UK are estopped from denying that which was at all material times commonly assumed and/or represented to Apotex Inc. whilst the Injunctions were in force, and the Court should therefore proceed with this inquiry as if the assumption and/or representation were correct, that is, as if Apotex Inc. had the benefit of SKB

and GSK UK's cross-undertaking as to damages and/or were a defendant to the action.'

The nature of the estoppel relied upon

[102] Two alternative kinds of estoppel are raised, estoppel by convention (where the parties act on a common, erroneous, assumption) and estoppel by representation (where one party has represented, erroneously, a state of affairs to be so and the other has relied upon that representation to his detriment). It was not disputed that for either kind of estoppel, the representation or common assumption as the case may be, must be unambiguous and unequivocal. That is inherent in the very nature of an estoppel.

[103] Before us the argument covered more points than were raised or dealt with by the judge. Mr Waugh contends that the pleading is not sustainable, even to the Pt 24 standard, for three distinct reasons. (a) An inter-partes estoppel cannot operate so as to expand or contract the effect of a court order. (b) An estoppel cannot be used as a key element of a claim (sword not shield) and particularly it cannot operate to create a legal relationship when there was none at the outset. (c) In any event the material pleaded is an inadequate basis to justify an estoppel. I think he was right for all three reasons.

Inter-parties estoppel cannot affect the scope of the order

[104] The interim injunction was directed at the defendants. The undertaking was given to the court, not the defendants. The undertaking was, if the court so ordered, to pay compensation to the defendants, no one else. I think it inexorably follows that whatever passed between the parties cannot affect the scope of what was actually undertaken, or, for that matter, the scope of the injunction. After all the court is not alleged to be party to the estoppel—to be estopped from reading its order to mean what it says.

[105] Suppose for instance, that one or other of the Canadian companies had themselves sold paroxetine hydrochloride in this country without any involvement of any of the defendants. Could SKB have invoked contempt proceedings on the basis that by estoppel, the Canadian parties were, or were 'to be treated as' actual defendants? The answer is obviously no—the court order did not forbid the Canadian companies from selling direct in the United Kingdom. No doubt if they had done so or threatened so to do, GSK would have applied for an interim injunction against them. But the basis of the application would have been actual or threatened infringement, not any estoppel.

[106] Mr Strauss recognised the force of that. He accepted that the Canadian companies were not in fact parties to the order and an estoppel could not make them so automatically. There could be no direct enforcement of the order by contempt proceedings against the Canadian companies. He took a more elusive position: that the Canadian companies 'were to be treated as though they were parties to the order'. There are echoes of Lord Mildew's aphorism here. Mr Strauss submitted that if the Canadian companies had themselves infringed, GSK could apply to the court to have them added as defendants in the existing action on the basis of an estoppel—as if there were a binding agreement that they should be treated as parties. The court would then formally make them so. Similarly, submitted Mr Strauss, by reason of the estoppel, the Canadian companies were entitled to apply to the court to be made defendants entitled to the benefit of the cross-undertaking.

[107] I do not accept that analysis. An estoppel cannot create an agreement. No doubt if there were an actual binding agreement by which the parties agreed that the Canadian companies should be defendants for all purposes, not only for the future but retrospectively, the court would give effect to it. But that would be by reason of the express agreement—an agreement that the existing order should be varied. And even then there is no way, supposing there had been past infringement by the newly added party, that that party could be a contemnor by reason of those past acts. Even an express agreement cannot change the meaning of the order. All an express agreement can do is lead the court to varying its order with effect for the future.

[108] So I just cannot see how the meaning of the court's order can be varied by an estoppel.

Shield not sword

[109] GSK's duty was to the court: to obey any order of the court that it should pay compensation to the defendants. There was no pre-existing rule of law such as tort or contract by which GSK came under a direct duty to the defendants or had a direct liability to the defendants to pay compensation. And there was never any legal relationship between GSK and the Canadian companies. So the proposed estoppel, said to operate between GSK and the Canadian companies would have the effect of creating a legal relationship between parties who had never, on the matter pleaded, even communicated with each other. That would be an astonishing result—and not one which I think the law could countenance.

[110] It is as well to remember here the fundamental nature of an estoppel. An estopped party is precluded from asserting that a particular fact or set of facts or state of affairs is so. Thinking of it in procedural terms, an estoppel inherently must be raised by way of a riposte. The claimant pleads his case basing himself on alleged facts x, y, and z. The defendant then raises an estoppel saying: 'You may not assert these facts by reason of an estoppel arising from representation, convention or whatever.'

[111] The pleaded case here does not fit that essential nature, as can be tested by the procedural model. If the Canadian companies applied to the court to enforce the existing undertakings without asserting the estoppel in their claim, the court would simply dismiss the application as bad on its face. There would be no need for GSK to assert that which they are alleged to be estopped from contending, namely that the Canadian companies are not to be treated as parties to the order. Even if GSK did not appear to argue the point, the claim would fail without the estoppel.

[112] Thus it is essential to the Canadian companies' case that the estoppel be pleaded as part of the claim. The pleading is not a mere anticipation of a reply to a defence. This shows that what is relied upon is not an estoppel at all—it is a naked attempt to create a legally binding agreement when there never was one and never any intention to create one. That an estoppel cannot do, see for instance by way of a recent example, the *Baird Textiles* case.

Mini-trial?

[113] It was on this ground that the Canadian companies succeeded. Mr Waugh contended that there was no question of a mini-trial: that all one had to do was to go through the documents pleaded: whether considered individually or collectively, none of them amount to an unequivocal representation, or demonstrate an unequivocal common assumption, that the parties treated the

Canadian companies as though they were parties to the proceedings. This exercise did not involve any attempt to resolve any conflict of evidence—no 'mini-trial'. So it was fit for determination under Pt 24.

[114] I think Mr Waugh was right. Going through the documents to see whether they are capable of supporting an estoppel is not a mini-trial exercise—no resolution of disputed facts is called for. None of them in my view were so capable. It is only necessary to discuss two—those chosen by Mr Strauss as his best.

[115] The first of these was an application notice issued by GSK's solicitors on 11 December 2002—after the interim injunction had been granted. It sought procedural orders against what it called 'Apotex', for instance an order that 'Apotex does . . . provide inspection of [the manufacturing process]'. So, it is submitted, GSK were treating the Canadian companies (whom they knew were actually the manufacturers) as parties to the action. But the notice is directed at the existing defendants only—for it is only they who are identified under the heading 'Parties to be served'. At no point had the solicitors for the defendants come on the record for the Canadian companies. In my opinion it is far too far-fetched to spell out of this an unequivocal mutual assumption, or representation by GSK, that the Canadian companies were to be treated as parties to the action as a whole, still less as parties to the cross-undertaking which had been given earlier. As a matter of convenience, and procedurally rather sloppily, the application was made against 'Apotex'. In fact if the Canadian companies refused to abide by the order I do not think they would have broken it.

[116] The other 'best' document was the court order made on that application—an order made, after discussion about some terms immaterial to the present point, essentially by consent. The headings name the three defendants and no others. The recital includes the words: 'Upon hearing counsel for the Claimants [GSK] and for the Defendants ["Apotex"].' So 'Apotex' is defined to mean the actual defendants and none other. None the less the order includes commands which could only be complied with if the Canadian companies co-operated. For instance para 1 provides: 'Apotex does . . . provide inspection of the process.'

[117] I cannot see how this document unequivocally represents or treats the Canadian companies as parties. If inspection was not provided (because the Canadian companies did not co-operate) that might have consequences for the actual defendants, but it was for them to comply with the order not the Canadian companies. The document is incapable of supporting the pleaded estoppels. So also for all the other documents pleaded in Sch 9 to the points of claim and those set out in it.

[118] I would add two further points. First it is not just that the pleaded documents do not support the estoppel. There is a letter emanating from the defendants' solicitors which positively contradicts it. The letter, of 4 March 2003, was in response to a query about verification of the list of documents. It said:

> 'A further specific point that we should raise now is that in paragraph 3 of your clients' Application Notice you have asked for the list to be verified by an officer from Apotex Europe Limited. You will appreciate the documents requested will not have been generated within Apotex Europe Limited (or indeed any party to the litigation) and the searches involve bringing together documents from other parties. We therefore suggest the disclosure

statement for the list come from a solicitor at Taylor Wessing, who knows the searches undertaken and the documents disclosed.' a

That letter reflects the reality. The solicitors were only acting for the actual defendants at that time. It is simply inconsistent with anyone believing or conducting themselves as though the Canadian companies were, or were to be treated, as parties.

[119] The other point is in relation to sub-para (f) of the pleading—which alleged that by reason of the common assumption and/or representation Apotex Inc did not apply for an express cross-undertaking. That is inconsistent with the statement on behalf of the Canadian companies that the first time they considered applying to become defendants in the action was following the handing down of judgment on 8 December. b c

[120] So I think the judge was wrong to dismiss the strike out application on the basis that consideration of the point would involve a mini-trial. As the matter developed before us, Mr Strauss recognised that his case based on the pleaded documents might fail. So he retreated to a fall-back position. This was that even if all the specific documents pleaded did not support either kind of estoppel relied upon, none the less the pleading, stripped of all reference to those documents, still contained general averments of a common assumption or a representation by GSK to the effect that the Canadian companies were to be treated as parties and that was enough. d

[121] I do not accept this. The detailed particulars are put forward as justifying the general averments. If they do not justify the general averments (and I do not think they do) then the averments fall with them. It is no good saying: 'Well there may be other material which we have or which may turn up on disclosure.' That does not demonstrate that a plea 'has a real prospect of succeeding'. e

[122] Likewise I do not accept Mr Strauss's reliance on the careful pleader's precautionary '(amongst other things)' in para 34(b). He submitted that could let in other things. I do not agree. One is entitled to assume with a modern pleading that a party is putting his best foot forward. If that best foot will not support the case, then this sort of reservation will not save it. f

[123] Mr Strauss suggested that Pumfrey J had restricted the nature of the Pt 24 exercise when he refused to order a preliminary point and ordered instead that the matter be decided 'according to the criteria under CPR Parts 3.4 and 24'. This is because Pumfrey J said in giving judgment: 'I am quite satisfied that the purely legal argument that will have to be advanced on the basis that all the facts pleaded are true . . .' The submission was that thereby the court was required to accept the general averments, stripped of their supporting particulars. I do not accept it. All that Pumfrey J was saying, and ordered, was that the usual criteria for Pt 24 applied—there was to be no trial of a preliminary point and (because Pt 24 does not allow it) no mini-trial of any disputed point of fact. Reaching the conclusion I do involves neither of these. g h

[124] I would add this. We had submissions on whether, as a matter of law, for estoppel by convention, a common understanding must actually be communicated by one party to the other. On one view Kerr LJ might be understood to have suggested this in *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt* [1985] 2 Lloyd's Rep 28 at 34: j

'All estoppels must involve some statement or conduct by the party alleged [to be estoppel on which the alleged representee was entitled] to rely and did

rely. In this sense all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by statement or conduct.'

However in *Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd, The Vistafjord* [1988] 2 Lloyd's Rep 343 a common assumption known to be so by both parties and upon which both acted, was enough to create the estoppel:

'Each [of the parties] was fully privy to the thinking of the other. Moreover we have very clear conduct crossing the line . . . This is not a case of inaction, but of action on both sides of which the other party was fully cognizant . . .' (See [1988] 2 Lloyd's Rep 343 at 351 per Bingham LJ.)

Lord Steyn put it this way in *The Indian Endurance (No 2), Republic of India v India Steamship Co Ltd* [1997] 4 All ER 380 at 391, [1998] AC 878 at 913:

'It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other . . . It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.'

The matter pleaded here does not fit any of these statements of the law. It does not plead 'clear conduct crossing the line', nor any action on both sides consistent only with the alleged estoppel, nor anything which amounts to a communication of an assumption from one side to the other.

CONCLUSION

[125] In the result I would dismiss the appeals, allow the cross-appeal and refuse the application of the Canadian companies to advance claims on their own behalf.

MOORE-BICK LJ.

[126] I agree.

SIR ANDREW MORRITT C.

[127] I also agree.

Appeal dismissed. Cross-appeal allowed.

Celia Fox Barrister.

Re Loftus (deceased)

Green and others v Gaul and others

[2006] EWCA Civ 1124

COURT OF APPEAL, CIVIL DIVISION

CHADWICK, THOMAS AND LLOYD LJJ

3 MAY 2006, 28 JULY 2006

Limitation of action – Accrual of cause of action – Claim to personal estate of deceased person or to any share or interest in any such estate – Date on which the right to receive the share or interest accruing – Limitation Act 1980, s 22(a).

Equity – Laches – Defence – Availability – Whether defence available where no period of limitation prescribed by statute – Limitation Act 1980, s 21(1)(b).

The deceased died intestate on 11 August 1990. The first defendant was granted letters of administration in 1991. On 20 January 2003 the claimants commenced proceedings for, inter alia, the removal of the first defendant as personal representative and the appointment of an independent solicitor in her place, and an account of the administration. The first defendant relied, inter alia, on a defence of laches or acquiesence or alternatively, a limitation defence under s 22(a)[a] of the Limitation Act 1980. That section was expressed to be subject to s 21(1)[b] and (2) of the 1980 Act and provided: 'no action in respect of any claim to the personal estate of a deceased person or to any share or interest in any such estate (whether under a will or on intestacy) shall be brought after the expiration of 12 years from the date on which the right to receive the share or interest accrued.' Section 21(1) of the 1980 Act provided: 'No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action . . . (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee . . .' The judge decided, inter alia, that the proceedings were not time barred under s 22(a), holding that time did not begin to run until the end of the 'executor's year' provided by the Administration of Estates Act 1925 under which a personal representative was not bound to distribute the estate of the deceased before the expiration of one year from the death. He went on to hold that if he were wrong the claim would fall within s 21(1)(b) 'for which there is no limitation period and in relation to which laches does not apply'. However, he went on to consider whether, had laches been available as a defence, it would have been made out on the facts, and concluded that it would not have been. The first defendant appealed, contending (i) that the judge had been correct to take the view that s 22(a) of the 1980 Act applied but wrong in his decision as to the commencement of the limitation period; and alternatively (ii) that if s 22 was displaced by s 21(1), so that there was no period of limitation prescribed by the 1980 Act, he had been wrong to hold (a) that the

a Section 22, so far as material, is set out at [10], below

b Section 21, so far as material, is set out at [10], below

doctrine of laches had no application; and (b) wrong to hold on the facts that laches would provide no defence in any event.

Held – (1) Proceedings to remove the personal representative of an intestate and appoint a substitute in her or his place did not fall within s 22(a) of the 1980 Act. The primary remedy of a beneficiary who complained of unjustified delay by an administrator in getting in the assets, paying the administration expenses and debts and distributing the residuary estate was an administration action. The power to remove and replace a personal representative was exercisable in circumstances where the beneficiary could have commenced an administration action and in a case where time would not run against the beneficiary in an administration action there was no reason why it should run if the only relief sought was the removal of the personal representative and the appointment of another in her place. It had not been contemplated by the legislature that s 22(a) would apply to claims against the personal representative of an intestate in respect of real estate which remained unsold or at a time when the estate remained unadministered. The better view was that, where s 22(a) applied, the period would not begin to run until the administrator had paid the costs, funeral and testamentary and administration expenses, debts and other liabilities properly payable out of the assets in her or his hands, and provided for the payment of any pecuniary legacies as not until then would she or he be in a position to distribute the residuary estate. Accordingly, s 22(a) had no application to the claim to remove the first defendant as administratrix (see [24], [25], [28]–[30], [49], [50], below); *Re Johnson, Sly v Blake* (1885) 29 Ch D 964 considered.

(2) The claims against the first defendant to an account and payment were claims in respect of property, real and personal, which had come into her hands as administratrix of the deceased's estate and fell within s 21(1)(b) of the 1980 Act so that no period of limitation prescribed by the 1980 Act applied to those claims. Further, because they were claims within s 21(1)(b) they were not claims to which s 22 had any application (see [32], [49], [50], below).

(3) A defence of laches or acquiescence was not excluded by s 21(1)(b) of the 1980 Act. Section 21(1) was not to be read as if the opening words were 'No period of limitation shall apply . . .' rather than 'No period of limitation prescribed by this Act shall apply . . .' However, in the instant case, the judge had been correct to hold that the defence failed on the facts. Accordingly, the appeal would be dismissed (see [37], [40], [41], [47]–[50], below); *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1963] 3 All ER 1 explained; *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2004] 1 BCLC 131 considered.

Decision of Lawrence Collins J [2005] 2 All ER 700 affirmed on different grounds.

Notes

For the defence of laches, see 16(2) *Halsbury's Laws* (4th edn reissue) para 910, and for actions in respect of trust property: exclusion from protection in certain cases and for actions claiming personal estates of deceased persons: benefits under will or on intestacy, see 28 *Halsbury's Laws* (4th edn reissue) paras 1037, 1058.

For the Limitation Act 1980, ss 21, 22, see 24 *Halsbury's Statutes* (4th edn) (2006 reissue) 771, 773.

Cases referred to in judgments

Diplock, Re, Diplock v Wintle [1948] 2 All ER 318, [1948] Ch 465, CA; *affd* sub nom *Ministry of Health v Simpson* [1950] 2 All ER 1157, [1951] AC 251, HL.

Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218, HL.

Frawley v Neill [2000] CP Rep 20, CA.

Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3) [2003] EWCA Civ 1048, [2004] 1 BCLC 131.

Johnson, Re, Sly v Blake (1885) 29 Ch D 964.

Lindsay Petroleum Co Hurd (1874) LR 5 PC 221, PC.

Patel v Shah [2005] EWCA Civ 157, (2005) Times, 2 March.

Pauling's Settlement Trusts, Re, Younghusband v Coutts & Co [1963] 3 All ER 1, [1964] Ch 303, [1963] 3 WLR 742, CA; *affg in part* [1961] 3 All ER 713, [1962] 1 WLR 86.

Ratcliff, Re [1898] 2 Ch 352.

Ridsdel, Re, Ridsdel v Rawlinson [1947] 2 All ER 312, [1947] Ch 597.

Appeal

The first defendant Margaret Winifred Gaul appealed with permission of Lawrence Collins J from his decision on 18 March 2005 ([2005] EWHC 406 (Ch), [2005] 2 All ER 700) in proceedings relating to the estate of Ivor Andrew Loftus deceased (the deceased) brought against Mrs Gaul by Angela Margaret Green, Sheila Mary Ross and Katherine Eva Toms (the claimants) by which the judge ordered: (i) that Mrs Gaul be removed as personal representative of the deceased and that Amanda King-Jones, solicitor, be appointed in her place; and (ii) that Mrs Gaul account for the property which had come into her hands as personal representative. Ms King-Jones appeared as an interested party. The facts are set out in the judgment of Chadwick LJ.

James Pickering (instructed by *Blaser Mills*, High Wycombe) for Mrs Gaul.

Sarah Asplin QC and *Kerry Bornman* (instructed by *Pearson Rowe*, Birmingham) for the claimants.

David Brownbill (instructed by *Thomas Eggar*, Worthing) for the interested party.

Cur adv vult

28 July 2006. The following judgments were delivered.

CHADWICK LJ.

[1] This is an appeal from an order made on 18 March 2005 by Lawrence Collins J in administration proceedings relating to the estate of the late Mr Ivor Andrew Loftus (see [2005] EWHC 406 (Ch), [2005] 2 All ER 700, [2005] 1 WLR 1890).

[2] Mr Loftus died on 11 August 1990, intestate. His wife had predeceased him. There were six children of the marriage, five of whom survived their father. Letters of administration to the estate were granted to the deceased's daughter, Mrs Margaret Gaul, on 10 December 1991. These proceedings were commenced by her three sisters on 20 January 2003. The remaining sibling, Mr Michael Loftus, was joined as the second defendant. He has taken no part in the proceedings.

THE CLAIMS IN THE PROCEEDINGS

[3] The proceedings included a claim against the third defendant Mr Dexter Gaul—the son of Mrs Gaul—in respect of property known as the yard (being land to the south of Headstone Drive, Middlesex) formerly comprised in the estate. The yard had been the subject of an assent by Mrs Gaul in her own favour in June 1992. Mrs Gaul had transferred the property to her son in August 1999. By the order which he made on 18 March 2005 the judge declared that the yard was held by the third defendant as trustee for the estate; and he made certain consequential orders for transfer of that property back to the estate and for an account. There is now no appeal on behalf of the third defendant in relation to the yard.

[4] The principal claim in the proceedings was for an order removing Mrs Gaul as personal representative and for the appointment of an independent solicitor in her place. There was an ancillary claim for an order that she deliver to the substituted administrator all documents in her custody and possession relating to the administration of the estate. And there was a claim that she account for the administration of the estate and pay to the substituted administrator such sum as might be found due on the taking of the account. The basis of the claims, as pleaded, was that, 'despite being administratrix for nearly eleven years, the First Defendant has failed to provide any or any adequate accounts, failed to complete the administration of the Deceased's estate and failed to make any distributions'. Further, it was said, Mrs Gaul had sworn an inventory and account in September 2002—in response to an order made by the court—which was, to her knowledge, incomplete and incorrect. And, it was said, the inventory and account (although incomplete and incorrect) disclosed that Mrs Gaul had acted in breach of her duties as administratrix and had wasted the assets of the estate. The particulars of breach included the grant to Barclays Bank plc of a charge over the yard in or about August 1999 and the transfer of the yard to Mr Dexter Gaul in September 1999 'for no consideration alternatively at an undervalue'.

[5] The substantive defence advanced on behalf of Mrs Gaul was that there had been a compromise agreement, made between the five siblings on 11 May 1992, under which each was to keep whatever assets derived from the estate which they then respectively controlled. On that basis, it was said, Mrs Gaul was entitled to deal as she wished with the yard and other assets in the estate which were under her control.

[6] The compromise agreement was said to have been made on 11 May 1992 informally and immediately following a formal meeting, with solicitors, at which no agreement had been reached. The formal meeting, it was said, had concluded on the basis that 'negotiations would continue at a further meeting in late May 1992'. Sub-paragraphs (5), (6) and (7) of para 4 of the re-re-amended defence are in these terms:

> '(5) Further and in any event, the proposed meeting for late May 1992 (at which it had been envisaged that the negotiations would continue) took place only between the parties' respective professional representatives (either face to face or over the telephone), following which the parties took no further steps and all discussions between the parties in relation to the distribution of the deceased's estate came to an end on the basis of the agreement reached on 11 May 1992 or alternatively on the basis of the provisional agreement reached on that date which thereby became final.
>
> (6) Further or alternatively, by reason of the acquiescence by the claimants and the second defendant in the above state of affairs (and in particular the

9½ year delay between the cessation of negotiations in May 1992 and the raising of any challenge to the first defendant's administration of the deceased's estate in December 2001, and the 12½ year delay between the deceased's death in August 1990 and the issue of the present claim in January 2003) and the first defendant's detrimental reliance in respect of the same, the claimants and the second defendant are now estopped from denying that they gave up any entitlement that they might otherwise have had to those assets then under the control of the first defendant.

(7) Further and in any event, by reason of the matters set out above (and in particular the above delays of 9½ and 12½ years) the claimants ought to be denied relief under the doctrine of *laches* and/or the Limitation Act 1980, sections 21(3) and 22(a).'

[7] The proceedings came before the judge for trial (over several days) at the end of January 2005. He rejected Mrs Gaul's evidence that there had been a compromise agreement on 11 May 1992—an agreement made, as she said, in the street outside the solicitors' offices. There is no appeal from that finding of fact.

[8] The judge went on to say this:

'[138] [Mrs Gaul] has raised defences of limitation, laches and estoppel . . . The argument . . . is as follows. First, from the date of the assent in June 1992 [she] would have held the yard as trustee and not as personal representative. The relevant limitation period would be 6 years under s 21(3) of the Limitation Act 1980 . . . Any claim would therefore have become statute barred by June 1998 . . .

[140] Second, if she did remain a personal representative, the relevant limitation period would be the 12 year period in s 22(a). On that basis, the limitation period would have expired on August 10, 2002, which was 12 years after Mr Loftus' death, and five and a half months before the commencement of these proceedings on January 20, 2003 . . .

[143] [Third, s]hould it be found that no period of limitation applies (whether by reason of s 21(1) or otherwise), then the claim will be barred by laches . . .'

[9] Section 21(3) of the Limitation Act 1980 provides that, subject to the provisions of sub-ss (1) and (2) of the section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of the Act, shall not be brought after the expiration of six years from the date on which the right of action accrued. Given that the yard has been recovered from Mr Dexter Gaul, the question whether Mrs Gaul could have relied on s 21(3) of the 1980 Act does not now arise. It is not the subject of any issue on this appeal.

[10] Section 22 of the 1980 Act is in these terms, so far as material:

'Subject to section 21(1) and (2) of this Act—(a) no action in respect of any claim to the personal estate of a deceased person or to any share or interest in any such estate (whether under a will or on intestacy) shall be brought after the expiration of twelve years from the date on which the right to receive the share or interest accrued; . . .'

As the opening words of the section make clear, s 22 of the 1980 Act applies 'subject to section 21(1) and (2)'. Section 21(1) is in these terms:

> '(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.'

It has not been suggested that para (a) of that subsection has any application in this case. Nor is s 21(2) of the 1980 Act said to be in point. The effect of that subsection is to limit the liability of a trustee who is also a beneficiary—in an action brought against him in reliance on s 21(1)(b) after the end of the six year period prescribed by s 21(3) of the Act—to the excess over his proper share (as beneficiary) in the trust property.

[11] The issue before the judge (in relation to the limitation defence) was whether—if s 22(a) of the 1980 Act had any application—the 12-year period under that section began to run against the claimants from the date of the death of Mr Loftus or (if at all, given that the administration was not complete) from some later date. If the period ran from the date of death (11 August 1990) the proceedings (commenced on 20 January 2003) were out of time. The judge held that s 22(a) of the 1980 Act did apply to the claim to remove Mrs Gaul as personal representative; but that the earliest date from which the 12-year period began to run against the claimants was 'the end of the executor's year'—that is to say 11 August 1991. But he went on to hold (at [150]) that, if he were wrong in that, then 'most of the claim would fall within s 21(1)(b), for which there is no limitation period, and in relation to which laches does not apply'.

[12] The judge found support for the proposition that, if the claim fell within s 21(1)(b) of the 1980 Act, the defence of laches was not available in observations made by Mummery LJ in *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2003] EWCA Civ 1478 at [140], [2004] 1 BCLC 131 at [140]. But he went on to consider whether, had laches been an available defence, it would have been made out on the facts. In that context, he accepted that there had been substantial delay on the part of the claimants. But he held that Mrs Gaul had been well aware that she was vulnerable to proceedings: she had deposed, in an affidavit dated 25 November 1993 made in proceedings against her brother and his company, MP Loftus Ltd, that 'I am aware that my brother and sisters have threatened to bring proceedings in the High Court to remove me as an administratrix. Such proceedings have not been commenced and, at present, I remain in such capacity'. The judge concluded, at [167], that, 'this would [not] have been (had laches been available as a defence) a case where the conduct of the claimants can reasonably have been regarded by [Mrs Gaul] as a waiver of their rights or have caused injustice to [Mrs Gaul].'

[13] Accordingly the defences of limitation and laches failed. Nevertheless, by his order of 18 March 2005, the judge gave Mrs Gaul permission to appeal—

'in relation to the application or otherwise of sections 22(a) and 21(1)(b) Limitation Act 1980 in this matter and in particular (a) the date from which the right to receive accrues under section 22(a) of the Limitation Act 1980 and (b) the application of *laches* in circumstances in which section 21(1)(b) of the Limitation Act 1980 applies.'

THE ORDER OF 18 MARCH 2005

[14] As I have said, the judge declared, by his order of 18 March 2005, that the yard was held by Mr Dexter Gaul as trustee for the estate. He also declared (on Mrs Gaul's counterclaim) that moneys in certain offshore bank accounts under the control of one or more of the claimants belonged to the deceased's company, I Loftus & Son Ltd. He ordered (on the counterclaim) that the claimants account for assets of the estate which had come into their hands. And he ordered Mr Dexter Gaul to transfer the yard back to the estate and to account to the estate for rents and profits in respect of the yard which had come into his hands. But, although it had appeared from the appellant's notice, filed on her behalf on 9 May 2005, that Mrs Gaul sought to appeal from the whole of the order of 18 March 2005, it became clear in the course of the appeal that she did not pursue an appeal against the parts of the order to which I have just referred. In particular, it was accepted on her behalf that she could not appeal against the order that her son return the yard to the estate, the order that he account for rents and profits, or the order for costs made against him.

[15] In addition to the declarations and order to which I have just referred, the judge ordered that Mrs Gaul be removed as personal representative; he appointed Miss Amanda King-Jones, a solicitor and partner in the firm of Thomas Eggar, as personal representative in her place; he ordered that Mrs Gaul deliver to the new administratrix all documents in her custody and possession relating to the administration of the estate; he ordered that an account be taken of the property of the deceased which had come into her hands or into the hands of any other person or persons to her order and that she should pay to the new administratrix such amount as should be found due to the estate on the taking of that account; and he ordered that she pay 60% of the claimants' costs of the claim and counterclaim. It is from those parts of the order that Mrs Gaul now seeks to appeal. It can be seen that they fall under two heads. First, the removal of Mrs Gaul as administratrix and the appointment of a new administratrix in her place. In that context I should make it clear that there is no challenge to the suitability of Miss King-Jones as an appointee; the challenge is as to the need for any appointment. Second, Mrs Gaul's liability to account for property which had come into her hands as administratrix. There is not, as I understand the appellant's case, an independent challenge to the order for costs; rather, it is said, the costs order should not stand if she succeeds under either of the other heads.

THE ISSUES ON THIS APPEAL

[16] The issues on the appeal are, of course, limited by the permission granted by the judge. No more extensive permission has been granted by this court. Given that constraint, the primary contention advanced on behalf of Mrs Gaul on this appeal is that the judge was correct to take the view that the claims against her in these proceedings were claims to which s 22(a) of the 1980 Act applied—that is to say, that the application of s 22 was not displaced by s 21(1) of the Act—but that he was wrong to hold that the period of 12 years for which

s 22(a) provides did not begin to run against the claimants from the date of death. In the alternative, and as a secondary contention, it is said that—if s 22 is displaced by s 21(1), so that there is no period of limitation prescribed by the Act—the judge was wrong to hold (i) that the doctrine of laches had no application in such a case and (ii) that, on the facts, laches would provide no defence in this case in any event.

[17] It is, I think accepted—and, if it is not accepted, I would hold—that it is not open to the appellant to seek to challenge the judge's findings of fact in relation to delay and detriment, having regard to the limited permission under which this appeal is brought. But, the judge having given permission to appeal on the issue which he described as '(b) the application of *laches* in circumstances in which section 21(1)(b) of the Limitation Act 1980 applies', he must have intended, as it seems to me, that if the appellant were to persuade this court that a defence of laches was available in principle, the court would go on to consider whether that defence had been made out on the facts. If that were not the judge's intention, then the permission on issue (b) would be incapable of being of any benefit to the appellant.

[18] The claimants, as respondents to the appeal, support the judge's conclusion that the claims against Mr Gaul in these proceedings were claims to which s 22(a) of the 1980 Act applied; and they are content to uphold his further conclusion that the 12-year period under that section did not run against them until the end of one year from the death (11 August 1991). But, if the judge were wrong on that latter point, the respondents—by notice filed on 26 May 2005—advance the submission that the 12-year period does not run against them until the completion of the administration; a point in time which, as they contend, has not yet been reached. In the alternative—by an amendment to their respondents' notice prompted, perhaps, by observations from the court—they contend that the period did not begin to run against them until the date on which letters of administration were granted to Mrs Gaul (10 December 1991). They seek, also, to uphold the judge's conclusion that laches is not an available defence in this case (either on the law or on the facts) on grounds which go beyond those on which the judge relied.

[19] For my part, notwithstanding the consensus between the parties that the judge was correct on the point, I do not find it self-evident that the claims made by the claimants in these proceedings are claims to which s 22(a) of the 1980 Act applies. First, I find it difficult to accept, without examination, that proceedings to remove a personal representative and appoint a substitute in his or her place fall within the descriptive words 'action in respect of any claim to the personal estate of a deceased person'. Second, I find it difficult to understand why a claim against an administrator for an account of the assets of an unadministered estate which have come into his or her hands (and for payment of the amount found due on the taking of that account) should not fall within s 21(1) of the 1980 Act—read with s 23 of the Act. And, if the claim does fall within s 21(1) of the Act, it will not be within s 22.

[20] It seems to me, therefore, that the correct approach to this appeal is to decide, first, whether either of the two heads of claim made against Mrs Gaul (and in respect of which she has appealed) are claims to which s 22(a) of the 1980 Act has any application. That will require the court to decide whether the claims to an account and payment fall within ss 21(1)(b) and 23 of the Act. It is

not suggested that, if the claim to remove Mrs Gaul as administratrix and appoint another in her place does not fall within s 22(a) of the 1980 Act, there is any other provision of the 1980 Act which limits the period within which that claim must be brought. Second, if the claims to an account and payment do fall within s 21(1)(b) of the 1980 Act, the court must decide whether the judge was correct to hold that the defence of laches is not available. Third, if (in principle) the defence of laches is available, the court must decide whether that defence is made out—and in respect of which claims (if any)—on the facts which were found by the judge.

WHETHER THE CLAIM TO REMOVE
THE ADMINISTRATRIX IS WITHIN S 22(A) OF THE1980 ACT

[21] Section 22(a) of the 1980 Act applies to an 'action in respect of any claim to the personal estate of a deceased person or to any share or interest in any such estate (whether under a will or on intestacy)'. The section is derived from s 40 of the Real Property Limitation Act 1833 and s 13 of the Law of Property Amendment Act 1860. Section 40 of the 1833 Act was in these terms (so far as material):

> '. . . no Action or Suit or other Proceeding shall be brought, to recover . . . any Legacy, but within Twenty Years next after a present Right to receive the same shall have accrued to some Person capable of giving a Discharge for or Release of the same . . .'

Section 13 of the 1860 Act extended that provision to—

> 'the Personal Estate, or any Share of the Personal Estate, of any Person dying intestate, possessed by the legal personal Representative of such Intestate . . .'

The period of limitation was reduced from 20 years to 12 years by s 8 of the Real Property Limitation Act 1874. The suggestion that, after 1874, the 12-year period applied only to claims to recover legacies and that the 20-year period continued to apply to claims by next-of-kin to a share in an intestate estate—which is found in the judgment of this court in *Re Diplock, Diplock v Wintle* [1948] 2 All ER 318 at 340, [1948] 1 Ch 465 at 509—overlooks, as it seems to me, the terms in which s 13 of the 1860 Act was enacted and the effect of that section when read with s 9 of the 1874 Act. But nothing turns on that.

[22] It is, I think, clear that, as enacted in 1874—and in the earlier statutes—the section had no application to a claim to remove a personal representative and to appoint another in his or her place; if only for the reason that, prior to the Judicial Trustees Act 1896, the court had no power to make such an order—see the observations of Kekewich J in *Re Ratcliff* [1898] 2 Ch 352 at 356. The power to appoint a judicial trustee in place of an existing administrator of the estate of an intestate was conferred by s 1(1) and (2) of the 1896 Act. The power to remove and replace a personal representative (without the need for the appointment of a judicial trustee) was conferred, for the first time, by s 50 of the Administration of Justice Act 1985, following a recommendation in the Report of the Review Body on the Chancery Division of the High Court 1981 (Cmnd 8205). Section 50(1) of the 1985 Act is in these terms (so far as material):

> 'Where an application relating to the estate of a deceased person is made to the High Court under this subsection by or on behalf of . . . a beneficiary of the estate, the court may in its discretion—(a) appoint a person . . . to act as personal representative of the deceased in place of the existing personal representative . . .'

[23] The reference, in the Law of Property Amendment Act 1860 and in the Real Property Limitation Act 1874, to 'the personal estate of the intestate' is explained by the rule that, at the time when those statutes were enacted, real estate did not vest in the personal representative. That position did not alter until, first, the enactment of the Land Transfer Act 1897—which provided that, where real estate had been vested in a deceased without the right of any other person (the heir) to take by survivorship, the land would devolve on the deceased's personal representatives who should hold it upon trust, as though it were personal estate, for the persons beneficially entitled thereto—and, second, the more general reform introduced by the Administration of Estates Act 1925. Section 1 of the 1925 Act assimilated the devolution of real and personal estate. Nevertheless, when the provision now in s 22(a) of the Limitation Act 1980 took its present form (in s 20 of the Limitation Act 1939), it continued to refer only to 'the personal estate of a deceased person'.

[24] Section 33 of the Administration of Estates Act 1925, as enacted, provided that:

> 'On the death of a person intestate as to any real or personal estate, such estate should be held by his personal representatives—(a) as to the real estate upon trust to sell the same; and (b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money, with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper . . .'

It is impossible to suppose that, when s 20 of the Limitation Act 1939 was enacted—and when that section was re-enacted as s 22(a) of the Limitation Act 1980—the legislature did not appreciate that the Administration of Estates Act 1925 continued to draw a distinction between real estate and personal estate in the hands of the personal representative of an intestate. And it is impossible to suppose that, with that knowledge, the legislature intended the words 'any claim to the personal estate of a deceased' to mean 'any claim to the real and personal estate of the deceased': indeed, s 38(1) of the 1980 Act defines 'personal estate' in terms which plainly exclude real estate. Those conclusions are unaffected by the amendments to s 33 of the 1925 Act which were introduced by s 5 of the Trusts of Land and Appointment of Trustees Act 1996.

[25] The true position, as it seems to me, is that it was not contemplated by the legislature that s 22(a) of the 1980 Act would apply to claims against the personal representative of an intestate in respect of real estate which remained unsold or (as to claims in respect of personal estate) at a time when the estate remained unadministered—in the sense that the costs, funeral and testamentary and administration expenses, debts and other liabilities properly payable thereout had not been paid and any pecuniary legacies provided for.

[26] The judge found assistance in the observation of Chitty J in *Re Johnson, Sly v Blake* (1885) 29 Ch D 964. The intestate had died on 2 October 1848. Letters

of administration had been granted to the administrator on 30 October 1848. Chitty J held that (subject to the short suspensory period for which the 1860 Act provided) s 13 of that Act had effect in relation to deaths which had occurred before it was enacted. He went on (at 970):

> '. . . the Defendants contend that the Plaintiff's right was barred at the end of twenty years from his death, or at all events of twenty-one years, the additional year being conceded in conformity with the general rule that an executor or administrator is allowed in an administration one year to complete the administration of the estate. In the absence of any special circumstances relating to the getting in of an intestate's estate, I think the latter contention is correct . . .'

But Chitty J made it clear (at 971), that the 'present right to receive' could not accrue to the beneficiary claimant until the asset was in the possession of the administrator.

[27] There are a number of factors which lead me to the conclusion that the observations in *Re Johnson* are of less assistance than the judge thought. First, the problem to which s 33 of the Administration of Estates Act 1925 now gives rise (the devolution on the personal representative of both real and personal estate) did not arise in that case: real estate did not devolve on a personal representative in 1848. Second, it was unnecessary, on the facts in that case, for Chitty J to address the question whether the 20-year period began to run from the date of the death (2 October 1848) or the date of the grant of letters of administration (30 October 1848): s 5 of the Statute of Distribution 1670, then still in force, prevented the administrator from distributing the personal estate until the expiry of one year from the death of the intestate. Third, there was nothing in the facts (so far as they appear from the report) which suggests that the administrator was not in a position to distribute assets in his hands (after paying funeral, testamentary and administration expenses and debts) by the end of one year from the death. I do not, myself, find support in *Re Johnson* for the proposition that the period for claims to which s 22(a) of the Limitation Act 1980 applies will, necessarily, begin to run from the end of one year from the death of the intestate.

[28] As I have said, the better view is that the period under s 22(a) of the 1980 Act (in cases to which that section applies) will not begin to run until the administrator has paid the costs, funeral and testamentary and administration expenses, debts and other liabilities properly payable out of the assets in his hands, and provided for the payment of any pecuniary legacies. It is not until then that he is in a position to distribute the residuary estate to those entitled under s 46 of the Administration of Estates Act 1925; because it is not until then that 'the residuary estate of the intestate' can be identified—s 33(4) of that Act. That is not, of course, to say that a beneficiary has no remedy against an administrator who delays in getting in the assets and paying the administration expenses and debts: it is only to say that, in such a case, time does not run against the beneficiary under s 22(a) of the Limitation Act 1980.

[29] The primary remedy of a beneficiary who complains of unjustified delay by an administrator in getting in the assets, paying the administration expenses and debts and distributing the residuary estate is an administration action. The power to appoint a judicial trustee, conferred by the 1896 Act, may be seen as 'a middle course in cases where the administration of the estate by the ordinary

trustees had broken down and it was not desired to put the estate to the expense of a full administration'—*Re Ridsdel, Ridsdel v Rawlinson* [1947] 2 All ER 312 at 316, [1947] Ch 597 at 605 per Jenkins J. The power conferred by s 50 of the Administration of Justice Act 1985 may be seen as a further route towards that end. It is clear that the power is exercisable in circumstances where the beneficiary could have commenced an administration action. In a case where time would not run against the beneficiary in an administration action, there is no reason why it should run if the only relief sought is the removal of the administrator and the appointment of another in his or her place.

[30] For those reasons I would hold that s 22(a) of the Limitation Act 1980 has no application to the claim to remove Mrs Gaul as administratrix. It is unnecessary to decide whether the judge was correct to hold that, if time did run under that section, the limitation period commenced at the end of one year from the death. But, for my part, I do not see how the 12-year period under s 22(a) of the 1980 Act could begin before the date of the grant of letters of administration; or, if there were successive grants, the date of the first grant. And, for reasons which I have explained, I think that the better view is that the period could not begin until the administrator is first in a position to distribute the residuary estate: that is to say, until he has paid the costs, funeral and testamentary and administration expenses, debts and other liabilities properly payable out of the assets in his hands, and provided for the payment of any pecuniary legacies.

WHETHER THE CLAIMS TO AN ACCOUNT AND PAYMENT FALL WITHIN SS 21(1)(B) AND 23 OF THE 1980 ACT

[31] Section 21(1)(b) of the Limitation Act 1980 applies to an action by a beneficiary under a trust to recover from the trustee 'trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use'. In that context 'trustee' includes a personal representative and 'trust' includes the duties incident to the office of personal representative—s 68(17) of the Trustee Act 1925 and s 38(1) of the Limitation Act 1980. Section 23 of the 1980 Act is in these terms:

> 'An action for an account shall not be brought after the expiration of any time limit under the Act which is applicable to the claim which is the basis of the duty to account.'

[32] In my view there can be no doubt that the claims against Mrs Gaul to an account and payment are claims in respect of property, real and personal, which came into her hands as administratrix of the deceased's estate; that those claims fall within s 21(1)(b) of the 1980 Act—either directly or indirectly, by reason of s 23 of that Act; and that having regard to the opening words of s 21, 'no period of limitation prescribed by [the 1980 Act] shall apply' to those claims. Further, because they are claims within s 21(1)(b) of the Act, they are not claims to which s 22 of the Act has any application.

IS THE DEFENCE OF LACHES EXCLUDED?

[33] Section 36(2) of the Limitation Act 1980 provides, in terms, that: 'Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.' It is not, I think, in doubt that 'acquiescence' in that context includes conduct which would lead a court of equity to refuse relief on the grounds of laches. At first sight, therefore, it is difficult to see how an express provision in the 1980 Act that no period of limitation prescribed by the Act shall

apply to the claim—or, more generally, the absence of any provision in the Act which does, on a true analysis, prescribe a period of limitation in respect of the claim—can have the effect of excluding a defence of laches if, on the facts, such a defence would otherwise be available.

[34] The judge addressed the point at [161] to [163] of his judgment. After observing that no limitation period applied to the claim to recover the proceeds of trust property or property previously received and converted to the trustee's use—s 21(1)(b) of the 1980 Act—he said this:

> '[161] . . . The doctrine of laches has no application to cases to which the Statutes of Limitation apply either expressly or by analogy: *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1963] 3 All ER 1 at 20, [1964] Ch 303 at 353.
>
> [162] Where s 21(1)(b) applies, because it expressly prescribes that there shall be no period of limitation, laches is not therefore available: *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* ([2003] EWCA Civ 1048, [2004] 1 BCLC 131), where Mummery LJ said (at [140]):
>
> > "The defence of laches is not available. As already explained no period of limitation is specified by the 1980 Act in respect of the cause of action for dishonest breach of fiduciary duty. The effect of s 21(1)(a) is that either as a result of direct application, or of analogy, there is no period of limitation applicable to that cause of action."
>
> [163] Although this was a decision on s 21(1)(a) there is no possible principled distinction between s 21(1)(a) and s 21(1)(b) which share the opening words of s 21(1): "No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action . . ."'

[35] In *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1961] 3 All ER 713, [1962] 1 WLR 86, Wilberforce J held ([1961] 3 All ER 713 at 735, [1962] 1 WLR 86 at 115), that the plaintiffs' rights were preserved by the proviso to s 19(2) of the Limitation Act 1939 (now s 21(3) of the 1980 Act). The effect of the proviso—being a proviso to a subsection which prescribed a limitation period of six years from 'the date when the right of action accrued'—was to postpone the date at which the right of action accrued to a beneficiary entitled to a future interest in the trust property until the interest fell into possession. He went on to say this:

> '*Laches*. There being an express statutory provision, providing a period of limitation for the plaintiffs' claims, there is no room for the equitable doctrine of laches.'

But he then addressed, under a separate head, the question whether the plaintiffs' claims were barred by acquiescence: 'the question is whether the plaintiffs have by their conduct done anything which is equivalent to a release of their claims or upon which an estoppel may be founded against them.'

[36] *Re Pauling's Settlement Trusts* went on appeal to this court, [1963] 2 All ER 1, [1964] Ch 303. In the judgment of the court, the point was addressed shortly ([1963] 2 All ER 1 at 20, [1964] Ch 303 at 353):

> 'The bank pleads the Limitation Act, 1939, and as to this we wholly agree with what the judge said and need not repeat it. So, too, as to the defence of laches. As to acquiescence, we think this must be looked at rather broadly.'

The court plainly recognised that a defence of acquiescence might be run, notwithstanding the express statutory provision; and, indeed, that is what s 36(2) of the 1980 Act requires. But, on the facts, the defence failed because 'a party cannot be held to have acquiesced unless he knew, or ought to have known, what his rights were'.

[37] *Re Pauling's Settlement Trusts* is authority for the proposition that, where the Limitation Act provides an express period of limitation, a claimant is not to be denied the benefit of that period by the operation of what was, in that case, understood to be the doctrine, or defence, of laches. It is not authority for the proposition that, where the Limitation Act prescribes no period of limitation, the defence of laches cannot be invoked. Nor, as it seems to me, is that case authority for the proposition that, where the Act prescribes a period of limitation, no defence of acquiescence (in so far as that may differ from what was, in that case, understood to be a defence of laches) can be relied upon. The judge's error, in the present case, was to read s 21(1) of the 1980 Act as if the opening words were 'No period of limitation shall apply to an action, etc' rather than 'No period of limitation *prescribed by this Act* shall apply to an action, etc'.

[38] I find it more difficult to understand what this court had in mind in the passage in its judgment in *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2004] 1 BCLC 131 at [140] to which the judge referred. It is clear that, on the facts in that case, the defence of laches or acquiescence was not available. The court said so, in terms (at [141]):

> 'In any event there were no grounds of applying the doctrine of laches; the delay in starting the proceedings was not inexcusable; no substantial prejudice had been caused to Mr Koshy by the delay; and the balance of justice favoured the granting, rather than the withholding, of relief by way of an account.'

On one view, when this court said, at [140], that 'The defence of laches is not available', it may have meant no more than that the defence was not available on the facts. It went on to say, in the same paragraph, that 'As already explained, no period of limitation is specified by the 1980 Act in respect of the cause of action for . . . breach of fiduciary duty'. That followed from the conclusion that the court should not interfere with the finding of dishonesty made by the trial judge—see [135], read with [120] and [121]. The claim fell within s 21(1)(a) of the 1980 Act.

[39] But the court continued, at [140] of its judgment in the *Gwembe Valley* case, with this sentence: 'The effect of s 21(1)(a) is that either as a result of direct application, or of analogy, there is no period of limitation applicable to that cause of action.' In one sense that observation is self-evidently correct: the effect of s 21(1)(a) of the 1980 Act is that there was no period of limitation prescribed by the Act. Nor was there any scope for applying a period of limitation 'by analogy'—for the reasons which the court had explained at [80] to [82] of its judgment. But the application of statutory time limits to equitable claims 'by analogy' is one thing: the power to refuse equitable relief on the grounds of

acquiescence or otherwise is another. The former is preserved by s 36(1) of the 1980 Act; the latter by s 36(2) of that Act.

[40] If the court were saying, in the *Gwembe Valley* case, that there is no scope for a defence of laches or acquiescence in a case where the 1980 Act prescribes no period of limitation, I would respectfully disagree; although, of course, if that proposition were binding upon me I would have no choice but to apply it. But the court did not say that in terms; and, because I think the proposition obviously wrong, I am not persuaded that the court intended to be understood as endorsing it. Further, the proposition cannot stand with the observations of Mummery LJ (with whom the other members of the court agreed) in his judgment in *Patel v Shah* [2005] EWCA Civ 157 at [22], (2005) Times, 2 March at [22]:

> 'It is common ground that the claims are not statute-barred. No period of limitation is prescribed by the Limitation Act 1980 for an action by a beneficiary under a trust to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his own use (s 21(1)(b)). It was accepted that s 36 of the 1980 Act preserved equitable jurisdiction to refuse relief on the grounds of acquiescence or otherwise and that that would include laches . . .'

[41] In my view a defence of laches or acquiescence is not excluded by s 21(1)(b) of the 1980 Act. It is necessary, therefore, to go on to consider whether the judge was correct to hold (as he did) that the defence must fail on the facts.

IS THE DEFENCE OF LACHES OR ACQUIESCENCE MADE OUT ON THE FACTS?

[42] The modern approach to the defences of laches, acquiescence and estoppel was considered by this court in *Frawley v Neill* [2000] CP Rep 20 to which reference was made in the judgment of Mummery LJ in *Patel v Shah* (2005) Times, 2 March at [32]. After reviewing the earlier authorities—and, in particular, observations in *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at 229 and *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1279—Aldous LJ (with whom the other members of the court agreed) said this:

> 'In my view the more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in the decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach.'

[43] The relevant circumstances in the present case appear from the judge's findings of fact. There is no permission to appeal from those findings. The starting point, as it seems to me, is that by May 1992 there were mutual claims as between the claimants and Mr Michael Loftus, on the one hand, and Mrs Gaul, on the other hand, in relation to the deceased's estate. It is important to have in mind, in that context, that the judge found that balances standing to the credit of offshore accounts in the joint names of the deceased and the second claimant and in the joint names of the deceased and Mr Michael Loftus belonged to the

company, I Loftus & Son Ltd, the shares of which were assets of the estate. The judge ordered the claimants to account for property comprised in the estate which had come into their respective hands.

[44] Those mutual claims were not resolved by agreement in May 1992. The judge found that, despite the allegations in her defence, Mrs Gaul knew that there had been no compromise: his findings are set out at [131] to [136]. At [129] he said that he was satisfied that she had 'made up' the account of a meeting outside the solicitor's offices on 11 May 'some years later'. At [167] he said this:

> '[Mrs Gaul] was well aware that she was vulnerable to proceedings. In an affidavit dated November 25, 1993, made in the proceedings against MP Loftus Ltd and Michael, [she] said: "I am aware that my brothers and sisters have threatened to bring proceedings in the High Court to remove me as administratrix. Such proceedings have not been commenced and, at present, I remain in such capacity."'

He went on:

> '. . . I do not consider that this would have been (had laches been available as a defence) a case where the conduct of the claimants can reasonably have been regarded by [Mrs Gaul] as a waiver of their rights or have caused an injustice to [her]. It also follows that I do not consider that any of the promissory elements of estoppel are present.'

[45] Mrs Gaul was the administratrix of her father's estate. It was her duty, as such, both to take steps to recover for the estate the assets of the estate that were in the hands of her siblings and to account for the assets that were in her hands. It may well be that she hoped that, if she took no action to recover assets from her siblings, they would be content to let matters rest and would take no action against her. But there was no evidence—and no finding—that the claimants did anything to encourage that hope. The decision not to take steps to recover assets from the claimants was her own unprompted decision. It seems to me impossible for her to assert that it is unconscionable for the claimants now to assert their rights in circumstances in which they had never led her to believe that they would not do so; and in which it had suited her to let matters rest rather than carry out her duties as administratrix and so push them into a position where they would think it in their interest to do so.

[46] The effect of the judge's order is that the claimants are required to account to the new administratrix for assets which have come into their hands; just as Mrs Gaul is required to account for assets which have come into her hands. It is said on her behalf that that is unfair; on the grounds that it is likely, now, to be difficult to verify the account which the claimants will make or to identify assets which they have not revealed. But, if those difficulties exist, they are of Mrs Gaul's making. They arise from her decision not to pursue estate assets as administratrix once she knew, in 1992, that there was to be no compromise.

[47] In my view the judge was correct to reject the defence of laches and acquiescence on the facts.

CONCLUSION

[48] I would dismiss this appeal.

THOMAS LJ.
[49] I agree.

LLOYD LJ.
[50] I also agree.

Appeal dismissed.

Vanessa Higgins Barrister.

McCarthy v McCarthy & Stone plc

[2006] EWHC 1851 (Ch)

CHANCERY DIVISION

PETER SMITH J

11, 20 JULY 2006

Income tax – Pay as you earn system – Deduction of tax by employer – Money paid by one person under compulsion of law – Employer accounting for tax and national insurance under PAYE system on exercise of share options by former employee – Employer seeking reimbursement from former employee – Whether amount of tax and national insurance paid recoverable in quasi contract.

Option – Option to purchase – Shares – Construction of scheme rules – Remedy for unlawful decision under scheme rules.

The claimant was a director and then an employee of the defendant until December 2003. The defendant operated several share option schemes. Under the PAYE income tax regime in Ch 5 of Pt 7 of the Income Tax (Earnings and Pensions) Act 2003 an employer was treated as making a payment of income when shares were acquired pursuant to share options. The employer would make a notional PAYE payment to the Revenue on the employee's behalf in respect of that deemed income and deduct the tax at the relevant time from any payment the employer actually made to the employee. In the context of Pt 7 of the 2003 Act 'employee' meant a person who held or had held employment with another person. After his retirement the claimant gave notice that he wished to exercise his options under one of the schemes. Under the scheme rule which applied where an option holder ceased to hold office or be employed the remuneration committee was to 'in its absolute discretion' determine whether the option would be exerciseable having considered the extent to which the 'performance condition' had been achieved at the date of termination. If the committee so decided the option holder could exercise all or a proportion of his options with the proportion being determined by the committee pro rata to the achievement of the performance condition. The 'performance condition' was linked to the overall increase in the earnings per share of the defendant during the relevant period. The relevant performance condition had been satisfied before the claimant left his employment. The remuneration committee resolved to accept the claimant's notice in respect to 75% of his options on the basis of its conclusions that the claimant had allied himself with the interests of a competing business in June 2003 and after that had not been in a position to make any material contribution to the performance of the company or the achievement of the performance condition. The claimant sought a declaration that he was entitled to exercise his option in full. By its counterclaim the defendant sought reimbursement of tax and national insurance which had been paid on the exercise of the claimant's share options after his retirement. It put the liability to repay, inter alia, in quasi contract, as money paid to the use of the claimant, and applied for summary judgment on the ground that the claimant's defence had no real prospect of success.

Held – (1) The remuneration committee had an 'absolute' discretion which was an unfettered discretion provided they acted bona fide. It had not been bona fide to take into account the factors referred to by the committee because they did not affect the satisfaction of the performance condition and the company had remedies for such conduct but had chosen not to institute proceedings. However, the claimant was not entitled to a declaration that he was entitled to exercise his option in full. As the decision had not been taken in a way which was lawful the consequence was that it was a nullity. The claimant was entitled to a declaration that the determination of the committee was invalid and an order directing the committee to reconsider its decision (see [25], [26], [28], [35]–[39], below).

(2) Where money had in fact been paid by employers in discharge of the PAYE liability there was a cause of action for money paid by them to the use of the taxpayer on the basis that they were compelled by process of law to pay money which was due in respect of his remuneration as to which he would ultimately be liable for taxation. In general anybody who had under compulsion of law made a payment whereby he had discharged the primary liability of another was entitled to be reimbursed by that other. The claimant was liable to pay tax on his own earnings if it was not deducted. The defendant had paid the tax on his behalf which he would otherwise have been liable to pay. The claimant had been given the benefit of that deduction and payment in his tax return. Accordingly, the claimant had no prospect of success on the claim in quasi contract and the defendant was therefore entitled to judgment on the counterclaim (see [69]–[73], below); dictum of Lynskey J in *Bernard & Shaw Ltd v Shaw* [1951] 2 All ER 267 at 270 applied.

Notes

For compulsory discharge of another's debt, see 40(2) *Halsbury's Laws* (4th edn reissue) paras 1364–1380.

Cases referred to in judgment

Bernard & Shaw Ltd v Shaw [1951] 2 All ER 267.

Levett v Biotrace International plc [1999] IRLR 375, [1999] ICR 818, CA.

Micklefield v SAC Technology Ltd [1991] 1 All ER 275, [1990] 1 WLR 1002.

Moule v Garrett (1872) LR 7 Exch 101, [1861–73] All ER Rep 135, Ex Ch.

Thompson v Asda-MFI Group plc [1988] 2 All ER 722, [1988] Ch 241, [1988] 2 WLR 1093.

Preliminary issue and application for summary judgment

The claimant John S McCarthy applied to the court for a declaration in relation to the exercise of his option over 138,786 shares in the defendant, McCarthy & Stone plc, granted on 21 November 2000. By order of Master Bragge made on 15 February 2006 the preliminary issue set out at [1], below was ordered to be tried. The defendant applied for summary judgment on its counterclaim seeking reimbursement of the sum of £197,931·33 paid to the Inland Revenue representing income tax and national insurance contributions on the claimant's behalf. The facts are set out in the judgment.

Derek Sweeting QC and *Jeffrey Jupp* (instructed by *Clarke Willmott Solicitors*, Southampton) for the claimant.

James Goudie QC and *Martin Griffiths* (instructed by *Travers Smith*) for the defendant.

Cur adv vult

20 July 2006. The following judgment was delivered.

PETER SMITH J.

INTRODUCTION

[1] This judgment arises out of a hearing on two matters: (1) A preliminary issue by order of Master Bragge dated 15 February 2006—

> 'to determine whether on its true construction of Rule 4.4 of Part B of the McCarthy & Stone PLC Company Share Option Plan (Unapproved) 2000 ("the Share Option Plan") has the meaning and effect set out in para 12 of the Particulars of Claim and if so whether the Claimant is entitled to the declaration of support . . .'

(2) An application for summary judgment brought by the defendant on the grounds that it believes that the claimant's defence to its counterclaim has no real prospect of success and there is no other reason why it should await trial.

BACKGROUND

[2] The claimant was a director and latterly an employee of the defendant until December 2003.

[3] The defendant operated two share option schemes. The first was the executive share option scheme (the 1996 scheme) which was adopted on 16 January 1996. The second was the 2000 scheme which was adopted on 10 November 2000.

[4] After his retirement the claimant sought to exercise his share options. He gave notice on 22 November 2004 that he wished to exercise his option over 138,786 shares which had been granted on 21 November 2000. There was an initial denial of entitlement but ultimately the defendant's remuneration committee in January 2005 allowed the claimant to exercise his option over 75% of the shares granted to him.

[5] The relevant rule (4.4) is as follows:

> 'Where an Option Holder ceases to hold any office or employment the Remuneration Committee shall in its absolute discretion determine whether the Option will be exercisable having considered the extent to which the Performance Condition has been achieved at the date of termination. If the Remuneration Committee so decides the Option Holder may exercise all or a proportion of his Option(s) during the period which begins on the date of such cessation and ends twelve months later, such proportion being determined by the Remuneration Committee pro rata to the achievement of the Performance Condition . . .'

[6] It is necessary to elaborate a little on the scheme rules.

[7] In the rules 'Performance Condition' is defined as 'the objective Performance Condition which must be met before Options may be exercised'. The objective condition is where the increase in earnings per share in the performance period is equal to 10% or greater than 10% per year above the

level of the rate of inflation. The performance period was three consecutive financial years of the company commencing on 1 September 2000 ie expiring on 1 September 2003.

[8] The performance condition was satisfied and it was satisfied before the claimant left his employment with the company. It will also be seen that the performance condition is linked to the overall increase in the earnings per share of the company during the performance period. It is not a performance that is personally linked to the claimant. This is not surprising given his role in the defendant. His role would be the directing force presumably which would lead to the increase in the value of the shares over the relevant period. That is important because it is necessary in that context to examine the reasons the remuneration committee gave for not entitling the claimant to a 100% exercise over his share options.

[9] Under r 2.3 the options are only exercisable following the attainment of the performance condition. There is an overriding power (r 2.4) when events happen which cause the directors to consider that the performance conditions become unfair or impractical. In that eventuality they can amend, relax, waive or substitute such performance conditions and issue a replacement option certificate or other notice. It is not permissible under that rule to impose more onerous conditions.

RIGHTS OF EXERCISE

[10] The option may not be exercised before whichever is the later of the 3rd anniversary of the date of grant or any date which has been specified in the option certificate or it can be ascertained that the performance condition has been achieved.

[11] Rule 4.2 provides that save as set out in rr 4.3, 4.4 and 5.6, an option may only be exercised by an option holder whilst he is a director or employee of a group company.

[12] Rule 4.3 gives an absolute right to a personal representative of a deceased option holder to exercise an option during the period of one year following the date of death. This is somewhat surprising when one looks at the elaborate provision of 4.4 which applies when the option holder has ceased to be in employment or hold any office. If that cesser occurred by reason of death none of the complications created by this case would arise.

[13] Rule 5.6 is a variation which applies when there are changes of control, schemes of arrangements or compulsory acquisitions or there is a winding up. Clearly that has no implication to the present dispute.

DECISION OF REMUNERATION COMMITTEE

[14] The remuneration committee met on 17 January 2005. It does not have any lawyers in its composition but that is a bad point because it acted with the benefit of legal advice as the minute shows. The minute shows that, after reporting the request to exercise and summarising the rule and being mindful of the fact that the performance condition had been exceeded, the decision is as follows:

> 'The Committee discussed the circumstances surrounding the approach made on behalf of the McCarthy family interests in June 2003. In making the approach JSM had allied himself with the interests of a competing business. He had not been in a position to make any material contribution to the performance of the Company or the achievement of the

Performance Condition from the date the approach was made. The results of the approach had been very considerable disruption to the normal operations of the Board, a risk to the morale and retention of staff, and a cost to the Company in terms of legal and professional fees in the order of £300k. At the time the approach was withdrawn JSM, whilst still a Director of the Company, had been responsible for a press announcement suggesting that the shares in the Company were over-valued. Further, prior to termination of his employment he had circulated an email message to staff in terms which implied that their interests would be better served by joining the competing business of which he indicated he had agreed to become a Director.

After discussion of the conduct of JSM and the proper weight to be given to the achievement of the Performance Condition, IT WAS RESOLVED by the Committee in exercise of its absolute discretion under Rule 4.4 that the notice of exercise dated 22 December 2004 served on behalf of JSM be accepted as a valid notice of exercise in respect of 75% of the options granted to JSM under the 2000 Unapproved Plan, that is to say that the exercise of options by JSM be regarded as valid over 104,089 shares at an exercise price of 267.5 pence per share'.

[15] It would be seen that the committee considered that an approach had been made by the McCarthy family interests (the claimant's family) to acquire the shares. They concluded that the claimant had allied himself with interests of a competing business in June 2003 and had not been in a position to make any material contribution to the performance of the company or the achievement of the performance condition from the date the approach was made. It is suggested that that caused considerable disruption to the operations of the board affecting morale and cost the company £300,000.

[16] The claimant disputes these matters. It is of course to be appreciated that the performance condition was achieved despite these matters and that the performance condition is not a personal performance indicator addressed to the claimant. Finally the performance condition is over three years and the alleged disruption was for three months. If the reduction was by 25% on an apportionment basis that is far too high. The minute does not say how the remuneration committee arrived at the figure of 75%.

CLAIMANT'S SUBMISSIONS

[17] The claimant in essence contends that the remuneration committee has to perform a twofold exercise. First (looking at the first sentence of r 4.4) it has an absolute discretion to determine whether the option will be exercisable 'having considered the extent to which the Performance Condition has been achieved at the date of termination'.

[18] Mr Sweeting QC, who with Mr Jupp appears for the claimant acknowledges that in that exercise the satisfaction of the performance condition is not anything other than an important but not determinative factor that can be taken into account. He also concedes that they have an absolute discretion which cannot be challenged provided they are bona fide in their decision not to exercise. It was unclear to me precisely what he said about the other factors. At some stage during the course of his submissions he appeared to accept that a bona fide belief in the factors referred to in the minute

(although disputed) could be considered by the remuneration committee at this first stage. Later in his submissions he retreated from that view.

[19] After the first stage his submission is that the second sentence of r 4.4 operates so that the remuneration committee then determines the proportion of the option holder shares 'pro rata to the achievement of the Performance Condition'.

[20] He submits that primarily the purpose of r 4.4 is to deal with the fact that an option holder might cease to be an employee or officer before the performance condition has been satisfied. Thus it would be unfair if the performance condition (for example) had been substantially satisfied but he would lose all rights when his employment ceased. On analysis of course that could happen even if he ceased to be an employee by virtue of being wrongfully dismissed by the defendant: see for example *Thompson v Asda-MFI Group plc* [1988] 2 All ER 722, [1988] Ch 241 and *Micklefield v SAC Technology Ltd* [1991] 1 All ER 275, [1990] 1 WLR 1002 and compare *Levett v Biotrace International plc* [1999] IRLR 375, [1999] ICR 818.

[21] Thus he submits that if the remuneration committee exercise their absolute discretion at stage 1, they then go on to consider the extent to which the option should be allowed. At that stage the wording of the second sentence means there is in reality no discretion; they are simply required to 'determine' the extent of exercise allowed pro rata to the performance condition. In the case of the present situation where the performance condition has been completely satisfied the determination can only be to 100%. There will of course be a far different exercise in the most usual case where the performance condition has only been partially satisfied. In that eventuality the remuneration committee will have to assess the extent to which the condition has now been satisfied (it will be observed there are no criteria set out in r 4.4).

[22] Either way Mr Sweeting QC submits that it is impermissible in deciding the appropriate percentage to introduce the factors which the remuneration committee relied upon. It is impermissible because they are irrelevant to the question it can ask namely 'what is the pro rata figure measured against the Performance Condition being satisfied?'

CONSEQUENCES

[23] The claimant by his claim seeks a declaration that the performance condition in relation to the share option plan has been met and a declaration that he is entitled to exercise his option in full.

[24] This has caused me considerable difficulty. The remuneration committee exercised a discretion. That discretion is absolute. It is plain from their decision and the defendant's submissions that they believed that there was no two-stage process. It is their case that as part of one decision-making process they have an absolute discretion as to whether or not to permit the exercise of the option in full or in part and that the decision cannot be challenged as long as they act bona fide. Accordingly if they have a bona fide belief as set out in the minute they are entitled to decide that it is appropriate to allow only a conditional exercise. As part of that discretion they are also allowed to determine the percentage upon which the shares are to be exercised.

[25] If the claimant's contentions are correct the consequence is that the remuneration committee have come about their decision in a way which is

wrong in law ie they have exercised their discretion under a mistaken belief that the law entitles them to act in the way they did.

[26] It seems to me that the consequence of that contention if successful is that the decision is a nullity. The normal train of events therefore would be a declaration that the decision of the remuneration committee was null and void and to seek an order remitting the matter back to the remuneration committee and to require it to exercise it correctly according to the manner in which the law determines it can be exercised.

[27] Mr Sweeting did not find this an attractive proposition. The reason for that is the (perhaps understandable) suspicion that if the matter is remitted back to the remuneration committee and it is given guidance at stage 1 as to the exercise of their discretion they will simply exercise their discretion to award the claimant nothing. I am by no means convinced that that would be the case. The remuneration committee is an independent body which is supposed to exercise its discretions according to r 4.4. At the stage 1 decision-making process it has to have regard to the performance condition. At that stage they will appreciate that the claimant has satisfied the performance condition entirely. At any time before his departure between September and December 2003 he could have exercised his option as of right and this debate would never have taken place. The relief sought by the claimant on the other hand seeks to take the benefit of part of the (faulty) method of decision ie the decision to allow the claimant to exercise but removes from that decision the (inconvenient) part which allows only 75% exercise.

[28] I do not see how that can be done. This is not a claim for damages as such; it is a challenge to the exercise of a discretionary decision. If that decision was done in a way which was not lawful according to r 4.4 then the consequence is that it is a nullity. It does not in my view enable the claimant to cherry pick the parts of the decision which suit him and ignore the parts which do not suit him.

THE DEFENDANT'S CONTENTIONS

[29] The defendant contends that the remuneration committee under r 4.4 had 'an absolute discretion', and the performance condition is not determinative but simply requires consideration. It submits that on the claimant's case the second stage confers no discretion at all: it is 'all or nothing'. That is the consequence of the claimant's submission. The defendant submits that the two-stage process is over elaborate and overly technical and as contended for by the claimant requires the remuneration committee simply to perform an arithmetical exercise if it is decided initially that the claimant should be entitled to exercise his share options.

[30] There are a number of difficulties about those observations. First I do not regard the two-stage process put forward by the claimant as being overly technical. Even if it is, the clause must be construed as it is and if that is technical then so be it. Second of course as I have already observed whilst there might not be any lawyers on the remuneration committee they clearly had legal advice. Third the defendant's arguments in my view do not give sufficient explanation as to what the phrase 'such proportion being determined . . . pro rata to the achievement of the Performance Condition' means.

[31] In my view that part of the second sentence clearly requires a determination that is measured pro rata to the achievement performance condition.

[32] In that context I should also say that I do not accept that as part of that determination they can change in effect the performance condition. It is measured solely by reference to the achievement of an increase in value of the earnings per share. That is not a direct personal assessment of the claimant's performance. If the claimant has behaved in the way in which the defendant contends it was of course always open to the claimant to allege he therefore acted in breach of his fiduciary and contractual duties to the defendant and commence proceedings against him. It has never done so. The matters remain merely disputed allegations. If of course they had prevented *the achievement of the performance condition* then that would have been another matter. The remuneration committee would then be in a position to assess the extent to which the performance condition had then been satisfied and then allow and exercise 'pro rata' to that satisfaction. I do not see how the defendants can say these matters are relevant to the satisfaction of the performance condition when it was satisfied in any event three months later.

[33] Further in exercising their first-stage discretion they will of course be aware of the consequences at stage 2. The reason for that of course is that at first stage they have to have regard to the performance condition. There is no reason why they cannot providing they act bona fide decide that it is not appropriate to allow him to exercise his option because they do not bona fide believe it will be appropriate for him to have (for example) 100% of the shares. That might occur for a number of reasons. A leaver might have left early in the process of satisfying the performance condition and then sought to exercise the options (there is a long time limit). The remuneration committee might think it inappropriate for him to have an exercise for 100% when he contributed minimally to the achievement of that performance by reason of his early departure. Equally if they had a bona fide belief that someone's conduct had for example reduced the percentage of which the performance condition had been satisfied they could in my view take that into account. They take all this into account on the claimant's case at stage 1.

[34] On the defendant's case they take them into account globally. The difference between the two in effect is as to the consequence. On the claimant's case once they had made the decision it is simply arithmetical at stage 2. On the defendant's case greater flexibility is introduced in that they are enabled having regard to the performance condition to decide at what level it is appropriate to permit the claimant to exercise his share option. The final sentence it is submitted is merely the way in which the shares are calculated. Thus if they decide that it is appropriate in his case to have regard to 75% satisfaction of the performance condition then pro rata he is entitled to 75% of his shares.

CONCLUSION

[35] In my view the claimant's contention is correct. I do not see that it is overly analytical to require the remuneration committee to go through a two-stage process. First they have to decide whether or not to exercise their absolute discretion. The key word I accept is *'absolute'* which gives them an unfettered discretion provided they act bona fide. There is no reason in that

process why they cannot have regard to the stage 2 consequences in deciding whether to allow it to be exercised and take into account bona fide factors which they believe are relevant to the claimant's conduct. In so far as it had an impact on the satisfaction of the performance condition. I do not believe it would be bona fide to take into account factors such as those referred to in the minute of the remuneration committee because (1) they did not affect the satisfaction of the performance condition (2) the company clearly had remedies for such conduct but had chosen not to institute any proceedings so far as I am aware.

[36] Once the discretion is exercised in favour of the claimant it is plain in my view that stage 2 requires the remuneration committee to decide that the option holder may exercise all or a proportion of his options such proportion to be determined pro rata to the achievement of the performance condition. It seems to me that part of the clause is mandatory and gives the remuneration committee no discretion as to the extent of the exercise. It says 'if' the remuneration committee so decides the option holder may exercise all or a proportion then such proportion has to be determined pro rata to the achievement of the performance condition.

[37] In this case exceptionally the achievement of the performance condition is 100%. I accept Mr Sweeting QC's submission that the clause is primarily intended to operate at a time when an option holder departed with the performance condition partially satisfied. The discretion element in my view comes in at stage 1 only. I have set out above what I believe are the factors that the remuneration committee can take into account at stage 1.

[38] For those reasons I prefer the claimant's construction of r 4.4. However I do not accept that the claimant is thus entitled to the relief sought by the declarations.

[39] In my view he is entitled to a declaration that the determination of the remuneration committee is invalid and an order directing the remuneration committee to reconsider its decision under r 4.4 in the light of this judgment. I will leave the parties to draw up a suitable minute of order in that regard.

SECOND ISSUE

[40] In the counterclaim the defendant seeks reimbursement of tax and national insurance which has been paid on the claimant's behalf under the PAYE legislation.

[41] The counterclaim is based on a number of facts none of which is in dispute. The claimant after termination of employment exercised a number of share options. These share options were taxable under the PAYE income tax regime as income of the claimant as well as attracting employee national insurance contributions also payable under the PAYE regime. Third the PAYE income tax has been paid on behalf of the claimant together with his employee national insurance contributions.

[42] Despite that the claimant contends that he is entitled to refuse to reimburse the company for the amounts paid on his behalf. The counterclaim seeks such reimbursement. The amount sought is £197,931·33. That figure is not in dispute. As I have said the defendant has paid those sums to the Inland Revenue under the PAYE scheme. Further in response to a question by me Mr Sweeting confirmed that for the relevant tax year the claimant had paid tax only on the excess above the basic rate sum which the defendant had deducted ie the difference between 22% basic rate and 40% higher rate. The claimant

therefore has received against his own personal tax and national insurance liabilities the benefit of the sums paid by the defendant which it now seeks to recover.

TAX REGIME

[43] The actual regime is not in dispute. I am grateful to Mr Griffiths junior counsel for the defendant for his clear and concise analysis of the regime.

[44] Income tax is payable on emoluments from employment. Under the basic PAYE scheme income tax is deducted from salary by the employer to HMRC. This is an advance payment because normally the tax regime only obligates a taxpayer to pay the tax at year end. It is then paid on the employee's behalf to the Inland Revenue.

[45] Further where any assessable income of an employee is provided in the form of a readily convertible asset (such as shares acquired pursuant to share options) the employer is treated for the purpose of PAYE regulations as making a payment of a specified amount of that income. Thus the employer makes a PAYE payment directly to the Inland Revenue on the employee's behalf in respect of that deemed income. Share options have been brought within this regime (see ss 471–478 of the Income Tax (Earnings and Pensions) Act 2003). The chargeable event occurs in this case when the securities are acquired pursuant to the option (s 477 of the 2003 Act). The amount of the charge is the difference between the gain realised on the occurrence of the chargeable event and any deductable amounts (s 478).

[46] There is no problem if that occurs whilst the option holder is an employee or officer of the company. It has recourse to the Sch E income being earned for the purpose of deduction. The claimant instead of having money deducted on previous exercises of share options reimbursed the company in full when he exercised those options whilst he was an employee. He thereby acknowledged a liability at that time to account to the company for the tax which was payable on the exercise of the option. Had he not done so then they would have deducted it from his earnings.

[47] I should say that at the time when the option holder scheme was introduced in 1996 the PAYE legislation summarised above did not apply. It did however apply when the options came to be granted namely on 26 November 1998 and 13 December 1998 (the legislation having changed with effect from 27 November 1996).

[48] The PAYE regime is applied to the gains from the securities option (s 700 of the 2003 Act and by s 712 it is extended to former employees). The difficulty of course the company faces by that application to the former employees is highlighted by the present case.

[49] It is significant to see how the payment by the employer is treated. Under s 710(1) of the 2003 Act the employer makes a notional payment of PAYE and then deducts the income tax at the relevant time from any payment or payments the employer actually makes of or on account of the PAYE income of the employee. That notional payment has to be paid by the employer even if he is unable to deduct from the employee (see s 710(3) and (4)).

[50] Finally in this context s 710(6) provides:

> 'Any amount—(a) which an employer deducts as mentioned in subsection (1), or (b) for which an employer accounts as mentioned in subsection (4), is to be treated as an amount of tax which, at the time

a when the notional payment is made, is deducted in respect of the employee's liability to income tax.'

[51] Thus the employer when deducting and accounting to the Revenue is deducting and accounting on the employee's behalf for the income tax for which of course he is primarily liable by virtue of his emoluments. Further there is protection for the employee in this sense. If the employer deducts and b fails to account to the Revenue (for example it deducts but goes into liquidation before accounting to the Revenue—a not uncommon occurance) the employee nevertheless receives credit for that deduction as against his own income tax liability on his own assessment not withstanding that the Inland Revenue did not receive it.

c [52] Regulation 78 of the Income Tax (Pay As You Earn) Regulations 2003, SI 2003/2682, provides for the amount of tax which the employer was liable to deduct from the relevant payments made by the employer in that tax period.

[53] Section 222(1) of the 2003 Act provides that if an employee does not pay to the employer the sum due from the employer to the Inland Revenue pursuant to s 710(4) within 90 days the sum paid by the employer is to be d treated as earnings from employment of the employee within the relevant year. In my view I accept Mr Griffiths's submissions that this is a rough and ready clause designed to penalise the employee who does not account to his employer for the Revenue by raising an assessment on him to cover that 90-day period. It is an extra payment and in my view has nothing to do with e the actual income tax deduction operated by virtue of s 710 of the 2003 Act. The liability arises out of consequence to pay the amount within the 90 days. If the claimant is liable to pay the subject matter of the counterclaim that does not involve a double deduction in my view; it merely involves the consequence of his delaying the payment because he is having the benefit of the use of money which he ought to have paid to the company. It is designed f to stop the company making the payment and not obtaining reimbursement.

NATIONAL INSURANCE

[54] A similar regime applies for the imposition and recovery of national insurance contributions from an employee under the Social Security g Contribution and Benefits Act 1992. The only difference that I can perceive is that the regulations provide that the deduction of national insurance is in addition to any other remedy otherwise available for the recovery of the national insurance contributions (reg 68(2)).

[55] Finally I should refer to s 59A of the Taxes Management Act 1970 which requires a taxpayer to pay the assessed tax in any year if it exceeds the h amount of any income tax which has been deducted at source. Thus if there is no deduction (as opposed to a failure to account) the claimant will be liable. This is logical because it is tax on *his income*.

LEGAL BASIS FOR LIABILITY

j [56] It is true that none of the Acts or regulations that I have referred to above expressly provide that the employee must reimburse the employer.

[57] The employer can of course deduct from the salary provided the salary will sustain the deductions. As these deductions occur on a weekly or a monthly basis that is overwhelmingly what usually happens. In the case of these share options of course the defendant has no income due to the claimant from which it can make a deduction.

[58] The defendant puts the liability to repay on three bases, namely, express term, implied term and in quasi contract.

EXPRESS TERM

[59] There is nothing in the scheme rules which expressly requires the claimant to reimburse any tax deducted. As I have said above this particular tax regime did not apply when the schemes were created but the rules could have been generally drafted at the time of their inception or subsequent to this regime.

[60] Nor is there anything in the claimant's contract of employment.

[61] The defendant claims that there is an express term by virtue of letters sent to the claimant when the option certificate was sent to him pursuant to the resolution of the company to grant him an option. Thus for example there is a letter dated 28 November 2000 addressed to him informing him that he has been granted the option on 21 November 2000, enclosing an option certificate and a booklet explaining how the plan worked. The letter says the booklet is only a guide and that in the event of any conflict between the booklet and the rules the latter will prevail. The booklet explains that when the option is exercised the grantee of the option will be liable to income tax at the highest rate and is payable under the PAYE regime and will be deducted from his monthly salary at the first opportunity after exercise. It does not of course expressly say he is liable to make the repayment over and above the power to deduct from the salary. In respect of earlier notification the defendant contends that in the covering letter (see for example the letter dated 8 January 1999) addressed to Mr McCarthy the question of liability for income tax was also raised: 'as a condition of exercise you will be required to reimburse the Company for these charges.' That letter provided for a signed acknowledgment to do that.

[62] The claimant denies that he received any of the letters on notification or any other certificates. His case is that he received none of the documentation and indeed had to chase up the option certificates at a much later stage.

[63] Even if I find that he received them Mr Sweeting QC submits that they are post contractual and cannot vary the contract unless they expressly or by implication are agreed by the claimant to have that effect. Significantly there is no evidence showing that he ever sent the counterpart signed back. The long list of other employees who apparently received such letter at the same time exhibited by the defendant to its evidence also do not show any signed copies.

[64] Similarly whilst the claimant admits to having made payments whilst he was an employee that is entirely consistent it is submitted with his stance because he accepts that he would be liable to make a reimbursement to the defendant whilst he was still an employee because otherwise they would be entitled to deduct it from his earnings.

[65] I am doubtful as to whether or not the claimant received these letters. Nevertheless I do not think I can decide that issue on a Pt 24 application. The claimant is entitled to present his case. In addition I accept Mr Sweeting QC's submission that variations are post contractual and cannot be imposed unless the claimant has expressly or by implication agreed to them. There is in my view a possible defence on this aspect which has a real prospect of success.

[66] I therefore reject at this stage the defendant's claim based on an express term of the contract.

IMPLIED TERM

[67] I agree that there is a case for suggesting such an implied term. I do not accept however at present that the defendant has satisfied me that the claimant had no point which has no prospect of success. In this context I refer to the Revenue and general literature advanced by the claimant. There is plainly a gap in the operation of schemes like this which could be said to be needed to be addressed. That gap has clearly been identified for a number of years. As Mr Sweeting submitted in his written and oral submissions it would have been very easy for the defendant to ensure an express term occurred. The rules could have been changed, the terms of employment could have been changed and the properly designated regime on the granting of the option could also have been put in place. None of those happened. Given that, Mr Sweeting submits that might well be a deliberate exercise designed not to ensure liability to pay. I am sceptical of that but I am not persuaded that I can decide that at this summary judgment stage.

[68] I therefore reject the defendant's claim based on implied term.

MONEY PAID TO THE USE OF THE CLAIMANT

[69] Here the defendant relies upon the well-known dictum of Lynskey J in *Bernard & Shaw Ltd v Shaw* [1951] 2 All ER 267 at 270 as follows:

> 'If the money had in fact been paid by the plaintiffs in discharge of the tax liability, it might well be that there would be a cause of action for money paid by the plaintiffs to the use of the defendant, on the basis that they were compelled by process of law to pay money which was due in respect of his remuneration as to which he would ultimately be liable for taxation. In those circumstances, the money might be recovered . . .'

[70] This is supported by Goff and Jones *The Law of Restitution* (6th edn, 2002) pp 423–424 and (para 15-01) as follows:

> 'In general, anybody who has under compulsion of law made a payment whereby he has discharged the primary liability of another is entitled to be reimbursed by that other. In the great majority of the cases discussed in this Chapter, that other was liable to pay a debt or other liquidated sum. Consequently in our view, the Civil Liability (Contribution) Act 1978 will have no application and the common law will still govern. The classic statement of the common law principle is to be found in a passage from the first edition of *Leake on Contracts*, which was quoted by Cockburn C.J. in *Moule v. Garrett* [(1872) LR 7 Exch 101, [1861–73] All ER Rep 135]:
>
> > "Where the plaintiff has been compelled by law to pay, or being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount."
>
> The basis of this right is similar to that which underlies the right to contribution. The plaintiff is allowed to recover because he has been compelled by law to make a payment which has discharged the defendant's liability to another. Whereas in contribution, the plaintiff seeks to recover

only a proportionate share of his payment, in the cases discussed in this Chapter he claims to be recouped the whole of the payment since the defendant is primarily liable to pay it. He may also seek relief by subrogation.

To succeed in his claim for recoupment, the plaintiff must satisfy certain conditions. He must show:

(1) that he was compelled, or was compellable, by law to make the payment;

(2) that he did not officiously expose himself to the liability to make the payment; and

(3) that his payment discharged a liability of the defendant.

The plaintiff enforces his right to reimbursement by recovering his money as paid to the defendant's use. But in certain cases the plaintiff is given a right to deduct a sum equal to his payment from money which he owes the defendant. He may also become entitled, on making the payment, to the benefit of securities deposited with the creditor by the defendant to secure the debt paid by the plaintiff.'

[71] The *Bernard & Shaw* case is not referred to in that extract. Nevertheless in my view the dictum in it is plainly correct. The claimant submits that requirement (3) is not satisfied because it is not discharging a liability of his.

[72] I do not accept that. As set out above s 59A of the 1970 Act reinforces the position that the claimant is liable to pay tax on his own earnings if it is not deducted. The defendant has paid the tax on his behalf which he would otherwise be liable to pay. He has received that benefit also because he has when his assessment return is sent in and the tax calculated, been given the benefit of that deduction and payment made by the defendant. It is only his liability in question. Merely because the revenue law is designed to ensure that the Revenue obtain early moneys from somebody other than the ultimate tax payer as a matter of operation of the recovery of its tax is neither here nor there. This in my view is also reinforced by the fact that when he was an employee he freely acknowledged his liability and made payments. I see no difference to the position if he ceased to be an employee. The company is deducting moneys which represent his income tax liability. As I have said the late payment is a non point for the reason that I have set out.

[73] I therefore conclude that on this quasi contractual claim the claimant has no defence which has any prospect of success and that therefore the defendant is entitled to judgment on the counterclaim on this basis.

Order accordingly.

Celia Fox Barrister.

R (on the application of Malik) v Central Criminal Court and another

[2006] EWHC 1539 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

SEDLEY LJ AND GRAY J

26 MAY, 27 JUNE 2006

Criminal law – Bail – Application – Application for bail application to be heard in public – Approach to be adopted on such an application.

The claimant remand prisoner sought bail from the Common Serjeant of London, sitting at the Central Criminal Court. He applied for his bail application to be heard in public. The Crown opposed that application on the grounds that the normal practice of the Central Criminal Court was that bail applications were made in camera. The Common Serjeant refused the application, concluding, inter alia, that there was nothing which distinguished the case from any other and that therefore the bail application would be decided in chambers. Bail was then refused. The claimant subsequently applied for judicial review of the Common Serjeant's refusal to hear the bail application in public. In determining those proceedings, the Divisional Court considered the approach to be adopted on an application for a bail application to be heard in public.

Held – When the court was considering an application to hear a bail application in public, the starting point was the fundamental presumption in favour of open justice. A hearing in open court of an application directly affecting personal liberty was, in the first instance, a matter not of private or individual right, and certainly not of judicial discretion, but of public obligation. The role of private or individual right, which would be prominent in bail applications, lay in the court's obligation to consider whether it was necessary to depart from the ordinary rule of open justice in the interests of justice itself. That might be at the instance of one party or both. It might also be on the court's own initiative in the interests of third parties. The court's decision was an exercise not of discretion, which implied a judicial choice between two or more equally proper courses, but of judgment as to whether a departure from the norm was justified. In the instant case, the Common Serjeant's approach was flawed in that it did not start, as it should have done, from the fundamental presumption in favour of open justice. Accordingly, the refusal to hear the claimant's bail application in public would be quashed and a judge of the Central Criminal Court would re-determine whether to hear the bail application in public and, having so decided, whether to grant bail (see [19], [30], [40], below).

Scott v Scott [1911–13] All ER Rep 1 applied.

Per curiam. There is nothing objectionable in listing bail applications in the Crown Court on the provisional assumption that the interests of justice will call for a closed hearing, so long as any application to sit in public is approached on the footing that, once made, it must be acceded to unless there is a sound reason for excluding the public (see [35], below).

Notes

For the openness of judicial proceedings, see 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) para 109.

Cases referred to in judgment

Assenov v Bulgaria (1999) 28 EHRR 652, [1998] ECHR 24760/94, ECt HR.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Clibbery v Allan [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] Fam 261, [2002] 2 WLR 1511.

DPP v Crown Court at Manchester and Huckfield [1993] 4 All ER 928, sub nom *R v Manchester Crown Court, ex p DPP* [1993] 1 WLR 1524, HL.

Hodgson v Imperial Tobacco Ltd [1998] 2 All ER 673, [1998] 1 WLR 1056, CA.

Neumeister v Austria (No 1) (1968) 1 EHRR 91, ECt HR.

Nikolova v Bulgaria (2001) 31 EHRR 64, [1999] ECHR 31195/96, ECt HR.

R v Croydon Crown Court, ex p Cox [1997] 1 Cr App R 20, DC.

R (on the application of M) v Isleworth Crown Court [2005] EWHC 363 (Admin), [2005] All ER (D) 42 (Mar).

R (on the application of the Director of Public Prosecutions) v Havering Magistrates' Court, R (on the application of McKeown) v Wirral Borough Magistrates' Court [2001] 3 All ER 997, [2001] 1 WLR 805, DC.

Scott v Scott [1913] AC 417, [1911–13] All ER Rep 1.

Taylor v Serious Fraud Office [1998] 4 All ER 801, [1999] 2 AC 177, [1998] 3 WLR 1040, HL.

Application for judicial review

The claimant, Usman Malik, applied with permission of Keene LJ and Jack J granted on 5 May 2006 for judicial review of the decision of the Common Serjeant of London, sitting at the Central Criminal Court on 24 March 2006, refusing (i) an application by the claimant for his bail application to be heard in public, and (ii) to direct that the claimant be produced at the hearing of the bail application. The facts are set out in the judgment of the court.

David Gottlieb (instructed by *Johns & Saggar*) for the claimant.

David Perry (instructed by the *Crown Prosecution Service*) for the Crown Prosecution Service.

Cur adv vult

At the conclusion of argument, the court quashed the refusal of the Common Serjeant to hear the claimant's bail application in public for reasons to be given later.

27 June 2006. The following judgment of the court was delivered.

GRAY J.

[1] This is the judgment of the court.

[2] This is an application made on behalf of Usman Malik, the claimant, for judicial review of the decision of the Common Serjeant of London, sitting at the Central Criminal Court, made on 24 March 2006, whereby he refused the claimant's application to have his application for bail heard in public.

The claimant also applies for judicial review of the refusal of the Common Serjeant to direct that the claimant be produced at the hearing of his bail application. The defendants are (1) Central Criminal Court and (2) Crown Prosecution Service. The Common Serjeant refused bail but there is no challenge to that part of his decision.

[3] The application is made with the permission of the full court (Keene LJ and Jack J) on 5 May 2006, following refusal of permission on 11 April 2006 on the papers by the single judge.

[4] The claimant, a 20-year-old man of good character, has been charged with possession of a record of information likely to be useful to a person committing or preparing an act of terrorism, contrary to s 58(1)(b) of the Terrorism Act 2000. The police had found material on his computer which has been described by the prosecution as 'extremist'. The claimant denies the offence.

[5] The claimant had made two previous bail applications in the magistrates' court on 10 and 16 March 2006 respectively. Both applications were heard in open court. The claimant was present, as were his mother, father and brother. Both applications were unsuccessful. We are told that members of the press attended both hearings and that reports of the hearings were published.

[6] What was described as 'an appeal' was lodged on 21 March 2006. It was strictly speaking an application: see s 81(1G) of the Supreme Court Act 1981. Nothing, however, turns on that. The application was accompanied by a letter from the solicitors acting for the claimant who requested that the application should be heard in open court.

[7] The claimant's application for bail was heard by the Common Serjeant on 24 March 2006. The claimant was represented by counsel, Mr David Gottlieb. The Crown, represented by Miss Rosemary Fernandes, opposed the application. According to the transcript of the hearing, Mr Gottlieb prefaced his submission by telling the judge that his point did not involve great issues of law and was simply a matter for the judge's judgment. He described his application for the hearing to take place in open court with the defendant produced and members of his family present as being 'not an unreasonable request'. Mr Gottlieb pointed out that the previous applications for bail made in the magistrates' court had taken place in open court. He submitted that there was no suggestion that Mr Malik posed some particularly high level of terrorist threat. Opposing the application, Miss Fernandes relied on 'the normal practice' of the Central Criminal Court that bail applications are made in camera. She submitted that there was nothing to distinguish the instant case from any other. It was not suggested in the course of the brief hearing that any issue of principle arose and the Common Serjeant understandably did not treat it as doing so.

[8] Refusing bail, the Common Serjeant said that the rules were clear and for a reason, as was the procedure in his court. He said that there was nothing which distinguished the present case from any other and expressed the intention to continue with the application in chambers unless the application were to be withdrawn in order for further consideration to be given to it. Mr Gottlieb then indicated that he wished to proceed with his application.

[9] In written observations which are annexed to the acknowledgment of service and for which the court is grateful, the Common Serjeant sets out his recollection of the course which the application took. Of the submission that the application be heard in public in the presence of the claimant and members of his family, the Common Serjeant said:

'Given the charges, the unusual nature of the case and the possibility of confidential matters being aired and taking into account the view of the Crown it did not seem appropriate to me to accede to the applicant's request and to divert from the usual course. I told counsel that if he wished he could adjourn his application [so that in effect he could give the matter further consideration and if necessary give notice that he wished to argue fully the point] or we could continue in chambers. He said that he wished to proceed.'

Bail was refused on the ground that it appeared to the Common Serjeant that there was a real risk of further offences being committed by the claimant or his failing to surrender if bail was granted. As I have said, that part of his decision is not challenged on this application.

[10] The grounds of the application may be summarised as follows: Mr Gottlieb accepts that there may be many cases where a public hearing is not in the interests of the defendant or of justice. He accepts that it is not necessarily unreasonable for a judge to refuse a public hearing. He submits, however, that the defendant's wish for a public hearing is a relevant factor to be taken into account by the tribunal. Indeed Mr Gottlieb goes so far as to say that, in the absence of any free-standing reason for the application to be heard in camera, the defendant's wishes should be decisive. He submits that the Common Serjeant failed to exercise his discretion to hold the bail application in open court; that he failed to take into account the claimant's previous request for the hearing to be in open court with his family present, that he failed to identify any free-standing reason why the claimant's request should be rejected and was wrong to treat the 'normal procedure' as a free-standing reason. Mr Gottlieb contends that the decision of the Common Serjeant was, as he puts it, '*Wednesbury* unreasonable'.

[11] In support of these submissions Mr Gottlieb referred the court to the Criminal Procedure Rules 2005, SI 2005/384, and in particular r 16.11 and to two decisions of the court in Strasbourg, namely *Assenov v Bulgaria* (1999) 28 EHRR 652 and *Nikolova v Bulgaria* (2001) 31 EHRR 64. The court was also invited to note the view expressed by the authors of the Law Commission Report 'Bail and the Human Rights Act 1998' (Law Com No 269 (2001)). Reliance was placed on *R (on the application of M) v Isleworth Crown Court* [2005] EWHC 363 (Admin), [2005] All ER (D) 42 (Mar). His attention having been drawn to it by the court, Mr Gottlieb relied in addition on the well-known case of *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1. Mr Gottlieb submits that the decision of the Common Serjeant is susceptible to judicial review and he says that his decision to sit in private should be quashed. It appears to us that if this part of his decision is quashed, the refusal of bail falls with it.

[12] In their skeleton argument, counsel for the second defendant (Mr David Perry, appearing with Miss Fernandes) do not challenge the susceptibility of the decision of the Common Serjeant to judicial review. Nor did Mr Perry in the course of his oral submissions seek to cast doubt on the general desirability, for the reasons advanced in *Scott v Scott*, that proceedings should take place in public. His argument is that it will invariably be necessary for bail applications to take place in private and that there is no general requirement for a defendant to be present at a bail application. The requirements of art 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) are satisfied if

the defendant participates in the bail proceedings through his legal representative and the parties enjoy equality of arms in an adversarial process. Mr Perry submits that art 6 of the convention has no application to preliminary hearings concerning trial arrangements including the question of bail for the defendant: see *R (on the application of the Director of Public Prosecutions) v Havering Magistrates' Court, R (on the application of McKeown) v Wirral Borough Magistrates' Court* [2001] 3 All ER 997, [2001] 1 WLR 805 and the Law Commission Report, to which we referred earlier, at paras 11.9 and 11.14.

[13] The argument for the second defendant is that the decision of the Common Serjeant was not unreasonable, since the presence of the claimant was not necessary to prevent unfairness or the risk of injustice and there were good and sufficient reasons for the hearing to take place in chambers.

THE JURISDICTION OF THE HIGH COURT

[14] Although Mr Perry does not contend otherwise, we should turn first to the question whether in the circumstances of this case this court has jurisdiction to entertain an application for judicial review of the decision of the Common Serjeant sitting in the Central Criminal Court, which is of course a Crown Court.

[15] Section 29(3) of the 1981 Act excludes 'matters relating to trial on indictment' from judicial review. There is, however, clear authority that a decision whether to grant or refuse bail at an early stage of criminal proceedings does not relate to trial on indictment. In *DPP v Crown Court at Manchester and Huckfield* [1993] 4 All ER 928 at 933–934, [1993] 1 WLR 1524 at 1530 Lord Browne-Wilkinson said:

> 'It may therefore be a helpful further pointer to the true construction of the section to ask the question: "Is the decision sought to be reviewed one arising in the issue between the Crown and the defendant formulated by the indictment (including the costs of such issue)?" If the answer is Yes, then to permit the decision to be challenged by judicial review may lead to delay in the trial: the matter is therefore probably excluded from review by the section. If the answer is No, the decision of the Crown Court is truly collateral to the indictment of the defendant and judicial review of that decision will not delay his trial: therefore, it may well not be excluded by the section.'

So s 29(3) is no barrier to the present application being made to this court.

[16] It was decided in *R v Croydon Crown Court, ex p Cox* [1997] 1 Cr App R 20 that a refusal of bail was not susceptible to judicial review. But, as this court pointed out in *M*'s case at [9], the ground of that decision was that there then existed an alternative remedy, namely the possibility of applying to a High Court judge for bail. That alternative remedy was, however, abolished by s 17(6)(b) of the Criminal Justice Act 2003. So that jurisdictional barrier has also been removed. This does not mean that the High Court can entertain challenges to refusals of bail on the merits, but it does enable a jurisdictional issue such as the present one to be entertained.

[17] The authorities to which we have referred were all applications challenging the refusal of bail in the Crown Court. In the present case the challenge is to the manner in which the Crown Court dealt with the bail application. It appears to us that, to use the terminology of Lord Browne-Wilkinson in the *Manchester* case, the decision was also truly

collateral to the indictment of the defendant. Accordingly the decision of the Crown Court in the present case is in our judgment susceptible to judicial review.

[18] Coming to the substance of the present application, we will deal first with the principal contention advanced on behalf of the claimant which is that the bail application should have been heard in public. As we will explain, different considerations arise when it comes to the claimant's ancillary submission that he should have been produced on the hearing of his bail application.

HEARING IN PUBLIC

[19] Our starting point is that, other things being equal, court hearings should take place in public. Article 6 of the convention says that everyone is entitled to a public hearing of any criminal charge against him; but the principle of open justice in both criminal and civil countries was established at common law in this jurisdiction long before 1950. In *Scott v Scott* [1913] AC 417 at 437, 438, [1911–13] All ER Rep 1 at 9, 10 Viscount Haldane LC, having referred to 'the broad principle . . . that the Courts of this country must, as between parties, administer justice in public' said:

> '. . . unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires.'

Likewise Lord Halsbury said ([1913] AC 417 at 440, [1911–13] All ER Rep 1 at 11):

> 'I am of opinion that every Court of Justice is open to every subject of the King . . .
> I believe this has been the rule, at all events, for some centuries . . .'

To similar effect are the words of Lord Shaw of Dunfermline ([1913] AC 417 at 477, [1911–13] All ER Rep 1 at 30) who, after quoting Bentham's dictum that 'Publicity is the very soul of justice', approved these words of the historian Hallam:

> 'Civil liberty in this kingdom has two direct guarantees; the open administration of justice . . . and the right of Parliament . . . to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable . . .'

It seems to us that these sentiments apply with equal, if not greater, force a century later: see *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673, [1998] 1 WLR 1056.

[20] Exceptions to the principle of open justice do of course exist in both criminal and civil cases. At common law there exists a jurisdiction to sit in camera if the justice of the case so requires. For instance cases concerning trade secrets may be heard in private where a public hearing would undermine the purpose of the proceedings. There are also various statutes which require or at least permit proceedings to take place in private, for example prosecutions under the Official Secrets Act. In all such cases the exception arises from the same source as the rule, namely the need for justice to be done: see Lord Haldane LC in *Scott v Scott* [1913] AC 417 at 437, [1911–13] All ER Rep 1 at 8–9.

[21] In this connection it is worth noting the recent change in the practice followed in the Family Division. Whereas formerly the presumption was that hearings in family cases should take place in private, the practice nowadays favours public hearings: see *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] Fam 261.

[22] No statutory provision has been relied on for the proposition that the public should routinely be excluded from bail applications. The 2005 rules provide by r 16.11:

> '(1) The criminal jurisdiction of the Crown Court specified in the following paragraph may be exercised by a judge of the Crown Court sitting in chambers.
>
> (2) The said jurisdiction is—(a) hearing applications for bail . . . (h) hearing appeals under section 1 of the Bail (Amendment) Act 1993 (against grant of bail by magistrates' court); and (i) hearing appeals under section 16 of the Criminal Justice Act 2003 (against condition of bail imposed by magistrates' court).'

In our view the word 'may' in that rule is permissive rather than mandatory. It is not to be taken to give rise to any presumption in favour of bail applications being heard in private. It enables the Crown Court judge to sit in chambers when it is necessary to do so. Sitting 'in chambers' is not synonymous with sitting 'in private', as Lord Woolf MR made clear in *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673 at 685–686, [1998] 1 WLR 1056 at 1070. So r 16.11 provides little assistance on the question before us, namely whether bail applications should be heard in public or in private. We express the issue in that way because, if such applications are heard in chambers but not in private (in the former terminology, in camera), there is in principle and subject to the law of contempt no inhibition on publishing an account of the proceedings: see s 12 of the Administration of Justice Act 1960.

[23] Moreover for r 16.11 to be construed as requiring the Crown Court judge to deal with bail applications in private might arguably fall foul of the European Convention on Human Rights. It is common ground that the potentially relevant convention rights are those contained in arts 5 and 6 which read respectively as follows:

> *'Article 5*
>
> 1. Everyone has the right to liberty and security of person . . .
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful . . .
>
> *Article 6*
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent

strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice . . .' a

[24] Mr Perry contends that art 6 extends only to proceedings by which a criminal charge is finally determined. He says that the guarantees provided by art 6(1) do not apply to preliminary hearings concerning trial arrangements including applications for bail. In support of that contention he relies on the *Havering* case. b

[25] The *Havering* case was a case where this court had to consider various questions concerning the manner in which bail applications should be conducted. Those questions did not include the question whether the hearing should be conducted in public, no doubt because, as we understand it, the practice in magistrates' courts is to conduct such applications in public. The court had to consider the interaction between arts 5 and 6 of the convention. Having considered a number of domestic and Strasbourg authorities Latham LJ, with whom Poole J agreed, said ([2001] 3 All ER 997 at 1007–1008, [2001] 1 WLR 805 at 816–817): c

'34. It seems to me that care needs to be taken to ensure that the facts and decisions in given cases do not hide the principal purpose behind the provisions of art 5. It is to ensure that persons are not subject to arbitrary deprivation of liberty . . . d

35. It is clearly with this principle in mind that the court has been prepared to borrow some of the general concepts of fairness in judicial proceedings from art 6. But that does not mean that the process required for conformity with art 5 must also be in conformity with art 6. That would conflate the convention's control over two separate sets of proceedings, which have different objects. Article 5, in the present context, is concerned to ensure that the detention of an accused person before trial is only justified by proper considerations relating to the risks of absconding, and of interfering with witnesses, or the commission of other crimes. Article 6 is concerned with the process of determining the guilt or otherwise of a person who if found guilty would be subject to criminal penalties. It is in that context that the procedural safeguards required respectively under arts 5 and 6 must be viewed.' e f g

[26] As we have said, the court in the *Havering* case was not concerned with the question whether magistrates dealing with bail applications should sit in public or in private. We respectfully agree that the principal purpose of art 5 is to ensure that persons are not subject to arbitrary deprivation of liberty. There is no reference to an entitlement to a public hearing to be found in art 5, whereas that is an entitlement conferred on everyone by the express terms of art 6. The entitlement applies, as is clear from the opening words of art 6, to 'the determination of his civil rights and obligations or of any criminal charge against him'. It is no part of the functions of a tribunal dealing with an application for bail to determine any criminal charge against the defendant. On the other hand, since the outcome of the bail application may be that the defendant will be incarcerated, it may be said that the bail application will involve the determination of the defendant's civil right to liberty. That right is to be found in the opening words of art 5, quoted above. If that be right, it would follow that the entitlement to a public hearing conferred by art 6 applies not only to the trial h j

itself but also to any bail application which may be made prior to or during the course of the trial. The point appears to be open, and we do not have to decide it.

[27] Mr Gottlieb relied on two Strasbourg cases mentioned earlier, *Assenov* and *Nikolova*. In both those cases the fact that the hearings in question had been held in closed court was one of the reasons given for the court's finding that they did not satisfy art 5(4). Mr Gottlieb is, however, right to point out that the hearings in both those cases denied access not only to the public but also to the defendant and his representative. In effect the applications were dealt with on the papers alone. Moreover, in *Neumeister v Austria (No 1)* (1968) 1 EHRR 91 at 132 (para 23) the court rejected the suggestion that pre-trial hearings are subject to the same procedural requirements as art 6(1) imposes in respect of trials, on the basis that, if this were so, it would follow that such hearings would have to be conducted in public, whereas '[p]ublicity in such matters is not . . . in the interests of accused persons as it is generally understood'. However, the argument to which we have adverted at [25], above was not raised in *Neumeister*.

[28] Mr Perry draws attention in his skeleton argument to the view expressed by the Law Commission in its Criminal Law Consultation Paper 'Bail and the Human Rights Act 1998' (Consultation Paper No 157 (1999)):

> 'The [Strasbourg] court has laid down certain essential characteristics of a "judicial procedure" in the context of pre-trial detention. First, the defendant should be able to participate in the hearing, if only through a legal representative. Secondly, the hearing must be "adversarial" and the parties must enjoy "equality of arms". Finally, though this is not entirely clear, it is arguable that the hearing must be held in public.'

[29] Of greater significance is what was said by the Law Commission on this point in its final report (Law Com No 269 (2001)):

> '11.40 [The issue whether there is a requirement that the hearing be held in public] does not seem to pose a problem. Under the present arrangements, there seems to be no reason why, if the defendant wants the hearing to be in public, the hearing should be held in private against his or her wishes. The power exists for the court to hold it in public and we would have thought it inconceivable that any judge would refuse such a request by the defendant unless there was some other free-standing reason for it to be held in camera.'

It is to be noted that that view was arrived at by the authors of the report after consideration of the Strasbourg jurisprudence.

[30] In our judgment the hearing in open court of an application directly affecting personal liberty is in the first instance a matter not of private or individual right, and certainly not of judicial discretion, but of public obligation. The role of private or individual right, which will be prominent in bail applications, lies in the court's obligation to consider whether it is necessary to depart from the ordinary rule of open justice in the interests of justice itself. This may be at the instance of one party or both; it may also be on the court's own initiative in the interests of third parties. The court's decision is an exercise not of discretion, which implies a judicial choice between two or more equally proper courses, but of judgment as to whether a departure from the norm is justified. All of this, it seems to us, is encapsulated in the well-known passage of *Scott v Scott* [1913] AC 417 at 477, [1911–13] All ER Rep 1 at 30 in which Lord Shaw of Dunfermline described the doing of justice in public as 'the maintenance

of constitutional right' and asserted that to treat adherence to it as simply a matter of discretion was 'to shift the foundations of freedom from the rock to the sand'.

[31] There will be cases where a bail application can be heard in public without any substantial risk that the position of either the prosecution or the defence at trial, or that of any third party, will be prejudiced. But there will also be a great many cases where there are good reasons for the court to sit in chambers, and a few, no doubt, where it may need to sit in private. Among the former will be those cases in which the delay involved in arranging a public hearing would defeat the purpose of the application.

[32] If bail is opposed by the prosecution, reliance will necessarily be placed on one or more of the grounds for refusing to grant bail contained in Sch 1, Pt I to the Bail Act 1976, namely that:

> '2(1) The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—(a) fail to surrender to custody, or (b) commit an offence while on bail, or (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person . . .
>
> 2A(1) If the defendant falls within this paragraph he may not be granted bail unless the court is satisfied that there is no significant risk of his committing an offence while on bail (whether subject to conditions or not).
>
> (2) The defendant falls within this paragraph if—(a) he is aged 18 or over, and (b) it appears to the court that he was on bail in criminal proceedings on the date of the offence . . .
>
> 3. The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare.
>
> 4. The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court or of any authority acting under any of the Services Acts.
>
> 5. The defendant need not be granted bail where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this Part of this Schedule for want of time since the institution of the proceedings against him.'

[33] Mr Perry listed for us a number of other instances where applications for bail may in the interests of the accused have to be heard in private: where the prosecution need to rehearse a damaging case against the defendant or his co-accused; where the prosecution intend to give detailed reasons for fearing that the defendant will not surrender if given bail; where the defendant's previous convictions will be referred to; where it will or may be necessary to reveal personal and confidential information about the defendant or about prosecution witnesses or others; and where the court may need to be told about information which has been provided to the prosecuting authorities by the defendant or by someone else connected with the case (as for example in *Taylor v Serious Fraud Office* [1998] 4 All ER 801, [1999] 2 AC 177). There will no doubt be many other applications where the court may properly decide to exclude the public.

[34] In other cases, by contrast, a public hearing will not only meet the primary requirement of open justice. It will serve as a discipline upon parties who are tempted to make exaggerated or unfounded assertions in seeking or opposing

bail if they face the possibility of having to answer at trial for what they have chosen publicly to assert.

[35] We recognise that this judgment may affect the day-to-day administration and practice of many Crown Courts. We would therefore make certain consequential things clear. It does not follow from what we have held that bail applications have to be listed and called on in open court and then adjourned to chambers if, and only if, a case is made for doing so. Such a process, as well as being time-consuming, would as often as not be self-defeating. There will be nothing objectionable in listing bail applications on the provisional assumption that the interests of justice are going to call for a closed hearing, so long as any application to sit in public is approached on the footing that, once made, it must be acceded to unless there is a sound reason for excluding the public. Such an application will ordinarily come from one or both of the parties, but it may also legitimately come from the media or some other third party. Whether listing is carried out on this basis or on a contrary presumption that the hearing will be in public, parties to bail applications must be prepared to respond promptly, and with relevant reasons, if the court requires to be told in advance of the hearing whether a different course is to be sought and, if it is, whether that course is to be supported or opposed. Crown Court administrators for their part may consider it wise to ask for this information when they list bail applications for hearing. Where there is a conflict, it must be resolved by a judicial decision which itself respects the principles we have set out.

THE PRESENCE OF THE DEFENDANT

[36] We come finally to the further question raised on this application, namely whether the Common Serjeant erred in law in failing to accede to Mr Gottlieb's application that (as it is put) the claimant should be produced at the hearing of the bail application, that is, that he was entitled to be present. As we have said, we consider that this is a question which is separate and distinct from the issue whether the application should be heard in private or in public.

[37] There is a separate rule dealing with the question of an applicant's entitlement to be present at his or her bail hearing. Rule 19.18 of the 2005 rules provides:

> '(5) Except in the case of an application made by the prosecutor or a constable under section 3(8) of the 1976 [Bail] Act, the applicant shall not be entitled to be present on the hearing of his application unless the Crown Court gives him leave to be present.'

Section 3(8) has no bearing on the present case because it relates to individuals already on bail who are seeking a variation of conditions. The words of sub-r (5) make clear that an applicant for bail who is already in custody has no automatic right to be present on the hearing of his application and that he or she has the burden of persuading the Crown Court that he or she should be given leave to be present.

[38] If, as was the case here, the defendant has legal representation one can see sound pragmatic reasons why he should not have a right to be 'produced'. Producing a defendant at court for a bail application can be and often is inconvenient and expensive. It is by no means uncommon for defendants who are in custody to be held at prisons a considerable distance away from the court where they are to be tried. Moreover, the increasing use of video links between the court and the prison where the defendant is detained effectively remove any

disadvantage to the defendant by reason of his not being physically present when the application for bail is heard. a

[39] Section 58 of the 2000 Act, under which section the claimant is charged, is not within the list of offences contained in the Protocol issued by the President of the Queen's Bench Division for the Management of Terrorism Cases. It is nevertheless worth noting that para 17 provides: 'Unless a judge otherwise directs, all Crown court hearings prior to the trial will be conducted by video link for all defendants in custody.' b

CONCLUSION

[40] The approach of the Common Serjeant to the application of the defendant to hear his bail application in public did not start, as it should have done, from the fundamental presumption in favour of open justice. Whether his conclusion would have been the same had he taken this approach we are in no position to say. We therefore announced at the end of the hearing our decision to quash his refusal to hear the claimant's bail application in public, with the consequence that the magistrates' refusal of bail remained extant and that a judge of the Central Criminal Court (we made no direction as to which judge it should be) must now re-determine in the light of our judgment whether to sit in public and, having so decided, whether to grant bail. This should now be done as soon as practicable. c d

Order accordingly.

Christian Metcalfe Barrister.

Centre Reinsurance International Co and another v Freakley and others

Freakley and others v Centre Reinsurance International Co and others

[2006] UKHL 45

HOUSE OF LORDS

LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD PHILLIPS OF WORTH MATRAVERS, LORD WALKER OF GESTINGTHORPE AND LORD BROWN OF EATON-UNDER-HEYWOOD

24 JULY, 11 OCTOBER 2006

Company – Administration order – Administrator – Costs of administration – Debts or liabilities incurred under contracts entered into by administrator in carrying out of his functions – Priority – Asbestos claims – Claims handling expenses – Insurance – Policy providing for transfer of claims handling rights to insurers on occurrence of insolvency event – Claims handling expenses incurred by insurers – Whether claims handling expenses to be treated as sums payable in respect of debts or liabilities incurred under contracts entered into by administrator in carrying out of his functions – Whether claims handling expenses having statutory priority over other costs of administration – Insolvency Act 1986, s 19(5).

A company faced a large number of personal injury claims arising out of the use of asbestos in its products. It had the benefit of an asbestos liability policy under which it was entitled to be indemnified against its 'ultimate net loss' (defined to include both established liabilities under asbestos claims and the costs of defending and handling such claims) in excess of a 'retained limit' of £690m and up to an insurance limit of £500m. It was a condition of the policy that after the occurrence of an 'insolvency event' (defined to include the presentation of an administration petition) or the reaching of the retained limit the insurers should have the exclusive right to handle and defend claims. In handling claims the insurers acted as agents for the company and were entitled to reimbursement for their expenses. In October 2001 the court, on the company's petition, appointed administrators. The administrators sought the directions of the court on a number of issues, including whether the right to reimbursement of the insurer's claims handling expenses incurred after the appointment of the administrators had a statutory priority over other costs of the administration, a floating charge and the unsecured creditors of the company (issue 14). The insurers contended that their claim to reimbursement of claims handling expenses fell within s 19(5)[a] of the Insolvency Act 1986, which provided that: 'Any sums payable in respect of debts or liabilities incurred, while he was administrator, under contracts entered into or contracts of employment adopted by him or a predecessor of his in the carrying out of his or the predecessor's functions shall be charged on and paid out of any such property as is mentioned in subsection (4) in priority to any charge arising under that subsection.' The judge rejected that submission on the ground that the payments to claims handlers by the insurers had not been pursuant to or in discharge of any contract entered into by the administrators. Whilst the

a Section 19, so far as material, is set out at [8], below

contracts with the claims handlers had been made on behalf of the company, they had not been made on behalf of the administrators and it was the policy, entered into before the appointment of the administrators, which gave the insurers authority to incur expenses on behalf of the company. The insurers' appeal to the Court of Appeal on issue 14 was successful. The administrators appealed to the House of Lords.

Held – Reimbursement of the insurers' claims handling expenses incurred under the liability policy did not represent sums payable in respect of debts or liabilities incurred under a contract entered into by the administrators in the carrying out of their functions within s 19(5) of the 1986 Act. Once an administrator had been appointed only he could act or confer authority to act on behalf of the company, however it did not follow that anyone with authority to act on behalf of the company would be deemed to have derived authority from the administrator. There was no reason of policy why such obligations (which might or might not be in the interests of the administration) should be given priority over the company's other debts. The purpose of administration under the 1986 Act was simply to impose a moratorium to allow time to find a way of saving the business or realising it to better advantage than in a liquidation. It was not intended to alter substantive rights or priorities more than was necessary to enable that objective to be achieved. The provisions of s 19(4) and (5) entrusted to the administrator (subject to the supervision of the court) the power to decide what expenditure was necessary for the purposes of the administration and should therefore receive priority. But there was no reason to extend that priority to expenditure which neither the administrator nor the court had specifically approved. Whilst the court could direct the administrator to authorise or ratify particular claims handling expenditure by the insurers, in the exercise of its broad discretion to authorise or direct the administrators to make payments or enter into contracts for the purposes of the administration, with the result that their rights to reimbursement would have priority under s 19(5), it would be unusual for the court to make such a decision, involving questions of business judgment, contrary to the opinion of the administrator that such expenditure, while no doubt in the interests of the insurers, was not necessary for the very limited purposes of the administration. In the instant case, whilst the business objectives of the insurers were sensible, they had little to do with the purposes of the administration. Accordingly, the appeal would be allowed (see [14]–[19], below).

Decision of the Court of Appeal [2005] 2 All ER (Comm) 65 reversed.

Notes

Section 19 of the Insolvency Act 1986 was substituted by new s 8, by the Enterprise Act 2002, s 248(1), as of 15 September 2003.

For the Insolvency Act 1986, s 19, see 4 *Halsbury's Statutes* (4th edn) (2004 reissue) 910.

Cases referred to in opinions

Atlantic Computer Systems plc, Re [1992] 1 All ER 476, [1992] Ch 505, [1992] 2 WLR 367, CA.

Cox v Bankside Members Agency Ltd [1995] 2 Lloyd's Rep 437, CA.

Groom v Crocker [1938] 2 All ER 394, [1939] 1 KB 194, CA.

Powdrill v Watson, Re Leyland DAF Ltd, Re Ferranti International plc [1995] 2 All ER 65, [1995] 2 AC 394, [1995] 2 WLR 312, HL.

Cases referred to in list of authorities

Allders Department Stores Ltd, Re [2005] EWHC 172 (Ch), [2005] 2 All ER 122.

British Eagle International Airlines Ltd v Compagnie Nationale Air France [1975] 2 All ER 390, [1975] 1 WLR 758, HL.

Company, a (No 005174 of 1999), Re [2000] 1 BCLC 593, [2000] ICR 263, [2000] 1 WLR 502.

Huddersfield Fine Worsteds Ltd (in admin), Re, Krasner v McMath [2005] EWCA Civ 1072, [2005] 4 All ER 886, [2006] ICR 205.

John Slack Ltd, Re [1995] BCC 1116.

Salmet International Ltd (in admin), Re [2001] BCC 796.

St Ives Windings Ltd, Re [1987] 3 BCC 634.

T & N Ltd, Re [2004] EWHC 2361 (Ch), [2005] 2 BCLC 488.

Toshoku Finance UK plc (in liq), Re, Khan v IRC [2002] UKHL 6, [2002] 3 All ER 961, [2002] 1 WLR 671.

Appeal

The administrators of T & N Ltd, Simon Freakley, James Gleave and Gary Squires, appealed, with permission of the Appeal Committee of the House of Lords given on 18 July 2005, from the decision of the Court of Appeal (Chadwick, Latham and Arden LJJ) on 11 February 2005 ([2005] EWCA Civ 115, [2005] 2 All ER (Comm) 65) whereby it was ordered that the appeal of Centre Reinsurance International Co and Muenchener Rueckversicherungs-Gessellschaft (the insurers), in relation to issue 14 of the order of Blackburne J dated 23 April 2004, would be allowed and the order of Blackburne J dated 23 April 2004 be varied so as to substitute the following answer to issue 14: 'reimbursement of claims handling rights should be treated as sums payable in respect of liabilities incurred within s 19(5) of the Insolvency Act 1986.' By order dated 2 October 2003, in three related sets of proceedings ((1) 5798 of 2001 between the administrators and the insurers, European International Reinsurance Co Ltd and Curzon Insurance Ltd; (2) HC02C03744 between the insurers and Curzon Insurance Ltd; and (3) 4246 of 2002 between the insurers and the administrators), Blackburne J had directed a hearing of a number of issues, of which issue 14 was one. The facts are set out in the opinion of Lord Hoffmann.

Gabriel Moss QC and *David Edwards* (instructed by *Denton Wilde Sapte*) for the administrators.

Geoffrey Vos QC, Christopher Butcher QC and *David Lord* (instructed by *Kendall Freeman*) for the insurers.

Their Lordships took time for consideration.

11 October 2006. The following opinions were delivered.

LORD HOFFMANN.

[1] My Lords, this appeal arises out of a number of questions on which the administrators of T & N Ltd (T & N) sought the directions of the court. On all but one of these questions the answers given by Blackburne J ([2004] EWHC 200 (Ch), [2004] 2 All ER (Comm) 28) were not appealed or affirmed by the Court of Appeal ([2005] EWCA Civ 115, [2005] 2 All ER (Comm) 65) and there is no further appeal. On the remaining question his decision was reversed and the administrators appeal.

[2] The relevant facts may be shortly stated. In 2001 T & N appeared likely to become unable to pay its debts because it was faced with a large number of tort claims arising out of the use of asbestos in its products. On 1 October 2001 Hart J, on the company's petition, appointed administrators for purposes including the approval of a corporate voluntary arrangement or scheme of arrangement under s 425 of the Companies Act 1985.

[3] The company had the benefit of an asbestos liability policy under which it was entitled to be indemnified against its 'ultimate net loss' (defined to include both established liabilities under asbestos claims and the costs of defending and handling such claims) in excess of a 'retained limit' of £690m and up to an insurance limit of £500m. It was a condition of the policy that after the occurrence of an 'insolvency event' (defined to include the presentation of an administration petition) or the reaching of the retained limit the insurers should have the exclusive right to handle and defend claims.

[4] It is accepted that in handling claims, instructing solicitors and so forth, the insurers act as agents for the company and are entitled to reimbursement for their expenses: *Groom v Crocker* [1938] 2 All ER 394, [1939] 1 KB 19; *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437. The question which is the subject matter of the appeal is whether the right to reimbursement of such expenses incurred after the appointment of the administrators has a statutory priority over other costs of the administration, the floating charge and the unsecured creditors of the company.

[5] The question is not asked in respect of any particular expenses. Your Lordships know nothing of the amount claimed or the reason why the expenses were incurred. The policy requires that the insurers exercise their rights 'in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to the policy'. It may therefore be assumed that the insurers complied with this requirement, otherwise there would be no claim to reimbursement at all. The question is whether any legitimate claim to reimbursement under the policy would have priority.

[6] Before looking at the specific statutory provisions under which priority is claimed, I should say something about the general scheme and purpose of administration as it existed under the Insolvency Act 1986 (the 1986 Act). Changes have since been made by the Enterprise Act 2002 but I say nothing about these because they were not in force at the relevant time. The background to the 1986 Act is explained by Lord Browne-Wilkinson in *Powdrill v Watson, Re Leyland DAF Ltd, Re Ferranti International plc* [1995] 2 All ER 65 at 76, [1995] 2 AC 394 at 441–442. It was introduced to enable a court to give insolvent companies a moratorium on the enforcement of debts and securities while the possibility of some form of rescue or arrangement with creditors was explored. Unlike Ch 11 of the United States Bankruptcy Code, with which it is sometimes compared, administration did not involve a reconstruction of the company. It usually looked forward to some kind of reconstruction, but that took place under different statutory provisions such as Pt I of the 1986 Act (corporate voluntary arrangement) or s 425 of the 1985 Act.

[7] In essence, an administration order did two things. First, it placed a procedural bar on the enforcement of security over the company's property or the commencement or continuance of any legal proceedings or execution against the company. Secondly, it substituted for the existing management a court appointed administrator with power, under the control of the court, to manage the company's business and property. It did not alter substantive rights under

contracts into which the company had entered or security which it had given. It did not affect the company's capacity, under its new management, to continue to trade and incur liabilities. It did not, save to the extent which I shall explain, affect the priorities which creditors would have if the company was wound up. That was left to any future reconstruction or liquidation.

[8] It was obviously necessary for the administrator, if he was to carry out his function of preserving the business of a company as a going concern, to be able to pay for necessary goods and services and give suppliers the assurance that they would be paid in full even if the administration ended in a liquidation or a reconstruction under which the unsecured creditors received only a small dividend. This latter object was achieved by s 19(3)–(10) of the 1986 Act. Subsections (6)–(10) deal with contracts of employment and it is necessary only to refer to sub-s (3)–(5):

> '(3) Where at any time a person ceases to be administrator, the following subsections apply.
>
> (4) His remuneration and any expenses properly incurred by him shall be charged on and paid out of any property of the company which is in his custody or under his control at that time in priority to any security [under a floating charge].
>
> (5) Any sums payable in respect of debts or liabilities incurred, while he was administrator, under contracts entered into . . by him or a predecessor of his in the carrying out of his or the predecessor's functions shall be charged on and paid out of any such property as is mentioned in subsection (4) in priority to any charge arising under that subsection.'

[9] Thus sub-s (4) deals with claims against the company by the administrator himself and sub-s (5) deals with claims against the company by third parties. Claims by the administrator may be either for remuneration or for expenses, that is to say, for goods and services supplied to the company for which the administrator has paid or chosen to make himself liable but for which he has not yet reimbursed himself out of the company's assets. Subsection (5) deals with debts and liabilities incurred by the administrator which have not been discharged and which were incurred under contracts entered into by the administrator 'in the carrying out of his . . . functions'. But the supplier will have the benefit of s 14(6), which provides that a person dealing with the administrator in good faith and for value 'is not concerned to inquire whether the administrator is acting within his powers.'

[10] The administrator's remuneration and expenses under sub-s (4) have priority over a floating charge and of course over unsecured creditors if there is a liquidation. The outside creditors' debts under sub-s (5) have 'super-priority' over the administrator as well.

[11] The insurers say that their claim to reimbursement of claims handling expenses falls within sub-s (5). Blackburne J rejected this submission on the short ground that the payments to claims handlers by the insurers had not been pursuant to or in discharge of any contract entered into by the administrators. It was true that the contracts with the claims handlers had been made on behalf of the company but they had not been made on behalf of the administrators. It was the policy, entered into before the appointment of the administrators, which gave the insurers authority to incur expenses on behalf of the company.

[12] In the Court of Appeal, Chadwick LJ said ([2005] 2 All ER (Comm) 65 at [125]), in my view correctly, that—

'[t]he relevant question ... is whether liabilities for claims handling expenses incurred on the instructions of the insurer—acting under the rights conferred by the policy ... are properly to be treated as liabilities incurred by the administrator in carrying out his functions ...' a

[13] Chadwick LJ then proceeded to examine the duties of the administrators and came to the conclusion that, given the objects for which they had been appointed, it would have been proper for the administrators to have incurred the claims handling expenses which had been incurred by the insurers. It followed that such expenses were 'necessary to the carrying out of the purposes for which the administration order was made' (see [130]). I think that Chadwick LJ may have stated these purposes a little widely and I would certainly have wished to have some evidence about exactly what the expenses were before expressing an opinion about their necessity. The administrators say that, given the existence of a stay, there is very little in the way of claims handling that needs to be done. Sometimes the administrator may be asked to give his consent to the issue of proceedings to stop the limitation period from running, but this requires no more than writing a letter and in any case it involves the exercise of a statutory discretion vested in the administrator himself. But for the sake of the argument I am willing to assume that Chadwick LJ was right. b c d

[14] Even so, I do not see how that makes the claims handling expenses liabilities under contracts entered into by the administrator. The administrator had nothing to do with either the contracts under which the liabilities were incurred or the contract which gave the insurers authority to incur them on behalf of the company. e

[15] Mr Vos QC, who appeared for the insurers, submitted that, as a company in administration could act only by its administrator, any liabilities incurred on behalf of a company in administration must have been incurred on behalf of the administrator. But that does not in my opinion follow. It is true that once an administrator has been appointed, only he can act or confer authority to act on behalf of the company. I say 'confer authority to act' because I do not suggest that an administrator is obliged always to contract personally. He may employ agents. But that does not mean that anyone with authority to act on behalf of the company must be deemed to have derived his authority from the administrator. The company may, before the appointment of the administrator, have conferred on someone an authority to contract on its behalf which, in law or in practice, the administrator cannot revoke. This is such a case. Such contracts are made on behalf of the company but not on behalf of the administrator. f g

[16] There seems to me no reason of policy why such obligations (which may or may not be in the interests of the administration) should be given priority over the company's other debts. As I have said, the purpose of administration under the 1986 Act was simply to impose a moratorium to allow time to find a way of saving the business or realising it to better advantage than in a liquidation. It was not intended to alter substantive rights or priorities more than was necessary to enable this objective to be achieved. The provisions of s 19(4) and (5) entrust to the administrator (subject to the supervision of the court) the power to decide what expenditure is necessary for the purposes of the administration and should therefore receive priority. But there is no reason to extend that priority to expenditure which neither the administrator nor the court has specifically approved. h j

[17] The Court of Appeal in *Re Atlantic Computer Systems plc* [1992] 1 All ER 476, [1992] Ch 505 said that the court, exercising its supervisory powers over an administration, has a broad discretion to authorise or direct the administrator to make payments or enter into contracts for the purposes of the administration. In the exercise of this power, the court can in my opinion direct the administrator to authorise or ratify particular claims handling expenditure by the insurers, with the result that their right to reimbursement would have priority under s 19(5). It would however be unusual for the court to make such a decision, involving questions of business judgment, contrary to the opinion of the administrator that such expenditure, while no doubt in the interests of the insurers, was not necessary for the very limited purposes of the administration. It would also require much more evidence of the particular expenditure than is available to your Lordships. Blackburne J refused to make a blanket order authorising claims handling expenditure by the insurers in general terms, saying ([2004] 2 All ER (Comm) 28 at [110]–[111])—

> '[w]hile . . . it may be true that the reinsurers' exercise of claims handling may be of benefit to T&N's creditors, the reinsurers' prime concern is to protect their own interests. The transfer of claims handling rights to the reinsurers is not something which the administrators desire. On the contrary, they are anxious to have control themselves of claims handling in what they see as the best interests of T&N and its creditors. The reinsurers have power to give back control of claims handling to T&N (in effect to the administrators) but the issue assumes that they decline to do so.
>
> [111] In these circumstances, it is difficult to see why the court should direct, in exercise of its power to regulate the conduct of an administration, that the cost to the insurers of conducting claims handling in pursuit of their own interests (in circumstances where, as the issue assumes, the cost of so doing is one which, under the policy, is recoverable in any event from T&N) should enjoy an elevated status as against the claims of others against T&N by treating it as an expense of the administration ahead of T&N's other pre-administration creditors. There is no injustice in this. If the reinsurers wish to avoid the risk of non-recovery of their claims handling expenses (a circumstance which can only occur if the ultimate net loss never exceeds the retained limit, since, once the retained limit is attained, it will be open to the reinsurers to set-off any un-recovered claims handling costs against the £500m limit of insurance), they can return claims handling to T&N.'

[18] It seems to me that Blackburne J correctly identified what, in commercial terms, is the issue in this case. The insurers want to handle the claims to ensure that the ultimate net loss, if it exceeds the retained limit, will do so by as little as possible. If the ultimate net loss does exceed the retained limit, they will recover any current expenditure by set-off against their liability to indemnify T & N. But they want both to handle the claims and to bring themselves within s 19(5) to ensure that they do not have to wait to exercise a right of set-off or take the risk that the claims will not exceed the retained limit and no set-off will be possible. These are sensible business objectives for the insurers but they have little to do with the purposes of the administration.

[19] In my opinion the decision of Blackburne J was entirely right and the appeal should be allowed and his judgment on this point restored.

LORD HOPE OF CRAIGHEAD.

[20] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons he gives I too would allow the appeal and restore the judgment of Blackburne J.

LORD PHILLIPS OF WORTH MATRAVERS.

[21] My Lords, for the reasons given by my noble and learned friend Lord Hoffmann I would allow this appeal and restore the judgment of Blackburne J.

LORD WALKER OF GESTINGTHORPE.

[22] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he gives I too would allow the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[23] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he gives I too would allow the appeal and restore the judgment of Blackburne J.

Appeal allowed.

Celia Fox Barrister.

Rothwell v Chemical & Insulating Co Ltd and another and other appeals

Re Pleural Plaques Litigation

[2006] EWCA Civ 27

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS CJ, LONGMORE AND SMITH LJJ

14, 16–18 NOVEMBER 2005, 26 JANUARY 2006

Negligence – Cause of action – Damage – Negligent exposure of employees by employers to asbestos – Employees developing pleural plaques – Employees at risk of asbestos related diseases – Employees suffering anxiety or depressive illness – Separate heads of claim incapable of founding cause of action – Whether cause of action could be founded by aggregating heads of claim – Whether employers owing duty of care not to expose employees to risk of psychiatric injury as consequence of anxiety about future health.

The claimants had been negligently exposed by their defendant employers to asbestos dust. Each claimant developed pleural plaques which were the most common pathological effect of asbestos inhalation. The presence of pleural plaques did not normally occasion any symptoms. Plaques did not in themselves threaten or lead to other asbestos-induced conditions and were not a necessary pre-condition to such conditions but they evidenced exposure to asbestos. The claimants were thus at the risk of developing one or more long-term asbestos related diseases and suffered anxiety at the prospect that they might suffer such disease. They bought actions against their employers on the basis that although none of those consequences of exposure, if experienced on its own, would constitute damage capable of founding a cause of action in negligence, that by aggregating (i) the pleural plaques with (ii) the risk of developing one or more long-term asbestos related diseases and (iii) the anxiety suffered, sufficient damage could be demonstrated to found a cause of action. Their actions were successful in the High Court, where the judge analysed the relevant injury not as pleural plaques per se but as the permanent penetration of the chest by asbestos fibres to which the plaques were pointers. The case of G differed in that he had claimed and was awarded damages for a depressive illness developed as a result of being diagnosed with an asbestos related disease. The case of H differed in that his employer had not disputed liability. The employers in the cases where liability had been disputed appealed and H appealed as to quantum.

Held – (1) (Smith LJ dissenting) The aggregation of three heads of claim, which individually could not found a cause of action, could not constitute sufficient damage to give rise to a legal claim. There was no logical basis for the aggregation approach and no justification for departing from logic or legal principle in the specific case of asbestos-induced pleural plaques. Moreover, there were a number of reasons of policy why it was undesirable that the development of pleural plaques should give rise to a cause of action. Furthermore, the presence of asbestos fibres, as demonstrated by pleural plaques, was no more capable than the existence of those plaques themselves, of founding a cause of action. Accordingly, the appeals by the employers in the cases other than the case

of G would be allowed (see [61]–[63], [67]–[69], [71], below); *Church v Ministry of Defence* (1984) 134 NLJ 623 distinguished; *Sykes v Ministry of Defence* (19 March 1984, unreported) and *Patterson v Ministry of Defence* (29 July 1986, unreported) considered.

(2) (Per Lord Phillips of Worth Matravers CJ and Longmore LJ) The test of foreseeability for psychiatric injury could not properly be extended so as to render a defendant who negligently exposed a claimant to the risk of contracting a disease liable for freestanding psychiatric injury caused by fear of contacting the disease. Furthermore, although, on principle, if the evidence were to establish that it was foreseeable that men of reasonable fortitude, if exposed to asbestos dust, might suffer psychiatric injury as a consequence of anxiety about their future health, it should follow that employers would owe a duty of care not to expose employees to that risk, there was no evidence in the case of G that would enable the court to find that such a risk was foreseeable. Accordingly, the appeal by the employer in the case of G would be allowed (see [76], [89]–[91], [94], [100], [101], below); *Page v Smith* [1995] 2 All ER 736 considered; dicta of Lord Steyn in *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1 at 38–39 applied.

(3) In the case of H the judge had erred in principle and the matter would be remitted to him for assessment of damages (see [105], [177]–[179], [187]–[197], below).

Notes

For negligence: causation, and for proving negligence, see 33 *Halsburys' Laws* (4th edn reissue) paras 603, 662.

Cases referred to in judgments

Alcock v Chief Constable of the South Yorkshire Police [1991] 4 All ER 907, [1992] 1 AC 310, [1991] 3 WLR 1057, HL.

Bittles v Harland & Wolff plc [2000] NIJB 209, NI QBD.

Cartledge (widow and administratrix of the estate of Fred Hector Cartledge (decd)) v E Jopling & Sons Ltd [1963] 1 All ER 341, [1963] AC 758, [1963] 2 WLR 210, HL; *affg* [1961] 3 All ER 482, [1962] 1 QB 189, [1961] 3 WLR 838, CA.

Church v Ministry of Defence (1984) 134 NLJ 623.

Creutzfeldt-Jakob Disease litigation, Group B Plaintiffs v Medical Research Council (1997) 41 BMLR 157.

Darley Main Colliery Co v Mitchell (1886) 11 App Cas 127, [1886–90] All ER Rep 449, HL.

Dulieu v White & Sons [1901] 2 KB 669, [1900–3] All ER Rep 353, DC.

Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd [2002] UKHL 22, [2002] 3 All ER 305, [2003] 1 AC 32.

Fitter v Veal (1701) 12 Mod Rep 542, 88 ER 1506.

Fletcher v Comrs of Public Works in Ireland [2003] 1 IR 465, Ir SC.

Gibson v McAndrew Wormald & Co Ltd 1998 SLT 562, Ct of Sess (OH).

Gregg v Scott [2005] UKHL 2, [2005] 4 All ER 812, [2005] 2 AC 176, [2005] 2 WLR 268.

Hartman v South Essex Mental Health and Community Care NHS Trust [2005] EWCA Civ 6, [2005] IRLR 293, [2005] ICR 782.

Hatton v Sutherland, Barber v Somerset CC, Jones v Sandwell Metropolitan BC, Bishop v Baker Refractories Ltd [2002] EWCA Civ 76, [2002] 2 All ER 1, [2002] ICR 613; *rvsd* sub nom *Barber v Somerset CC* [2004] UKHL 13, [2004] 2 All ER 385, [2004] 1 WLR 1089.

Hay or Bourhill v Young [1942] 2 All ER 396, [1943] AC 92, HL.

Heil v Rankin [2000] 3 All ER 138, [2001] QB 272, [2000] 2 WLR 1173, CA.

HM Prison Service v Johnson [1997] IRLR 162, [1997] ICR 275, EAT.

King v Phillips [1953] 1 All ER 617, [1953] 1 QB 429, [1953] 2 WLR 526, CA.

Lynch v Knight (1861) 9 HL Cas 577, 11 ER 854.

McLoughlin v O'Brian [1982] 2 All ER 298, [1983] 1 AC 410, [1982] 2 WLR 982, HL.

Mallett v McMonagle [1969] 2 All ER 178, [1970] AC 166, [1969] 2 WLR 767, HL.

Metro-North Commuter Railroad Co v Buckley (1997) 521 US 424, US SC.

Nixon v Philip Morris (Australia) Ltd [1999] FCA 1107.

Norfolk and Western Railway Co v Freeman Ayers (2003) 538 US 135, US SC.

Page v Smith [1995] 2 All ER 736, [1996] AC 155, [1995] 2 WLR 644, HL.

Patterson v Ministry of Defence (29 July 1986, unreported).

Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm) [1983] 1 All ER 65, [1983] 2 AC 1, [1983] 2 WLR 6, HL.

Sykes v Ministry of Defence (19 March 1984, unreported).

Vento v Chief Constable of West Yorkshire Police (No 2) [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318.

White v Chief Constable of the South Yorkshire Police [1999] 1 All ER 1, sub nom *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, [1998] 3 WLR 1509, HL.

Appeals

Rothwell v Chemical & Insulating Co Ltd and anor

The defendants Chemical & Insulating Co Ltd and WB Industrial Ltd (formerly Darlington Chemicals Ltd) appealed from the decision of Holland J in the Manchester District Registry on 15 February 2005 ([2005] EWHC 88 (QB), [2005] All ER (D) 219 (Feb)) awarding the claimant Alan Rothwell damages for personal injury in proceedings brought by Mr Rothwell against the defendants. The facts are set out in the judgment of Lord Phillips CJ and Longmore LJ.

Topping v Benchtown Ltd (formerly Jones Bros (Preston) Ltd)

The defendant Benchtown Ltd appealed from the decision of Holland J in the Manchester District Registry on 15 February 2005 ([2005] EWHC 88 (QB), [2005] All ER (D) 219 (Feb)) awarding the claimant Bernard Topping damages for personal injury in proceedings brought by Mr Topping against the defendant. The facts are set out in the judgment of Lord Phillips CJ and Longmore LJ.

Johnston v NEI International Combustion Ltd

The defendant NEI International Combustion Ltd appealed from the decision of Holland J in the Manchester District Registry on 15 February 2005 ([2005] EWHC 88 (QB), [2005] All ER (D) 219 (Feb)) awarding the claimant Kenneth Johnston damages for personal injury in proceedings brought by Mr Johnston against the defendant. The facts are set out in the judgment of Lord Phillips CJ and Longmore LJ.

Mears v RG Carter Ltd

The defendant RG Carter Ltd appealed from the decision of Holland J in the Manchester District Registry on 15 February 2005 ([2005] EWHC 88 (QB), [2005] All ER (D) 219 (Feb)) awarding the claimant David Mears damages for personal injury in proceedings brought by Mr Mears against the defendant. The facts are set out in the judgment of Lord Phillips CJ and Longmore LJ.

Jackson v Brock plc

The defendant Brock plc appealed from the decision of Holland J in the Manchester District Registry on 15 February 2005 ([2005] EWHC 88 (QB), [2005] All ER (D) 219 (Feb)) awarding the claimant Brian Jackson damages for personal injury in proceedings brought by Mr Jackson against the defendant. By order Mr Jackson was to play no active role in the appeal but was to abide by the event. The facts are set out in the judgment of Lord Phillips CJ and Longmore LJ.

Downey v Charles Evans Shopfitters Ltd

The defendant Charles Evans Shopfitters Ltd appealed from the decision of Holland J in the Manchester District Registry on 15 February 2005 ([2005] EWHC 88 (QB), [2005] All ER (D) 219 (Feb)) awarding the claimant Patrick Downey damages for personal injury in proceedings brought by Mr Downey against the defendant. By order Mr Downey was to play no active role in the appeal but was to abide by the event. The facts are set out in the judgment of Lord Phillips CJ and Longmore LJ.

Grieves v FT Everard & Sons Ltd and anor

The defendants FT Everard & Sons Ltd and British Uralite plc appealed from the decision of Holland J in the Manchester District Registry on 15 February 2005 ([2005] EWHC 88 (QB), [2005] All ER (D) 219 (Feb)) awarding the claimant John Grieves damages for personal injury in proceedings brought by Mr Grieves against the defendants. The facts are set out in the judgment of Lord Phillips CJ and Longmore LJ.

Hindson v Pipe House Wharf (Swansea) Ltd

The claimant Ellis Hindson appealed as to quantum from the decision of Holland J in the Manchester District Registry on 15 February 2005 ([2005] EWHC 88 (QB), [2005] All ER (D) 219 (Feb)) awarding him damages for personal injury in the sum £7,000 in proceedings brought by Mr Hindson against the defendant Pipe House Wharf (Swansea) Ltd. The facts are set out in the judgment of Lord Phillips CJ and Longmore LJ.

Michael Kent QC, Michael Rawlinson and *Sophie Allan* (instructed by *Halliwells*, Manchester) for the defendants in the cases of Mr Rothwell, Mr Topping, Mr Johnston, Mr Mears and Mr Grieves.

Frank Burton QC and *Nigel Lewers* (instructed by *Field Fisher Waterhouse*) for Mr Hindson.

Frank Burton QC and *Harry Steinberg* (instructed by *Marrons*, Newcastle-upon-Tyne) for Mr Rothwell.

Allan Gore QC (instructed by *Whittles*) for Mr Topping.

Frank Burton QC and *Harry Steinberg* (instructed by *Thompsons*) for Mr Johnston.

Frank Burton QC and *Harry Steinberg* (instructed by *John Pickering*, Halifax) for Mr Mears.

David Allan QC (instructed by *John Pickering*, Halifax) for Mr Grieves.
Charles Feeny (instructed by *Cartwright Black*, Cardiff) for the defendant in the case of Mr Hindson.

Cur adv vult

26 January 2006. The following judgments were delivered.

LORD PHILLIPS OF WORTH MATRAVERS CJ.

This is the judgment of Longmore LJ and myself. We have each contributed to it.

INTRODUCTION

[1] We heard together eight appeals in respect of ten claims for personal injury which were tried together, as test cases, before Holland J. He gave judgment on 15 February 2005 ([2005] EWHC 88 (QB), [2005] All ER (D) 219 (Feb)) in favour of the claimants. One of the appeals is by a claimant, Mr Hindson. In his case liability was never in issue, but he appeals against the quantum of the damages awarded by the judge. The other appeals are by defendants. They appeal against the judge's finding that they were liable to the claimants. Alternatively, they appeal against the quantum of the damages awarded by the judge. In each of those cases, the claimant cross-appeals on quantum.

[2] Five of the seven appeals in respect of liability, those of Messrs Mears, Jackson, Downey, Topping and Johnston, raise the issue that led to the trial of these actions as test cases. It is an important issue on which there is no direct authority at appellate level. Each of the claimants was negligently exposed by his defendant employer to asbestos dust. That exposure has had three foreseeable consequences. The claimant has developed pleural plaques. The claimant is at risk of developing one or more long-term asbestos-related diseases. The claimant has suffered anxiety at the prospect that he may suffer such disease. It is common ground, for reasons that we shall explain, that none of these consequences, if experienced on its own, would constitute damage capable of founding a cause of action in negligence. The common issue is whether, by aggregating with pleural plaques one or both of the other consequences, sufficient damage can be demonstrated to found a cause of action.

[3] The case of Mr Rothwell differs from the five cases considered above only in that, in the course of the trial, Mr Rothwell was diagnosed as having developed some localised pleural thickening. This was symptomless and did not affect his prognosis. He nonetheless sought permission to withdraw from the trial, but this was refused. His case then proceeded as if it was on all fours with that of the other five claimants. No amendment was made to the particulars of damage in respect of which he claimed. He claimed and was awarded provisional damages on the assumption that he would not, during the remainder of his lifetime, develop 'diffuse pleural thickening sufficient to cause symptoms'. No challenge was made of the judge's ruling that Mr Rothwell's claim should remain as one of the test cases. The cross-appeal on quantum did not make any claim in respect of the pleural thickening. No respondent's notice was served seeking to rely on the diagnosis of pleural thickening.

[4] Despite this, Mr Frank Burton QC submitted, on behalf of Mr Rothwell, that because he had developed pleural thickening the appeal against liability to him should be dismissed in any event. We do not agree. Pleural thickening raises issues of some difficulty to which we shall refer. So far as Mr Rothwell is

concerned, however, we consider we must follow the judge's approach of treating his case as indistinguishable in principle from those of the other five claimants.

[5] The case of the seventh claimant, Mr Grieves, differs from those that we have so far considered in the following respect. Mr Grieves developed a depressive illness as a result of worrying about the consequences of his exposure to asbestos. He amended his pleading to allege that this was 'as a result of being diagnosed with an asbestos-related disease'. He claimed final damages and those awarded included compensation for his depressive disease. Depressive illness can, in some circumstances, constitute sufficient damage to found a claim in negligence. We shall have to consider whether it does so in the case of Mr Grieves.

[6] The final appeal relates to Mr Hindson. The facts of his case resemble those of the first five claimants to whom we have referred, save that the defendant employers did not choose to dispute their liability in his case. The only issue related to quantum. The judge awarded him £7,000. Against that award he appeals.

ASBESTOS-RELATED CONDITIONS

[6A] It is convenient at the outset to summarise the relevant different effects that ingestion of asbestos fibres can have upon the body. The risks of exposure to asbestos and the insidious nature of diseases which can be caused by such exposure are now well known. They are described by Lord Bingham of Cornhill in *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] UKHL 22 at [6], [7], [2002] 3 All ER 305 at [6], [7], [2003] 1 AC 32. The judge in the present case was assisted by two eminent consultant respiratory physicians, Dr Robin Rudd and Dr John Moore-Gillon, and has set out the salient facts in a way from which no party has dissented. For present purposes it is sufficient to set out the clear findings of the judge to whose summary we are much indebted.

[7] *Asbestos.* Asbestos fibres are of two main types: serpentine and amphibole. The former are curly and flexible, typically the product of white asbestos (chrysotile); the latter are straight and stiff, typically the product of blue asbestos (crocidolite) or brown (or grey) asbestos (amosite). The body has mechanisms for the clearance, or for the neutralising of inhaled asbestos fibres, but a proportion of inhaled asbestos will remain in the body for the balance of the lifetime of someone who has been exposed. It is this characteristic of persistence in the body which gives rise to the long-term risks associated with asbestos exposure. Clearance occurs more rapidly for serpentine fibres than for amphibole fibres; it is therefore amphibole fibres that give the greater risk of diseases.

[8] Once deposition occurs in the alveolar regions, 'scavenger cells' known as macrophages try to engulf the fibres. They succeed with smaller fibres but fail with larger fibres. The cells which fail in their attempts to engulf fibres die and release chemical mediators. These and chemicals generated at the surface of the asbestos fibres are responsible for producing inflammation. If this is sufficiently severe and long lasting, fibrosis (ie the laying down of complex protein called collagen) may develop. Removal by macrophages and dissolution in situ succeeds in clearing some of the asbestos fibres from the lungs. Remaining fibres in the lungs commonly become coated with ferroprotein to form ferruginous (or asbestos) bodies.

[9] *The pleura.* The movement of the lung in the course of respiration is facilitated by a slippery membrane covering, the pleura. There are two layers to the pleura: the parietal pleura which lines the inside of the rib cage, and the visceral pleura which covers the lungs. Normally there is no gap between these layers which are lubricated with pleural fluid. The pleura is separate from, and not part of the lung. The route by which asbestos fibres reach the parietal pleura has not been fully elucidated.

[10] *Pleural plaques.* These are localised areas of pleural thickening with well demarcated edges. They usually develop on the parietal pleura but occasionally develop on the visceral pleura. They consist of bland fibrous tissue. The pathogenesis is uncertain but it is believed that the presence of asbestos fibres leads to a prolonged low-grade inflammatory response resulting in the release of chemical mediators, in turn leading to the laying down of fibrous tissue. The following propositions are common ground. (a) Pleural plaques are by far the most common pathological effect of asbestos inhalation on the respiratory system. (b) They may occur after occupational exposure at a lower level than is needed to cause asbestosis. (c) The frequency and extent of occurrence have a relationship with the quantity of fibres inhaled and the duration of exposure. (d) The presence of pleural plaques does not normally occasion any symptoms. Very occasionally, in fewer than 1% of cases, the patient may be aware of an uncomfortable grating sensation on respiration. (e) Given an absence of symptoms, the presence of pleural plaques is only established by way of chest X-ray or computerised tomography (CT) scan or on post-mortem autopsy, often incidental to some other investigation. When reading an X-ray it may not always be easy to distinguish between pleural plaques and pleural thickening. (f) Pleural plaques are rarely detected during the first 20 years following exposure to asbestos. Moreover, exposure to asbestos does not necessarily result in the development of plaques, notwithstanding the passage of 20 years or more. (g) With time plaques may become more extensive. (h) Plaques do not in themselves threaten or lead to other asbestos-induced conditions nor are they a necessary precondition to such conditions; they do not increase the risk of lung cancer; they differ from diffuse pleural thickening; and their pathology is entirely distinct from that of mesothelioma. They evidence exposure to asbestos.

[11] It is useful to cite from Dr Rudd's own work on *Occupational Disorders of the Lung*, published in 2002:

> 'Pleural plaques are not thought to lead directly to any of the other benign varieties of asbestos-induced pleural disease, nor to pose any risk of malignant change leading to mesothelioma. Their presence may indicate, nevertheless, a cumulative level of asbestos exposure at which there is an increased risk of mesothelioma or other asbestos-related disorders. On average, in the absence of any other evidence about exposure it is reasonable to assume that subjects with plaques will have had higher exposure to asbestos than subjects without plaques. The frequency of development of other complications of asbestos exposure in persons with plaques is not a function of the presence of the plaques, but of the asbestos exposure that caused plaques. Since plaques may occur after a wide range of different exposures, the risks of other asbestos-related conditions may differ widely between different populations and individuals with plaques.'

[12] Dr Rudd and Dr Moore-Gillon were asked to express views as to whether pleural plaques signified an 'injury' or a 'disease'. They emphasise that such

choice of categorisation does not normally concern the clinician but said that in some (but not all) medical textbooks pleural plaques are categorised as a benign disease.

[13] *Pleural thickening.* This is a pleural fibrosis arising from inhalation of asbestos that extends continuously over a variable proportion of the thoracic cavity but without well circumscribed margins—it is diffuse and not demarcated. It usually involves the visceral pleura. If sufficiently extensive it may cause restrictive lung function impairment and breathlessness; occasionally it is the cause of persistent chest pain. In itself the condition is benign. It is not caused only by asbestos exposure, but can be caused by other pathologies such as infection or trauma.

[14] *Asbestosis.* This is a fibrosis of the lungs caused by exposure to asbestos. A minimum dose of the latter is necessary to bring about the condition; the severity increases with the amount that is inhaled. It does not usually develop within the first 20 years following exposure.

[15] *Mesothelioma.* This is a malignant terminal tumour found not only, but most commonly, in the pleura. In the main such tumours are caused by exposure to asbestos. The mean latent period between first exposure to asbestos and death from mesothelioma is of the order of 40 years. The incidence of mesothelioma in western Europe has been increasing: in the United Kingdom it is expected to peak between 2010 and 2020 at some 2,500–3,000 cases per annum. There is no cure and death commonly results within 12 to 18 months of the onset of symptoms. It is a very distressing way in which to die.

[16] *Lung cancer.* This, as the title implies, is a cancer arising in the lung which can be caused or contributed to by asbestos. As with asbestosis, the risk of such cancer is related to the dose of asbestos—the greater the dose, the greater the risk, particularly if the asbestos is of the amphibole type. In this context there is interaction between the exposure to asbestos and smoking since, as is now well known, smoking can also be the cause of lung cancer.

THE THREE HEADS OF DAMAGE

[17] We propose at this stage to consider the three heads of damage which, together, the claimants contend can found a cause of action and to explain why, individually, each one will not suffice for this purpose.

PLEURAL PLAQUES

[18] Pleural plaques undoubtedly constitute a physiological change in the body. We have described the nature of this change above. For present purposes their relevant feature is that, save in the case of about 1% which no one has suggested has significance, they are symptomless, have no adverse effect on any bodily function and, being internal, have no effect on appearance. In short, ignoring the 1%, no one is any the worse physically for having pleural plaques.

[19] It has always been the law in England and Wales that negligence is not actionable per se, it is only actionable on proof of damage. While such damage need not be substantial it must be more than minimal. This is not controversial. In *Fairchild's* case [2002] 3 All ER 305 at [8], Lord Bingham said: 'In a personal injury action based on negligence or breach of statutory duty the claimant seeks to establish a breach by the defendant of a duty owed to the claimant, which has caused him damage.' (See further *Clerk & Lindsell on Torts* (18th edn, 2000) p 1712 (paras 33-07), n 44 and the old cases there cited.)

[20] Lord Pearce in *Cartledge (widow and administratrix of the estate of Fred Hector Cartledge (decd)) v E Jopling & Sons Ltd* [1963] 1 All ER 341 at 349, [1963] AC 758 at 779 observed:

> 'It is for a judge or jury to decide whether a man has suffered any actionable harm and in border-line cases it is a question of degree . . . It is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. Evidence that those changes are not felt by him and may never be felt tells in favour of the damage coming within the principle of de minimis non curat lex. On the other hand evidence that in unusual exertion or at the onslaught of disease he may suffer from his hidden impairment tells in favour of the damage being substantial.'

[21] The principle that judges used to describe as 'de minimis non curat lex' is one of policy. It is but one of a number of principles of policy which are of relevance to this appeal. The courts will not allow their process to be used to pursue a claim unless what is at stake justifies the use of the process. A claim for negligence will only lie where damage has been caused that is worth suing for. In *Cartledge*'s case [1963] 1 All ER 341 at 350, [1963] AC 758 at 781 Lord Pearce said: 'The cause of action accrued when it reached a stage, whether known or unknown, at which a judge could properly give damages for the harm that had been done.' It seems to us that this comes close to the definition of 'significant injury' in s 14(2) of the Limitation Act 1980, namely injury in respect of which a claimant 'would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment'. Indeed, in *Patterson v Ministry of Defence* (29 July 1986, unreported) Simon Brown J held that material damage sufficient to set time running was the same as damage necessary to complete a claimant's cause of action in negligence.

[22] In *Cartledge*'s case the House of Lords approved the judgments of the Court of Appeal. In that court Pearson LJ ([1961] 3 All ER 482 at 492, [1962] 1 QB 189 at 207) expounded two alternative theories as to when actionable damage first accrues in a case of pneumoconiosis, of which he espoused the former. It is, perhaps, worth quoting a passage as giving guidance on the difficult question of when injury passes from being de minimis to being sufficiently significant to found a cause of action:

> 'there is from the beginning some injury occurring from day to day, as each of the minute particles which enter the lung tissue causes some microscopic injury and permanent scarring, but a reasonable application of the de minimis rule postpones the first damage for legal purposes to the point at which the accumulated scarring is sufficient to diminish appreciably the elasticity of the lungs and deprive them of much of their reserve capacity; that point is not likely to be reached for several years, and may not be reached for many years, but when it is reached there is the damage completing the cause of action . . .'

[23] It is common ground in this case, rightly in our view, that the development of pleural plaques is insufficiently significant, of itself, to constitute damage upon which a claim in negligence can be founded.

RISK OF FUTURE DISEASE

[24] Where injury caused by negligence carries with it the chance that the claimant will suffer further physical damage in the future, the general damages recoverable by way of a final award will be increased to reflect the chance of this adverse outcome: see *Gregg v Scott* [2005] UKHL 2 at [67], [2005] 4 All ER 812 at [67], [2005] 2 AC 176 per Lord Hoffmann. But no claim can be made in respect of the chance of contracting a future disease if this is not consequent upon some physical injury. The reason for this must once again be attributed to policy.

ANXIETY

[25] Worry about what may happen in the future can impair the enjoyment of life. Where physical injury is caused by negligence a claimant's general damages will include compensation for 'pain and suffering'. *McGregor on Damages* (17th edn, 2003) pp 1289–1290 (para 35–213) accurately states: 'As to suffering, this would seem to include . . . *fear of future incapacity, either as to health, sanity or the ability to make a living* . . .' (my emphasis) to which we would add the fear of premature death. But the English courts have never entertained a claim for fear of future illness, incapacity or death where these are not the potential consequences of physical injury. As Lord Wensleydale put it in *Lynch v Knight* (1861) 9 HL Cas 577 at 598, 11 ER 854 at 863:

> 'Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested.'

Thus, in the present case, the claimants do not suggest that they could bring a free-standing claim for the anxiety that they have been caused. They claim compensation for this because they claim that it is linked to the development of the pleural plaques.

[26] Here also, the reason why anxiety cannot be treated as a free-standing head of damage is one of policy. Even where the defendant's conduct foreseeably causes psychiatric injury to a claimant, policy places restrictions upon the circumstances in which this can give rise to a claim in negligence. This will be of relevance when we come to consider the case of Mr Grieves.

OTHER PRINCIPLES OF POLICY IN PLAY

[27] We draw attention at this point to two other principles of policy that are relevant. The first is that a claim should be brought within a reasonable time of the cause of action arising. This principle is reflected by the statutes of limitation. They originally posed a problem in circumstances where a claimant might be unaware that a cause of action had accrued, typified in *Cartledge*'s case. That problem has been alleviated by subsequent legislation—currently ss 11, 12 and 14 of the 1980 Act which provide that the three-year limitation period in respect of a claim for personal injury does not begin to run until the claimant is aware that he has sustained significant injury, defined as set out in [21] above.

[28] The other principle is that litigation should be finite, so that a claimant can only bring one claim in respect of damage attributable to a particular cause of action. This creates a problem where the extent of the damage caused is uncertain because it depends upon what happens in the future. This problem has been alleviated by rules of court which entitle a claimant to opt to recover

provisional damages, made pursuant to s 32A of the Supreme Court Act 1981, which provides:

> '(1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.
>
> (2) . . . as regards any action for damages to which this section applies in which a judgment is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person—(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and (b) further damages at a future date if he develops the disease or suffers the deterioration . . .'

Any claimant may now, therefore, choose to obtain a provisional award.

THE CLAIMANTS' CASE

[29] Holland J did not accept in total the way in which the claimants advanced their case. Before us they have stuck to their guns, advancing the following primary case pursuant to respondents' notices:

> '1. The development of pleural plaques as a result of exposure to asbestos is an injury and/or disease . . .
>
> 2. Pleural plaques represent irreversible structural damage to the pleura which, in combination with the attendant risks of other asbestos-related diseases (such as mesothelioma, lung cancer and asbestosis) and anxiety suffered as a result of the diagnosis, constitute significant injury sufficient to complete the cause of action in each case.'

[30] In advancing these submissions the claimants relied before the judge and have relied before us on three decisions at first instance: *Church v Ministry of Defence* (1984) 134 NLJ 623, *Sykes v Ministry of Defence* (19 March 1984, unreported) and *Patterson v Ministry of Defence* (29 July 1986, unreported), and on the fact that damages have been awarded in respect of pleural plaques in the 20 years that have followed these decisions.

THE JUDGMENT OF HOLLAND J

[31] Holland J held that the question of whether the claimants had a cause of action fell to be determined by applying the tests laid down in *Cartledge*'s case which we have cited above. The judge held that the claimants had been wrong to focus on the pleural plaques. These were not the relevant injury. He held (at [80]):

> 'I start by rejecting any notion that pleural plaques per se can found a cause of action. I am not satisfied that for forensic purposes they can be categorised as a "disease" nor as an "impairment of physical condition". This whole forensic exercise arises because for practical purposes there is no disease, nor is there any impairment of physical condition.'

The plaques were merely pointers to the relevant injury, which was the permanent penetration of the chest by asbestos fibres.

[32] The judge identified the following issues (at [65]):

'a. Can that permanent penetration with the implications necessarily flowing from such constitute "damage" or "injury" so as to complete the foundation for a claim in negligence?

b. If "no", then does the position differ as and when the fact of penetration is confirmed by the finding of pleural plaques?

c. If "no", then is it only with the onset of significant asbestos-related symptoms that the foundation is provided?'

[33] The judge answered the first issue in the negative, for the reasons set out in para [71] of his judgment:

'inferred permanent penetration by asbestos fibres cannot, simpliciter, constitute injury or damage so as to found a cause of action. Penetration that is permanent (that is, such that has defeated the body's natural defences) raises a potential for damage, but no more. For damage to found a cause of action such has to be real, other than minimal . . .'

[34] The judge went on to answer the second issue in the affirmative, for reasons which appear from the following extracts from para [80] of his judgment:

'. . . I am satisfied that when, as in the instant cases, anxiety is engendered by tortiously inflicted physiological damage it can properly contribute to "damage" or "injury" so as to complete the foundation of a cause of action. It becomes that which is routinely encompassed in "pain and suffering" or "loss of amenity". I take it to be beyond dispute that a continuing anxiety engendered by a tortiously inflicted external scar can contribute to the compensatable injury and I see no logical difference between that situation and such that arises in the instant situation.'

'. . . I cannot myself regard as minimal the presence of asbestos within the body that is permanent, raising a possibility (albeit no higher than that) of the future onset of asbestosis or the even more daunting mesothelioma.'

[35] The claimants rely, by way of alternative submission, on the reasoning of the judge. It seems to us that the difference between the approach of the claimants and the approach of the judge is as follows. The pleural plaques, upon which the claimants rely as constituting the relevant injury, have no potential causal nexus with the asbestos-related diseases that the claimants may develop in the future. The penetration of the chest by asbestos fibres, identified by the judge as the relevant injury, will have a causal nexus with any such diseases. The plaques are merely relevant as the evidence which demonstrates extensive penetration of the chest by asbestos fibres.

[36] On the judge's analysis it does not seem to us that the plaques have more relevance than any other indication of the ingestion of asbestos fibres. Plaques by no means always accompany a particular degree of ingestion of such fibres. Other indicators, such as the degree of exposure, may be more reliable. Furthermore, we think that the judge attached unjustified importance to the role of the plaques as evidence because he mistakenly interpreted *Cartledge*'s case as ruling that there can be no cause of action until damage has been caused which is *capable of being discovered*, when in fact the case laid down no such requirement. It seems to us that the essential issue in this case is as follows. Can physical changes to the body negligently caused, which are of themselves insufficiently serious to give rise to a cause of action, found a claim in negligence if they carry a risk of causing significant injury and give rise to consequent anxiety? The law

attaches particular importance to physical damage as this is the gateway for recovery for secondary effects of negligence which give rise to no free-standing claims. If the physical change is so insignificant that it cannot, of itself, found a claim, the question arises of why, as a matter of logic or principle, it should open the door to recovery for risk of future injury or for anxiety.

[37] In focusing on the development of pleural plaques as the trigger of liability, the claimants have selected a physical change which is more readily demonstrable than the piercing of the lung by asbestos fibres, but one that does not itself have the propensity to develop into an asbestos-related disease. It merely evidences a degree of exposure to asbestos which carries with it the risk of developing such disease. We propose to consider first the claimants' primary case before examining the alternative basis for liability which found favour with the judge. We shall start by looking at the relevant authorities, before considering the impact of consideration of policy

[38] In *Cartledge*'s case [1963] 1 All ER 341, [1963] AC 758 the issue was whether employees' claims for breaches of duty causing pneumoconiosis were time-barred under the Limitation Act 1939 because more than six years had elapsed between the time when their causes of action had accrued and the dates when the writs were issued. The critical issue in each case was when the cause of action arose. The evidence was that inhalation of noxious dust could cause substantial injury to lungs before such injury could be discovered by any means known to science. The evidence was that each claimant had, in fact, developed pneumoconiosis and consequent reduction in lung capacity to an extent that would have been detectable by X-ray prior to the relevant six-year period. The statements made by their Lordships as to the extent of injury necessary to found a cause of action were made in the context of physical injury alone. The decision demonstrates the correctness of the proposition that pleural plaques, or indeed the piercing of the lungs by asbestos fibres, could not, of themselves, found a cause of action in that neither condition had any symptom or adverse effect on the functioning of the body. The decision does not, however, afford any assistance with the critical question of whether such physical conditions can be aggregated with the risk of future asbestos-related disease and the consequent anxiety so as to constitute damage of sufficient significance to found a cause of action.

[39] In *Church v Ministry of Defence* (1984) 134 NLJ 623 the claimant was aged 62 and had been exposed to asbestos when working for the defendants as a dockyard fitter up to 1954. The evidence was first that pleural plaques were apparent on X-ray; second, that it was possible for those plaques to extend so that the pleura would constrict the lung and induce breathlessness; and, third, that the asbestos must have passed through the lung to reach the pleura so that it was probable that there was some concurrent fibrosis. As to the future, it was probable that there would be no future deterioration, 'but there is undeniably a substantial risk that, the condition having been stable for many years, there will suddenly be a marked progression of lung fibrosis with consequent effect on breathing and on health'. There was an extremely small risk of mesothelioma. For his part the claimant had worried 'very considerably'.

[40] Counsel for the ministry submitted that the evidence disclosed no damage. It was 'undeniable that some physiological injury has been done' but it was symptomless and unlikely to lead to future incapacity. The damage to the pleura and any damage to the lung should be regarded as minimal. No damages

should be awarded for anxiety: it was not substantial and was not 'attached' to some physical cause. He cited *Cartledge*'s case.

[41] Peter Pain J ruled against the ministry. He stated that it was an error to consider the pleural plaques on their own. The pleural plaques had to be considered in conjunction with damage that had probably been caused to the lungs; he could not, therefore, regard the damage as minimal. He regarded anxiety as the natural consequence of the radiological finding, so that it was justifiably 'considerable' for some months. Saying 'I do not think I can rate the damages as being very substantial in this case', he made a final award of £1,500 general damages; the law did not then permit a claim for a provisional award.

[42] This decision plainly falls to be distinguished from the cases before us. The judge found as a fact that physical damage had been caused to the lungs which could not be described as minimal. Here it is common ground that the physical damage is minimal.

[43] In *Sykes v Ministry of Defence* (19 March 1984, unreported) the claimant was aged 62. From about 1938–1970 he had been exposed to asbestos. Subsequent X-rays revealed pleural plaques. The evidence was to the effect that these plaques were unlikely to give rise to any future disability. That said, there was, by reason of the claimant's past exposure to asbestos, 'a slightly increased risk of developing a lung cancer and a definite increased risk of developing mesothelioma'. Additionally the plaintiff had reasonably suffered genuine anxiety.

[44] Counsel for the ministry made a similar submission to the effect that no injury had been sustained. Otton J rejected this submission saying:

> '. . . there has been a definite change in the structure of the pleura due to the presence of the asbestos. In my judgment that amounts to a significant and definite degree of damage which entitled the plaintiff to compensation as he has established actual damage . . . he is entitled to be compensated not only for the physical damage . . . but also for the aspect of anxiety which seems to me to have a connection with physical damage, to be entirely genuine and thoroughly understandable in a person who has worked in such conditions and has known his workmates to die in the circumstances that he has described. I have also come to the conclusion that he is entitled to be compensated for the risks of lung cancer and mesothelioma.'

[45] In the event a final award was made: £1,500, specifically to reflect physical damage, anxiety and the risks of future disease.

[46] Otton J held that the change in the structure of the pleura constituted by the pleural plaques amounted to a 'significant and definite degree of damage' which could not be treated as minimal or negligible and which entitled the plaintiff to compensation as he had established 'actual damage'. That finding contrasts with the acceptance on behalf of the claimants in the present case that their pleural plaques do not, of themselves, amount to damage that is sufficiently significant to found a cause of action. For this reason *Sykes v Ministry of Defence* affords no assistance in resolving the appeals before us.

[47] In *Patterson v Ministry of Defence* (29 July 1986, unreported), the claimant was aged 59 and in the course of his employment from 1942 to 1983 had been exposed to asbestos. X-rays had revealed pleural plaques. The medical evidence identified: (a) plaques which were and would remain asymptomatic; (b) some pleural thickening—which was presently asymptomatic but which if it became more severe would have a 5% risk of causing significant breathlessness and a

reduced lung function; (c) no increased risks of asbestosis or lung cancer; (d) a 2% to 3% risk of the future development of mesothelioma; and (e) a significant degree of genuine if misplaced anxiety.

[48] Counsel for the ministry repeated the submissions made to Peter Pain J and Otton J. They were rejected: Simon Brown J saying:

> 'I have no doubt whatever that the plaintiff . . . has suffered material damage. It consists of the symptom-free pleural changes, the risk of pleural thickening deteriorating with the consequences I have indicated, the risk of mesothelioma developing and the understandable worry attendant upon these matters.'

[49] By July 1986 a plaintiff was able to claim a provisional award and one such had been claimed. In making a provisional award Simon Brown J said:

> 'I therefore have to value in combination (a) the present symptom-free pleural changes; (b) the 5%-odd risk of further diffuse changes developing so as to aggravate the plaintiff's breathlessness; and (c) the anxiety which the plaintiff entirely understandably, and in my judgment reasonably, has hitherto suffered, in particular over the last two years, and to a far more limited degree, the worry he may still experience in the future, even though, as I have sought to emphasise, these future risks are really very small. Doing my best to arrive at a figure which accords reasonably with the scale established by [*Church v Ministry of Defence* (1984) 134 NLJ 623 and *Sykes v Ministry of Defence* (19 March 1984, unreported)], both now two years old, and with my own views upon the particular facts of the instant case, I assess such damages in the sum of £1,250. There will accordingly be judgment for the plaintiff for damages in that sum assessed on the assumption that the plaintiff will not develop mesothelioma at any future stage.'

[50] Simon Brown J made it plain that he did not consider that 'symptom-free pleural changes' could, of themselves, constitute significant damage for the purpose of founding a cause of action. But he also held that:

> 'In deciding whether material damage has been caused it is appropriate to have regard not merely to actual physical manifestation of injury, but also to whatever risks consequent upon the original injury may exist of future symptoms becoming manifest.'

[51] Simon Brown J cited in support of this proposition *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 1 All ER 65, [1983] 2 AC 1 and its citation of a passage from the speech of Lord Halsbury in *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 132, [1886–90] All ER Rep 449 at 451.

[52] Simon Brown J's decision is directly in point and supports the claimants' case. He did not, however, carry out any analysis of the issue of whether it was correct to aggregate with physical damage which was too insubstantial to give rise to a cause of action a risk of future damage which could not, of itself, found a cause of action. Nor, with respect, was his application of the *Pirelli General Cable Works* case apt. In that case the defendants were negligent in using the wrong material to build a chimney. The consequence of the negligence was that the chimney developed cracks which called for expensive repairs. The cracks developed by April 1970 but were not discovered until November 1977. The House of Lords held, following *Cartledge*'s case, that time began to run for limitation purposes when the damage was caused, not when it was discovered.

[53] The citation from the *Darley Main Colliery* case to which Simon Brown J referred read as follows ((1886) 11 App Cas 127 at 132, [1886–90] All ER Rep 449 at 451):

> 'No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once shew all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time, the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained.'

[54] That passage does not support the proposition that if damage, of itself insignificant, is caused by negligence, it will found a cause of action if there is a *risk* that it may lead to more substantial damage at a later stage.

AUTHORITIES FROM OTHER JURISDICTIONS

Northern Ireland

[55] The Northern Ireland courts appear to consider that pleural plaques constitute, of themselves, sufficient damage to found a cause of action in negligence. Thus, in *Bittles v Harland & Wolff plc* [2000] NIJB 209 at 211–212 Girvan J held (para 12):

> 'In a case such as the present where the plaintiff has been exposed to and has inhaled asbestos dust as a result of the defendant's negligence and has in consequence developed pleural plaques, the development of the pleural plaques even if asymptomatic represents bodily damage and a personal injury which when combined with the defendant's breach of a duty of care brings about the establishment of a cause of action against the defendant. It is trite law that for a plaintiff to succeed in an action for negligence he must establish a duty of care, a breach of that duty and consequent damage. Once the plaintiff has suffered the physical bodily damage represented by the pleural plaques his cause of action has accrued and the plaintiff's claim will relate to all the physical consequences and risks which flow from the negligence. Thus the plaintiff is entitled to recover damages both for the pleural plaques and for the risks of developing more dangerous medical conditions such as asbestosis and mesothelioma.'

The contrary does not appear to have been argued and we were not referred to any decision in which the defendant raised the issue of principle that has been raised on these appeals.

Scotland

[56] In Scotland also it appears to have been accepted that 'pleural plaques constituted an identifiable injury for which damages were recoverable': see *Gibson v McAndrew Wormald & Co Ltd* 1998 SLT 562 at 563 per Lord MacLean.

Australia

[57] We were referred to a number of state decisions holding that symptomless pleural plaques do not constitute damage that is capable of founding a cause of action and that the fact that there is a risk of developing an asbestos-related disease does not do so either—see the review of authorities in *Nixon v Philip Morris (Australia) Ltd* [1999] FCA 1107 (paras 76–83). The aggregation issue that arises on these appeals does not appear to have been expressly considered.

United States

[58] The Federal Employers' Liability Act provides by s 1 that every common carrier by railroad while engaged in interstate commerce shall be liable in damages to any person suffering injury in the course of his employment resulting from the carrier's negligence. In *Norfolk and Western Railway Co v Freeman Ayers* (2003) 538 US 135 the Supreme Court ruled that workmen who were able to prove that they had sustained physical injury as a result of being negligently exposed to asbestos could recover, as part of their damages for pain and suffering, mental anguish as a result of fear of developing cancer. Speaking for the majority of the court, Ginsburg J (at 156–157), after very wide citation of both federal and state authority, made it plain that damages for such mental anguish could only be recovered by a plaintiff suffering from an asbestos-related disease. Furthermore she appeared to approve commentators who drew a distinction between plaintiffs who had suffered 'real physical harm' and plaintiffs with pleural thickening that was asymptomatic.

[59] There was considerable debate before us as to the effect of a substantial volume of state authority. This, while not all to the same effect, accorded in general with Ginsburg J's ruling.

POLICY

[60] We identified earlier in this judgment established principles of policy that are relevant to these appeals. It seems to us that this court should, so far as possible, achieve a result that accords with those principles. We propose nonetheless to comment briefly on their merits.

De minimis non curat lex

[61] Litigation is expensive and, under our system, the costs fall to be borne by the unsuccessful party. We consider it plainly desirable that claimants should not be permitted to pursue claims for trivial injuries. The fact that negligence has produced a physiological change that is neither visible nor symptomatic and which in no way impairs the bodily functions should not attract legal liability.

Risk of future disease

[62] We consider that there is obvious justification for the policy that prevents free-standing recovery of damages for being exposed to the risk of contracting a disease. An award of damages in such a case could only be computed on the basis of the chance of contracting the disease. The passage of time is bound to demonstrate that the award was unjust. If the claimant contracts the disease, the award that he has received will be inadequate compensation. If he does not, it will become apparent that he has received a windfall award at the expense of the defendant. This unsatisfactory state of affairs also arises where a claimant who

has sustained injury obtains a final award that takes into account the risk of subsequent disease.

Anxiety

[63] Anxiety is a form of psychiatric prejudice that is less serious than one of the recognised forms of psychiatric injury. The law does not recognise a duty to take reasonable care not to cause anxiety. It does not even recognise a duty to take reasonable care not to cause psychiatric injury. Control mechanisms, the creatures of policy, restrict the circumstances in which a defendant will be liable for causing foreseeable psychiatric injury. One can readily appreciate the policy reasons for not imposing a general duty of care not to cause anxiety. Where, however, a defendant has by want of care or breach of statutory duty exposed a claimant to the risk of contracting a disease for which the defendant is potentially liable, it is less easy to see why the defendant should not be liable for foreseeable psychiatric injury or lesser psychiatric prejudice, if this can be shown to be having a significant effect on the claimant. The latter requirement may, however, provide justification for not permitting recovery for anxiety. The difficulty of proving anxiety, of determining the moment at which a cause of action arises and of quantifying damages in respect of both past and future anxiety may be reason enough for not permitting free-standing claims for this form of prejudice. Different considerations apply in respect of psychiatric injury, to which we shall return when considering the case of Mr Grieves.

Claims should be brought promptly; litigation should be final

[64] The first of these principles is reflected in the law of limitation; the second is the requirement to claim compensation in a single action for all the consequences of a wrong. It was the interaction of these two principles which led to the injustice that so troubled their Lordships in *Cartledge*'s case. If these appeals were being heard in the context of the law as it stood at the time of that decision, there would be strong arguments of policy against holding that the existence of pleural plaques, latent and possibly unappreciated, were critical in giving rise to a cause of action that started the limitation period running.

[65] The law has changed since *Cartledge*'s case in that time does not begin to run against a claimant until he is aware that he has sustained personal injury and the claimant can then claim provisional damages, leaving open the possibility for a further claim if an asbestos-related disease supervenes. Policy considerations are today more nicely balanced.

[66] It can be argued that the requirement that a claimant should have developed pleural plaques is a useful control mechanism, restricting the circumstances in which damages can be recovered for anxiety and, at the same time, providing certainty as to when such a claim will lie, the more so as it is often the discovery of the existence of the plaques which, however illogically, creates or augments the anxiety. This argument presupposes that it is desirable that claimants should be able to recover damages for anxiety induced by exposure to asbestos. It also raises the question of why those who can demonstrate pleural plaques should have the privilege of being entitled to recover damage for anxiety whereas others, who have been similarly exposed to asbestos, have just as much cause to be anxious, and who may be just as anxious, should have no cause of action.

[67] Mr Michael Kent QC, for the defendants, has persuaded us that there are a number of reasons of policy why it is undesirable that the development of

pleural plaques should give rise to a cause of action. We can summarise these as follows. If pleural plaques give rise to a cause of action: (i) on discovery of the existence of pleural plaques a claimant will be advised that he should bring a claim in order to protect his position, even if he would not otherwise wish to do so unless and until he developed symptomatic disease; (ii) bringing legal proceedings is stressful. It will result in the claimant's attention being drawn to all the possible consequences of exposure to asbestos and may well create or augment the anxiety for which compensation will be claimed; (iii) there is a danger that those, such as claims managers, who make a business out of litigation, will encourage workers who have been exposed to asbestos to have CT scans in order to see whether they have pleural plaques for the sole purpose of bringing claims for compensation. Such a practice will tend to create stress and anxiety where none exists; (iv) some claimants will be tempted to claim a final award, thereby, in effect, gambling, to the possible prejudice of themselves and their families, that they will not contract an asbestos-related disease; (v) the costs of litigation in cases such as those before us tend to be disproportionate to the damages recoverable; (vi) it is unjust that the right to recover damages should depend upon the fortuity of whether or not the particular claimant has developed pleural plaques.

Conclusions

[68] We have demonstrated that there is no legal precedent in this country, beyond first instance decisions, for aggregating three heads of claim which, individually, could not found a cause of action, so as to constitute sufficient damage to give rise to a legal claim. We can see no logical basis for such an approach. Nor can we see any justification for departing from logic or legal principle in the specific case of asbestos-induced pleural plaques. Policy points the other way, as do decisions in Australia and the United States. For these reasons, which differ from those of the judge, we have reached the conclusion that the primary way that the claimants put their case is unsound.

[69] Holland J held that the foundation of the claimants' cause of action was not the pleural plaques themselves, but the penetration of the lungs by asbestos fibres that was evidenced by the existence of pleural plaques. He held that this penetration did not, of itself, give rise to a cause of action but that it did when coupled with the risk that the asbestos fibres would give rise to disease and the anxiety generated about this risk. Is this analysis a more compelling justification for holding that a cause of action has been made out? We do not believe so. Statistics indicate that a small minority of those exposed to asbestos to the extent that they develop pleural plaques will develop an asbestos-related disease. In the case of any individual claimant the odds are that the asbestos fibres in his lungs will remain innocuous. We do not consider that the presence of those fibres, as demonstrated by pleural plaques, is any more capable than the existence of the plaques themselves, of founding a cause of action.

[70] Counsel for the claimants argued that if we hold that pleural plaques will not found a cause of action, our judgment will raise problems in relation to pleural thickening. Pleural thickening differs from pleural plaques in that its development tends to reduce lung capacity. We accept that our judgment may focus attention on the question of the stage at which pleural thickening gives rise to a cause of action, but this is an issue which will have to be considered as and when it arises.

[71] For these reasons the appeals by the defendants in the cases of Messrs Mears, Jackson, Downey, Topping, Johnston and Rothwell will be allowed. We appreciate that by this decision we are holding erroneous a practice that courts of first instance in the United Kingdom have been following in these cases for twenty years or so but, for the reasons of policy that we have given, we do not believe that this will result in injustice.

MR GRIEVES' S APPEAL

[72] Mr Grieves's particulars of claim, dated 29 July 2003, stated under the heading 'Details of Injury' that he had developed pleural plaques, that there was a chance that he would develop specified asbestos-related diseases and that 'the Claimant is anxious about the risks of malignancy'. On 16 February 2004 Dr Rajiv Menon produced a report that attributed a depressive illness suffered by Mr Grieves to anxiety at being exposed to asbestos-related disease and further attributed to the depressive illness a condition of irritable bowel syndrome (IBS) experienced by Mr Grieves. This led, on 13 September 2004 to an updating of Mr Grieves's schedule of special damage and future loss to allege that Mr Grieves had suffered and continued to suffer from a depressive illness and IBS and had, in consequence, sustained loss of earnings and would sustain future loss of earnings.

[73] Holland J dealt with Mr Grieves's case on exactly the same principles as those of the other claimants, awarding damages totalling £33,292 which included £10,000 general damages and past and future loss of earnings.

[74] Before us Mr David Allan QC for Mr Grieves submitted that, if the appeals against the awards in favour of the other claimants were allowed, Mr Grieves remained entitled to his award of damages, which was challenged as inadequate, because he had a free-standing claim for psychiatric injury. This was on the basis that the psychiatric injury sustained had been a foreseeable consequence of the defendants' breach of duty. Alternatively, because physical injury was a foreseeable consequence of that breach of duty, recovery could be made for psychiatric injury in accordance with the principle in *Page v Smith* [1995] 2 All ER 736, [1996] AC 155. These submissions raise issues of difficulty and importance that tended to be submerged under the generic issues in the appeals, for very little argument was addressed to them.

[75] The relevant facts, as found by the judge, were as follows. (1) Mr Grieves's initial anxieties of the 1960s and 1970s when he was exposed to asbestos fibres were alleviated by X-rays of 1979, 1982 and 1994 which reported no abnormalities. (2) An X-ray of 29 August 2000 reportedly showed slight pleural and mucosal thickening. He reacted badly to this news. There was a long interval between the reputed findings and medical reassurance. He developed IBS and stopped work as a result in November 2002. (3) Dr Rudd examined Mr Grieves on 28 November 2002 for the purpose of the current proceedings; new X-rays revealed no sign of pleural thickening or asbestosis. They did show 'possible minimal pleural plaques formation'. He recommended a CT scan. (4) No CT scan could be arranged before 21 July 2003 which caused additional further anxiety. The CT scan showed 'very small bilateral pleural plaques formation'. (5) On 23 July 2003 Dr Rudd told Mr Grieves that: (a) there was a 2% risk of disabling breathlessness arising from diffuse pleural thickening; (b) there was a 2% risk of the development of asbestosis; (c) there was a 5% risk of the development of mesothelioma; (d) the existing risk of lung cancer (resulting from Mr Grieves's habit of smoking in his early life) was enhanced to 5%. (6) On 1 December 2003 Mr Grieves was examined by a consultant

psychiatrist, Dr Rajiv Menon who diagnosed the existence of a depressive illness at the time of examination which had already existed for some time. He recommended medication and cognitive behaviour therapy. (7) Happily, by the time Mr Grieves gave evidence, he had much improved even though he had taken no medication and participated in no cognitive behaviour therapy. This was because he had had the opportunity to reflect upon Dr Rudd's diagnosis and prognosis and the relative optimism associated with it. Dr Menon was surprised at his patient's progress. (8) Mr Grieves had suffered a depressive illness which was different from the anxiety proved by the other claimants.

[76] The judge did not find that Mr Grieves's psychiatric injury was a reasonably foreseeable consequence of the defendants' breach of duty. There is no material which would enable us to make such a finding. Dr Menon described Mr Grieves's case as 'relatively unique because he had longstanding, anticipatory fears of developing the disease, which were present ever since he had learnt about the dangers of exposure some decades ago'. It is not possible to deduce from Dr Menon's report whether employees of reasonable fortitude are liable to suffer psychiatric injury on learning, whether as a result of developing pleural plaques or otherwise, that their exposure to asbestos carries with it a risk of developing mesothelioma, lung cancer or other serious disorder. In these circumstances the issue is whether the approach of the majority of the House of Lords in *Page v Smith* is applicable to a case such as that of Mr Grieves. That is a question that must be considered in the context of the approach of the English courts to claims for psychiatric injury.

[77] The English courts have never applied a simple test of foreseeability as determinative of the circumstances in which liability arises under the law of negligence for causing psychiatric harm. In *McLoughlin v O'Brian* [1982] 2 All ER 298 at 303, [1983] 1 AC 410 at 421–422 Lord Wilberforce stated: 'there remains, in my opinion, just because "shock" in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation on the extent of admissible claims.'

[78] The law in relation to psychiatric injury has developed in two different areas where acts or omissions may lead to such injury: (1) 'accidents' causing or threatening death or personal injury; (2) stress at work.

[79] In the field of personal injury the development started with *Dulieu v White & Sons* [1901] 2 KB 669, [1900–3] All ER Rep 353, where it was held that a plaintiff could recover in respect of the physical consequences of 'nervous shock' caused by reason of 'reasonable fear of immediate personal injury to oneself' (see [1901] 2 KB 669 at 675, [1900–3] All ER Rep 353 at 357). Liability was then extended to cover the effect of nervous shock arising from witnessing an accident. In *King v Phillips* [1953] 1 All ER 617 at 623, [1953] 1 QB 429 at 441 Denning LJ produced the pithy proposition that 'the test of liability for shock is foreseeability of injury by shock'.

[80] In *McLoughlin v O'Brian* [1982] 2 All ER 298, [1983] 1 AC 410 Lord Wilberforce laid down a number of control mechanisms to apply in relation to claims for psychiatric injury as a result of reaction to death or physical injury caused to another. The person killed or injured should normally be a close relative of the claimant; the claimant should be at the scene of the accident or come on the aftermath of it; the claimant should witness the accident or its aftermath by sight or sound—it was not enough merely to be told about it.

[81] *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907, [1992] 1 AC 310 involved claims by relatives of spectators killed in the Hillsborough

disaster. The House of Lords unanimously approved Lord Wilberforce's control mechanisms. Lord Oliver of Aylmerton identified two categories of victim, the 'primary victim' being a person killed or injured by the negligence of another and the 'secondary victim', a person whose psychiatric injury arose as a reaction to witnessing an accident to a primary victim. Lord Wilberforce's control mechanisms were relevant to claims by a secondary victim. The following descriptions of the cause of the psychiatric injury giving rise to the cause of action should be noted: 'a sudden assault on the nervous system' per Lord Keith of Kinkel ([1991] 4 All ER 907 at 914, [1992] 1 AC 310 at 398);

> '"Shock", in the context of this cause of action, involves the sudden appreciation . . . of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period in time of more gradual assaults on the nervous system'

per Lord Ackner ([1991] 4 All ER 907 at 917, [1992] 1 AC 310 at 401); '[a] sudden and unexpected shock to the plaintiff's nervous system' per Lord Oliver ([1991] 4 All ER 907 at 925, [1992] 1 AC 310 at 411).

[82] With this background, we turn to *Page v Smith* [1995] 2 All ER 736, [1996] AC 155. The facts were unusual. The plaintiff was the driver of a car which collided with another with an impact of some force but which, while causing damage to the vehicles, did not cause physical injury to either driver. The experience, however, was held to have resulted in a recrudescence of a chronic fatigue syndrome from which the plaintiff had previously suffered, with the result that he could never work again. The Court of Appeal held that the defendant was not liable because it was not reasonably foreseeable that the accident would cause the plaintiff psychiatric injury. They applied Denning LJ's words—'the test of liability for shock is foreseeability of injury by shock'.

[83] In the House of Lords a critical issue was whether this was the right test. A minority, Lord Keith and Lord Jauncey of Tullichettle, thought that it was and that the claim should be dismissed. The majority disagreed. Lord Lloyd of Berwick gave the leading speech. Having referred to *Alcock*'s case, and cases which preceded it, he said ([1995] 2 All ER 736 at 755, [1996] AC 155 at 184):

> 'In all these cases the plaintiff was the secondary victim of the defendant's negligence. He or she was in the position of a spectator or bystander. In the present case, by contrast, the plaintiff was a participant. He was himself directly involved in an accident, and well within the range of foreseeable physical injury.'

[84] Lord Lloyd then examined the reasoning of the Court of Appeal and observed that in cases where a claimant sustains physical injury and consequent psychiatric illness, no question of the foreseeability of the latter arises. He posed the question ([1995] 2 All ER 736 at 757–758, [1996] AC 155 at 187):

> 'We now know that the plaintiff escaped without external injury. Can it be the law that this makes all the difference? Can it be the law that the fortuitous absence of actual physical injury means that a different test has to be applied? Is it to become necessary, in ordinary personal injury claims, where the plaintiff is the primary victim, for the court to concern itself with different "kinds" of injury?'

He answered that question with the following proposition of law, which he described as a 'provisional conclusion':

'Foreseeability of psychiatric injury remains a crucial ingredient when the plaintiff is the secondary victim, for the very reason that the secondary victim is almost always outside the area of physical impact, and therefore outside the range of foreseeable physical injury. But where the plaintiff is the primary victim of the defendant's negligence, the nervous shock cases, by which I mean the cases following on from [*Hay or Bourhill v Young* [1942] 2 All ER 396, [1943] AC 92], are not in point. Since the defendant was admittedly under a duty of care not to cause the plaintiff foreseeable physical injury, it was unnecessary to ask whether he was under a separate duty of care not to cause foreseeable psychiatric injury.'

[85] When considering the merits of his provisional conclusion, Lord Lloyd remarked ([1995] 2 All ER 736 at 759, [1996] AC 155 at 188–189):

'Liability for physical injury depends on what was reasonably foreseeable by the defendant before the event. It could not be right that a negligent defendant should escape liability for psychiatric injury just because, though serious physical injury was foreseeable, it did not in fact transpire. Such a result in the case of a primary victim is neither necessary, logical nor just. To introduce hindsight into the trial of an ordinary running-down action would do the law no service.'

[86] After considering authority Lord Lloyd decided that this was not inconsistent with his provisional conclusions and ended his speech with the following propositions ([1995] 2 All ER 736 at 767, [1996] AC 155 at 197):

'(1) In cases involving nervous shock, it is essential to distinguish between the primary victim and secondary victims.

(2) In claims by secondary victims the law insists on certain control mechanisms, in order as a matter of policy to limit the number of potential claimants. Thus, the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude. These control mechanisms have no place where the plaintiff is the primary victim.

(3) In claims by secondary victims, it may be legitimate to use hindsight in order to be able to apply the test of reasonable foreseeability at all. Hindsight, however, has no part to play where the plaintiff is the primary victim.

(4) Subject to the above qualifications, the approach in all cases should be the same, namely, whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury, whether physical or psychiatric. If the answer is yes, then the duty of care is established, even though physical injury does not, in fact, occur. There is no justification for regarding physical and psychiatric injury as different "kinds of damage".

(5) A defendant who is under a duty of care to the plaintiff, whether as primary or secondary victim, is not liable for damages for nervous shock unless the shock results in some recognised psychiatric illness. It is no answer that the plaintiff was predisposed to psychiatric illness. Nor is it relevant that the illness takes a rare form or is of unusual severity. The defendant must take his victim as he finds him.'

[87] In the course of his speech Lord Lloyd expressed the view that the Court of Appeal had been wrong to conclude that, on the facts of the case, it was not reasonably foreseeable that a person of reasonable fortitude would sustain

psychiatric injury as a result of the collision in which the plaintiff was involved. The other two members of the committee who were in the majority, Lord Ackner and Lord Browne-Wilkinson, agreed with Lord Lloyd's reasoning, but each expressed the view that, on the facts of the case, psychiatric injury had been foreseeable.

[88] Lord Lloyd's formulation of principle in *Page v Smith* has not been without its critics, not least Lord Goff of Chieveley in his dissent in *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, [1999] 2 AC 455. The decision is nonetheless binding on this court. The issue is whether Lord Lloyd's test of liability can be applied to the facts of this case. Lord Lloyd's test was applied in the context of a road traffic accident in which the plaintiff was a participant and which, for that reason, foreseeably exposed him to the risk of physical injury. The report of *Norfolk and Western Railway Co v Freeman Ayers* (2003) 538 US 135 suggests that the American Supreme Court has adopted a similar approach. Ginsburg J referred (para 146) to the 'zone-of-danger' test:

> 'That test confines recovery for stand-alone emotional distress claims to plaintiffs who: (1) "sustain a physical impact as a result of a defendant's negligent conduct"; or (2) "are placed in immediate risk of physical harm by that conduct" that is, those who escaped instant physical harm, but were "within the zone of danger of physical impact".'

[89] Following *Metro-North Commuter Railroad Co v Buckley* (1997) 521 US 424 (which involved exposure to asbestos but no physical manifestation of disease) the Supreme Court held that the zone-of-danger test could not properly be extended so as to render a defendant who negligently exposed a plaintiff to the risk of asbestos-induced cancer liable for emotional distress caused by the fear of developing cancer.

[90] By similar reasoning we do not consider that the test in *Page v Smith* can properly be extended so as to render a defendant who negligently exposes a claimant to the risk of contracting a disease liable for free-standing psychiatric injury caused by the fear of contracting the disease. In so holding we are mindful of the view expressed by Lord Steyn in *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1 at 38–39, [1999] 2 AC 455 at 500:

> '[T]he law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify . . . In my view the only sensible general strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in [case law] as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way that is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform.'

[91] For these reasons we reject Mr Allan's submission that Mr Grieves is entitled to recover damages for his psychiatric illness under the principle in *Page v Smith*.

[92] We turn to the alternative route by which recovery can be made for free-standing psychiatric injury. It is well established that an employee can recover for psychiatric injury caused as a result of being exposed to stress at work provided that certain requirements are satisfied. Those requirements were set

out by Hale LJ in *Hatton v Sutherland, Barber v Somerset CC, Jones v Sandwell Metropolitan BC, Bishop v Baker Refractories Ltd* [2002] EWCA Civ 76 at [43], [2002] 2 All ER 1 at [43], [2002] ICR 613 in a passage that was approved when the case reached the House of Lords. Hale LJ's starting point was that an employer was usually entitled to assume that his employee was up to the usual pressures of the job. The threshold question was thus whether it was reasonably foreseeable that the particular employee was liable to suffer psychiatric injury as a result of those pressures. A duty to take steps to reduce pressure would only arise if a reasonable employer should have foreseen that he was exposing his employee to the risk of psychiatric injury and this normally involved knowledge that the employee had a particular vulnerability.

[93] In *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 6, [2005] IRLR 293, [2005] ICR 782 this court held that, where an employer had knowledge that particular stresses carried with them the risk of psychiatric injury to employees, failure to implement recommended precautions against such injury could attract liability without any need to demonstrate knowledge that an employee was particularly vulnerable.

[94] How, if at all, do these principles apply to a case such as that of Mr Grieves? We are here dealing, not with stress at work causing psychiatric injury in the course of employment, but exposure to noxious substances at work causing psychiatric injury as a result of anxiety after employment has ceased. On principle, were the evidence to establish that it was foreseeable that men of reasonable fortitude, if exposed to asbestos dust, might suffer psychiatric injury as a consequence of anxiety about their future health, then it should follow that employers would owe a duty of care not to expose employees to that risk. As we have said, however, there is no evidence in this case that would enable us to find that such a risk was foreseeable.

[95] We were referred to two authorities which are relevant in the present context. In *Creutzfeldt-Jakob Disease litigation, Group B Plaintiffs v Medical Research Council* (1997) 41 BMLR 157 Morland J had to rule on preliminary issues in a group action. The claimants had been negligently injected as children with Hartree HGH, a human growth hormone that exposed them to the risk of contracting Creutzfeldt-Jakob disease. The relevant issue was whether this rendered the defendants liable for psychiatric illness caused by the shock of learning of the risk to which they had been exposed. Morland J held that the defendants should reasonably have foreseen that they were exposing the claimants to the risk of sustaining psychiatric injury in this way and that they were liable for so doing. He held (at 169):

> 'I can see no logical reason why foreseeability of, or responsibility for, shock and psychiatric injury should be limited to an area of time contemporaneous or almost contemporaneous to the negligent physical event, ie the injection of Hartree HGH. If the psychiatric injury was reasonably foreseeable, it should be untrammelled by spatial physical or temporal limits (see per Lord Scarman in *McLoughlin v O'Brian* [1982] 2 All ER 298 at 311, [1983] 1 AC 410 at 431).'

Morland J's conclusion is in line with that which we have reached above.

[96] The question remains of whether a claimant should be entitled to recover damages for psychiatric injury caused by anxiety at the risk of sustaining a disease where a person of reasonable fortitude would not have reacted in this way. *Fletcher v Comrs of Public Works in Ireland* [2003] 1 IR 465 is a decision of the Irish

Supreme Court which is directly in point. The plaintiff was negligently exposed by the defendants to asbestos dust. This led to anxiety, which developed into 'reactive anxiety neurosis', which the court treated as a recognisable psychiatric illness. The trial judge found that it was reasonably foreseeable that a person of 'normal fortitude' would suffer from the kind of anxiety and develop the psychiatric condition experienced by the plaintiff. He awarded the plaintiff substantial damages.

[97] This decision was reversed by the Supreme Court, essentially on grounds of policy. Two judgments were delivered, with each of which the other three members of the court agreed. Keane CJ differed from the trial judge in finding that the plaintiff was a man of ordinary fortitude. He commented (at 480):

> 'I think that such a person, on being informed that there was no more than a minimal risk of his contracting the disease, would not have permitted so remote a contingency to disrupt his family, working and social life, any more than he would have allowed all the risks to which we are subject at every turn of our lives, including the tobacco smoke pollution in much of our environment, to have a similar effect.'

At the same time he held (at 479):

> 'I see little difficulty in arriving at a conclusion that, in a case such as the present, it was reasonably foreseeable that the plaintiff would suffer a recognisable psychiatric disorder as a result of his taking medical advice and being informed that he was at risk of contracting the disease of mesothelioma, even though at the time of the proceedings he had not actually contracted that disease. Moreover, that result should also follow, irrespective of the extent of the risk. If, for example, the advice of Professor Clancy had been that, as a matter of probability, he would contract the disease and the plaintiff had, in the result, suffered the psychiatric disorder of which he now complains, it would seem to me unjust and anomalous that the defendants should escape liability. The fact that the advice he received was that he was at no more than a very remote risk of contracting the disease would not be a reason, in principle, for relieving the defendants of liability *in limine*. If they ought to have foreseen that the plaintiff would be at risk of contracting mesothelioma and, as a result, might also suffer psychiatric injury, the fact that the psychiatric injury would not have been suffered by a person of "ordinary fortitude" is not material; the general principle that the wrongdoer must take his victim as he finds him should, in the absence of other considerations, apply.'

[98] Keane CJ went on to distinguish the facts of the case from those of claimants who suffered psychiatric injury as a result of 'shock'. The claim for psychiatric injury as a result of apprehension of disease broke new ground, and it was relevant to have regard to policy considerations when considering whether such a claim should lie.

[99] He identified two policy considerations that weighed against admitting Mr Fletcher's claim. The first (at 484) was 'the undesirability of awarding damages to plaintiffs who have suffered no physical injury and whose psychiatric condition is solely due to an unfounded fear of contracting a particular disease'. The second was the adverse effect on funds available for health care that would follow from the flood of claims that might be anticipated if damages were recoverable in such circumstances. He concluded (at 484–485):

'At an earlier point in this judgment, I expressed the view that the law would be in an unjust and anomalous state if a plaintiff who was medically advised that he would probably suffer from mesothelioma as a result of his negligent exposure to asbestos could not recover damages for a recognisable psychiatric illness which was the result of his being so informed. I am also satisfied, however, that in cases where there is no more than a very remote risk that he will contract the disease, recovery should not be allowed, for such a psychiatric illness. That is because the policy considerations which I have summarised point clearly to the necessity for imposing some limitation on the number of potential claims which might otherwise come into being.'

The judgment of Geoghegan J was to similar effect.

[100] We have some difficulty in reconciling Keane CJ's finding that it was reasonably foreseeable that the plaintiff would suffer psychiatric injury as a result of fear of disease with his finding that a person of ordinary fortitude would not have done so. He made reference to the 'eggshell skull' principle, but that is a principle that enables a claimant to recover damages for an injury the extent of which was *not* foreseeable. Despite this difficulty, we concur with the result reached in *Fletcher*'s case. It would be possible to postulate that an employer who negligently exposes an employee to the risk of sustaining a disease should be liable for psychiatric injury resulting from anxiety at the risk of such disease, even if this is not a reaction to be foreseen in an employee of ordinary fortitude, but so to do would be to extend the law in a manner not supported by established principle. We have not been persuaded that it would be right to make such an extension.

[101] For these reasons the appeal against the judgment in favour of Mr Grieves is allowed.

DAMAGES

[102] Having regard to our conclusions on liability, issues in relation to damages are academic in the case of all appeals, save that of Mr Hindson. We propose, however, to make some brief comments on those parts of the judgment of Smith LJ which address damages.

PROVISIONAL AWARDS

[103] Had the claimants sustained actionable physical injury, we consider that an award of provisional damages could properly reflect anxiety at the risk of sustaining mesothelioma or other serious asbestos-related disease consequent upon the breach of duty that caused the physical injury. The appropriate amount would depend upon the facts of the particular case. One person may make light of a risk the fear of which may blight the life of another. We would not dissent from Smith LJ's conclusion that compensation for significant anxiety would normally be expected to fall within a bracket of £4,000 to £6,000, although the facts of an individual case might make appropriate an award falling on either side of this bracket.

FINAL AWARDS

[104] We agree, for the reasons given by Smith LJ, that the judge's approach in respect of these awards erred in principle. A final award which will preclude a claim should mesothelioma or some other disease result from the breach of duty in respect of which suit is brought must fully reflect the risk that such a consequence will be suffered, even if that risk is relatively modest. Had there

been liability, we would have indorsed the assessment of damages made by Smith LJ in respect of Mr Grieves.

MR HINDSON'S APPEAL

[105] Liability was admitted in the case of Mr Hindson. The only issue before us relates to the amount of the damages awarded to him. We agree with Smith LJ that the judge erred in principle in holding that the distinction between the views of the two experts was insufficiently significant to justify alternative awards. The parties accepted that we could not be expected to choose between the two experts, but hoped that we might be able to make alternative assessments of damages on the assumption that each was correct. Unfortunately this is not a straightforward exercise, having regard to the implications of the co-morbidity caused by Mr Hindson's smoking. Concentration on the much more important general issues raised by these appeals obscured the difficulties that arise in the case of Mr Hindson and, if his claim cannot now been settled, the most satisfactory course must be to refer it back to the judge so that he can deal with it in accordance with the principles identified by Smith LJ. On that basis the appeal of Mr Hindson will be allowed.

SMITH LJ.

INTRODUCTION

[106] I have read the joint judgment of Lord Phillips of Worth Matravers CJ and Longmore LJ and, with considerable diffidence, I have decided that I must dissent from its conclusion. However, the first 58 paragraphs are not contentious and I gratefully adopt their exposition of the issues and the law and turn, with only a brief further introduction, to an explanation of my own conclusions.

[107] The main issue in this appeal is whether a claimant has a completed cause of action where he has been exposed to asbestos dust in breach of duty, is suffering from symptom-free pleural plaques and is at significantly increased risk of developing an asbestos-related malignant disease, about which he is anxious. In posing the question in this way, almost as if it were a question of law, one must not forget that whether a claimant has suffered actionable injury is a question of fact to be determined in the individual case. However, because there are many claimants who are in the position that I have just described, it is important that they, defendants and their respective advisers should know how a judge is likely to decide that issue of fact in such a case.

DAMAGE DUE TO ASBESTOS EXPOSURE

[108] In the law relating to actions for personal injuries, it is well established that the nature or gist of the action is the occurrence of damage as the result of the breach of duty relied on and that, for the cause of action to be complete, the damage must be more than minimal. The damage must comprise or at least include some personal injury. In the Limitation Act 1980, personal injury is said to include any disease or impairment of the body or mind.

[109] As has been explained in the joint judgment, exposure to asbestos may cause five different conditions of the lung and pleura. These are pleural plaques, diffuse pleural thickening, asbestosis, lung cancer and mesothelioma. Mesothelioma is an extremely painful terminal condition and the death is usually very distressing. At present, doctors think (although they are not sure) that the condition can be triggered by a single asbestos fibre within the pleura. However, they also believe that the risks of developing the disease are related to the extent

of exposure; it is said to be dose-related. It occurs much more frequently in those who have had moderately heavy exposure in the course of their employment but it is also found in those who have been exposed to the much lower levels found in neighbourhood exposure or by the handling of clothing contaminated by asbestos dust. Very occasionally indeed, it is found in a person who has no known exposure to asbestos. For a person who has not had occupational exposure to asbestos, the lifetime risk of developing mesothelioma is as low as one in ten thousand. For a person who has been exposed to sufficient asbestos to develop pleural plaques, the risk will typically be between 1% and 5%, depending on the dose of asbestos received. It follows that any claimant who has pleural plaques will also be at a significantly increased risk (at least one hundred-fold and possibly five hundred-fold) of developing mesothelioma. I mention this because it is often said that the mesothelioma risk faced by claimants such as these is very small. So it may be, but the increased risk they face is very substantial. It is, of course, important to recognise that it is not the presence of the pleural plaques which gives rise to the increased risk of mesothelioma but the asbestos exposure.

[110] The risk of developing lung cancer as the result of asbestos exposure is also dose-related. Typically, a claimant who has developed pleural plaques will carry a risk of developing lung cancer of the order of 1% to 3%. However, smoking also gives rise to a risk of lung cancer. In those who have been exposed to asbestos and cigarette smoke, the two risks potentiate each other. They are thought to be multiplicative rather than additive. Thus, if a man has a 10% risk of lung cancer from smoking and a 2·5% risk of lung cancer as the result of asbestos exposure, he faces a total risk of lung cancer of 25%. The effect of the asbestos exposure is to increase his (self-induced) risk from 10% to 25%.

THE QUESTION IN ISSUE

[111] Not surprisingly, many of the men who have had significant exposure to asbestos dust are anxious about the risks to their future health. However, it is well established that the risk of serious disease and the concomitant anxiety are not in themselves enough to found a cause of action. To found the cause of action, there must be damage which includes personal injury. That damage must be material, which means that it must be more than minimal. As Lord Pearce put it in *Cartledge (widow and administratrix of the estate of Fred Hector Cartledge (decd)) v E Jopling & Sons Ltd* [1963] 1 All ER 341 at 350, [1963] AC 758 at 781, a cause of action accrued when 'a judge could properly give damages for the harm that had been done'. As I understood the appellants' contention, they accepted that, if the personal injury or disease carries with it an inherent risk of deterioration or an inherent risk that another disease or condition might develop, those risks can be taken into account in determining whether the damage crosses the threshold of materiality. That was the position in *Cartledge*'s case, where the injury was a form of early pneumoconiosis. This condition had the potential to deteriorate so as to produce symptoms; it also apparently carried a risk that tuberculosis might develop. The injury was held to be more than minimal at a time when it was symptom-free and the plaintiff was unaware that he had it. With pleural plaques, the position is different. The inherent risk of deterioration is very slight and the risks of serious deterioration arise not from the plaques themselves but from the asbestos exposure, which is, of course, the same exposure as has caused the plaques. In the present case, the question is whether, when proving that he has suffered material damage, a claimant with symptom-free pleural plaques can pray

in aid, as part of his damage, the risks of serious illness which result from the same exposure as caused the plaques.

[112] As was pointed out in the majority judgment, this question was not addressed by the House of Lords in *Cartledge*'s case. It did not arise. I agree with the view expressed in that judgment that there is no binding authority on this point. For that reason, the majority has concluded that the question can and should be determined by policy considerations. I do not agree and consider that the question can and should be answered by the application of established legal principle to a new factual situation. That is what I propose now to attempt.

HAVE THESE RESPONDENTS SUFFERED ANY PERSONAL INJURY?

[113] The first question is whether these respondents have suffered any personal injury at all and, if so, what it is. Holland J ([2005] EWHC 88 (QB), [2005] All ER (D) 219 (Feb)) found that pleural plaques are not an injury, disease or impairment but held that the presence within the body of unneutralised asbestos fibres does amount to an injury. The respondents did not seek to support this finding with any vigour. For the reasons given in the majority judgment, I agree that the judge's conclusion on this point cannot be sustained. Either the pleural plaques are an injury (and/or disease) or there is no personal injury at all.

[114] The argument for the appellants was that pleural plaques are not an injury or disease, although they do represent a change in the pleural tissue. The appellants rely on the agreed evidence that the plaques are symptom-free and progress to cause symptoms in less than 1% of cases. Even then the symptoms which might result from this remote possibility are not serious ones, comprising only discomfort. Additionally, pleural plaques do not themselves carry an increased risk of pleural thickening, asbestosis, mesothelioma or lung cancer; it is the asbestos exposure which gives rise to the risk of these conditions rather than the presence of the pleural plaques. Thus, say the appellants, the judge was right to hold that they were not an injury or disease.

[115] The respondents' case, (as set out in the respondents' notice) was that the pleural plaques do amount to an injury although not one which, standing alone, would be sufficiently serious to cross the de minimis threshold and complete the cause of action. They submit that the plaques are an abnormal and permanent tissue change caused by the asbestos exposure. Plaques are analogous to scar tissue.

[116] In my judgment, such a tissue change does amount to an injury. I say so for two reasons. First, it is accepted that pleural plaques do amount to an injury in those rare cases where they are sufficiently extensive to give rise to symptoms. However, in such a case, it is not the symptoms which are the injury; it is the plaques themselves. The presence or absence of symptoms goes only to the question of how serious the injury is. One cannot say that the pleural plaques are an injury if they are sufficiently extensive to cause symptoms but not if they are limited and symptom-free. The plaques are of the same nature whether they are extensive or limited and, in my view, if extensive plaques are an injury, so are limited ones.

[117] My second reason is related to the first. In the course of argument, it appeared to be common ground that a tissue change giving rise to a benign lesion on the surface of the body does amount to an injury, and not merely because such a lesion will usually have been caused by a cut or a burn. Even if caused by some non-traumatic mechanism such as radiation, it is accepted that it would be an

injury. The appellants argue that such a lesion is different from pleural plaques because the lesion on the skin is noticeable and causes embarrassment. It has a cosmetic effect, which sounds in damages. I accept, of course, that the damages for a lesion on the skin will take account of the cosmetic effect but it is the lesion which is the injury and the cosmetic effect merely increases the damages. I cannot accept that a visible tissue change is different in nature from a tissue change which is hidden within the body. If pleural plaques were to form on the skin instead of on the pleura, they would be an injury, not because they had a cosmetic effect but because they were a tissue change.

[118] It does not matter for the purposes of my decision but I would also hold that pleural plaques are a disease. They are capable of progressing without further exposure to asbestos due to a process within the body. To my mind that process characterises them as a disease. I would say that the pleural plaques are an injury because they are an abnormal tissue change and that they are also a disease because they are capable of progression. I do accept, however, that, unless the plaques are extensive, they are not, in themselves, sufficiently serious to complete the cause of action because they are not sufficient to warrant an award of damages from a judge.

MUST THE PHYSICAL INJURY AND ITS INHERENT RISKS CROSS THE DE MINIMIS THRESHOLD?

[119] Does the law permit a claimant to complete his cause of action by bringing into account, in addition to the minimal physical injury he has suffered, all the other consequences of the same breach of duty? Holland J held that it does and also held that, when the risks of other serious asbestos-related diseases and the concomitant anxiety are added in, the total damage will cross the de minimis threshold.

[120] Leaving aside a risk which is assessed at more than 50%, which does not arise in these cases and to which different considerations may apply, the appellants argued that a claim for the risk of developing a more serious condition and the associated anxiety can be brought in only in respect of the risks that arise out of the condition which constitutes the physical injury. They submit that that was made plain in *Cartledge*'s case.

[121] Mr David Allan QC for the respondents submitted that *Cartledge*'s case did not say any such thing. The issue did not arise for consideration. All three members of this court accept that submission. However, Mr Allan suggested that some of the dicta in *Cartledge*'s case indicate an approach that is helpful to the respondents' case. Bearing in mind that their Lordships were not concerned with the question before this court, I do not think that much weight can be attached to these indications. However, it is worth recording that Lord Evershed said ([1963] 1 All ER 341 at 344, [1963] AC 758 at 774) that it could no longer be in doubt that, in a personal injury action, 'the cause of action from such a wrong accrues when the damage—that is, real damage as distinct from purely minimal damage—is suffered'. It was suggested that the use of the word 'damage' indicated that, in assessing materiality, it was the whole of the damage that had to be considered rather than just the personal injury. Lord Reid said ([1963] 1 All ER 341 at 343, [1963] AC 758 at 771–772):

> 'It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and

> cannot be discovered by the sufferer; and that further injury arising from the same act at a later date does not give rise to a further cause of action.' *a*

[122] It appears to me that their Lordships used the word 'damage' and 'injury' interchangeably. They were not concerned with the question which is now before the court, namely whether it is the existing physical damage and its inherent risks which must pass the de minimis threshold or whether it is possible *b* to include all the effects of the wrongful act. I conclude therefore that Lord Pearce's use of the word 'damage' as opposed to 'injury' is not significant. However, Lord Reid's reminder that a further injury arising at a later date from the same wrongful act does not give rise to a further cause of action does, to my mind, suggest that what he had in mind when speaking of 'personal injury beyond what [was] negligible' was all the consequences of the wrongful act, *c* whether or not they had yet occurred. The same point was made at greater length by Lord Pearce ([1963] 1 All ER 341 at 350, [1963] AC 758 at 780) where he cited the old case of *Fitter v Veal* (1701) 12 Mod Rep 542, 88 ER 1506 as authority for the same proposition, namely that only one action may be brought in respect of all the damage from personal injury. Those references do, I think, give some *d* support for the respondents' contention but it is very limited.

[123] Second, Mr Allan submitted that the respondents' contention derived support from *Patterson v Ministry of Defence* (29 July 1986, unreported), one of the pleural plaque trilogy of cases from the 1980s. He accepted that neither *Church v Ministry of Defence* (1984) 134 NLJ 623 nor *Sykes v Ministry of Defence* (19 March 1984, unreported) was of assistance. In *Church v Ministry of Defence*, Peter Pain J *e* had considered only the physiological damage when deciding whether the de minimis threshold had been passed. He considered the plaques themselves as being minimal but held, on the medical evidence before him, that there was probably some early asbestosis present, which carried a risk of progression so as to give rise to a loss of lung function. The judge held that, looking at the totality *f* of the physical changes, the physiological damage was more than minimal. The case was on all fours with *Cartledge*'s case.

[124] In *Sykes v Ministry of Defence,* Otton J said:

> 'I have to decide whether the physiological damage which was done to the plaintiff and which I have described is to be treated as minimal or negligible *g* . . . I have come to the conclusion that one has to look at the evidence as a whole. As I have indicated, there has been a definite change in the structure of the pleura due to the presence of the asbestos. In my judgment, that amounts to a significant and definite degree of damage which entitled the plaintiff to compensation, as he has established actual damage.' *h*

[125] The judge then went on to consider the risk of mesothelioma and held that, standing alone, that risk would not sound in damages. However, once the plaintiff had established that he had suffered some physical damage which was actionable he would also be entitled to be compensated for the risks of exposure. *j* In *Patterson*'s case, Simon Brown J doubted whether Otton J had really held that pleural plaques were, of themselves, sufficient physical damage to be actionable. He noted the judge's reference to looking at the evidence 'as a whole'. However, it seems to me that Otton J did indeed hold that pleural plaques in themselves were sufficient to cross the de minimis threshold. These two cases do not support Mr Allan's contention; rather they support the appellant's submission that it is the

physiological damage (and its inherent risks) which must be sufficient to cross the threshold.

[126] However, in *Patterson*'s case, Simon Brown J took a different approach. He said:

> 'In deciding whether material damage has been caused, it is appropriate to have regard not merely to actual physical manifestations of injury, but also to whatever risks consequent upon the original injury may exist of future symptoms becoming manifest.'

Then he said:

> '. . . I have no doubt whatever that the plaintiff in the instant action has suffered material damage. It consists of the symptom-free pleural changes, the risk of the pleural thickening deteriorating with the consequences I have indicated, the risk of mesothelioma developing and the understandable worry attendant upon these various matters.'

[127] In my view, Simon Brown J's approach provides some support for the respondents' contention. The risk of mesothelioma, which arose not from the pleural disease but from the prior exposure, was taken into account. So was worry, which must have related mainly to the risks of future onset of other conditions rather than the discovery of the conditions then present. It is pointed out in the majority judgment that Simon Brown J's reliance on *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 1 All ER 65, [1983] 2 AC 1 was inapt. I accept that that is so. However, this remains a decision of an eminent jurist and must be regarded as providing some support for the respondents' case.

[128] The only other decision directly in point is that of Holland J in the instant case. This dearth of authority is not altogether surprising. Most personal injury actions arise out of traumatic injuries to the person and the physical injury is usually of sufficient severity to be actionable. In disease cases, the historical position was that plaintiffs did not sue until they had symptoms because they did not know until then that they had suffered an injury. With the advent of X-rays, it became possible to demonstrate that there was an actionable injury before the plaintiff was aware of it. *Cartledge*'s case pointed to the limitation difficulties that this created for plaintiffs and, very soon afterwards, the law of limitation in personal injury actions was changed so that time did not begin to run until the plaintiff first knew or ought to have known that he had suffered a significant injury. After that time, there was no need to focus on when the cause of action arose, as there had been in *Cartledge*'s case. Actionability in disease cases did not then give rise to any interest until the trilogy of Ministry of Defence cases in the 1980s. There can be no doubt that, after these three cases, both lawyers and insurers working in this field accepted that plaintiffs with pleural plaques were entitled to damages. It is not clear whether they did so on the basis that the pleural plaques themselves were actionable or on the basis that it was permissible to bring into account the risk of mesothelioma (and/or lung cancer) which flowed from the asbestos exposure and/or the anxiety attendant on those risks. Many hundreds of cases of pleural plaques (with risks and anxiety) have been settled since that time. Many more have been fought on the issue of quantum of damages but none on the issue of actionability. It appears that no other industrial disease has given rise to the legal problems that exist in asbestos-related disease.

[129] The respondents' second submission is that s 32A of the Supreme Court Act 1981 demonstrates the correctness of their contention. Section 32A(1) provides:

> 'This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as the result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.'

[130] As is well known, the purpose of this provision was to alleviate the problem which arose as the result of the rule which requires a plaintiff to sue in respect of all the risks of deterioration and the development of other personal injury consequences arising from a wrongful act. A typical case was that of a claimant with a head injury who might develop epilepsy many years after the accident. If he was compensated for the risk of that happening and it did not materialise, he would have recovered more than he should have done; if the risk did materialise, he would have recovered nowhere near enough. The section permitted him to take an immediate award of provisional damages, assessed on the assumption that the epilepsy would not develop, and to reserve the right to return to court for a further award in the future if it did. As applied to a case such as *Cartledge (widow and administratrix of the estate of Fred Hector Cartledge (decd)) v E Jopling & Sons Ltd*, the section would permit a claimant with silicosis to reserve for the future the right to return if he developed tuberculosis. In that situation, the risk of tuberculosis would have arisen from the silicosis itself and not from the exposure to stone dust. However, it is plain from the words of the section that the provision is not limited to the risk of deterioration of the existing condition or the risk of onset of a new condition consequent upon the existing condition but also applies to the risk of any serious condition resulting from the 'act or omission [giving] rise to the cause of action'. So, as applied to asbestos cases, the section allows a claimant who has asbestosis to reserve the right to return if he develops mesothelioma, even though the mesothelioma does not arise from the asbestosis but from the asbestos exposure. There have been many cases in which that has been done. So far as I am aware, it has never been suggested that it should not have been.

[131] There have also been many cases in which provisional damages have been awarded for pleural plaques with the risks of other more serious diseases left to the future. The appellants acknowledge that but submit that this should not have been allowed to occur; it was wrong in principle. This point was argued mainly in respect of quantum of damage but is related to the main contention on actionability. The appellants contended that the true position is that each condition or disease that can be caused by asbestos exposure gives rise to a separate cause of action. That means that, not only is a claimant unable to bring into account on 'materiality' the risks of developing other asbestos-related conditions, he cannot claim damages in respect of those other conditions even if his existing condition, standing alone, crosses the materiality threshold. The other conditions are to be treated quite separately. Accordingly, s 32A does not come into play in respect of other asbestos-related diseases. The only s 32A right open to a claimant with an asbestos-related condition is to claim for the deterioration in his existing condition and any other serious disease or condition which stems from that existing condition itself.

[132] The respondents submitted that it is well established that there is only one cause of action for all the personal injuries caused by the wrongful act or omission which founds the cause of action and that, if one form of personal injury comes into existence, the cause of action accrues for all the personal injury consequences of that wrongful act or omission. Since the post-*Cartledge* amendment of the limitation provisions, once a claimant is aware of one consequence of the act or omission, he must sue in respect of all consequences or face the danger of being time-barred. Damages were and are recoverable for the risk of future consequences. At common law, the courts became accustomed to evaluating future risks. Now, under s 32A, the claimant has the choice whether to opt for provisional damages or to accept a final award which will include an evaluation of the risk. The purpose of s 32A was limited to permitting claimants to defer part of their damages. It was not intended to change the underlying law of personal injury actions in respect of the recoverability of damages for the risk of future consequences. In passing s 32A, Parliament recognised and implicitly affirmed the old rule that there is only one cause of action for all the personal injury consequences of a wrongful act or omission. If the claimant's cause of action for the consequences of asbestos exposure must include all personal injury consequences, his damage is the sum total of all those consequences. Therefore it is that damage which must be considered when the judge is deciding whether the damage is sufficient to cross the threshold of materiality.

[133] In my view, the respondents' submissions are correct. I agree that s 32A was not intended to change the underlying law in relation to personal injuries. In my view, the wording of s 32A is consistent only with the proposition that a claimant has only one cause of action for all personal injury consequences of a wrongful act or omission. The wording of the section is not consistent with the notion that the same exposure to asbestos can and does give rise to separate torts in respect of each consequence. Because he has only one cause of action, as soon as the claimant knows that he has one personal injury consequence, he must sue for all such possible consequences. Under s 32A, he is able to defer the assessment of that part of his damages which relate to future risks, instead of having to accept them now, imperfectly assessed, as he was required to do at common law. Whether he chooses a provisional or final award is a matter for him. The important point is that, because he has only one cause of action, his damage must include the risks that other serious conditions might eventuate. Therefore, both the existing condition and the future risks must be brought into account when the judge is considering whether the damage is more than minimal.

[134] The risks of developing malignant disease accrue during the asbestos exposure and could be established by the time that exposure ceases. It will probably be several more years before any sign of an asbestos-related disease becomes apparent. In the case of a man who has developed pleural plaques, the exposure will be such that he will face a risk of mesothelioma of between 1% and 5%, that is an increase of 100 to 500 times his unexposed risk. That is to leave out the risk of developing lung cancer which, to a large extent, is dependent on the claimant's smoking habit. In my view, it follows from the extent of the risk of mesothelioma alone, that, by the time pleural plaques develop, the claimant must have suffered material as opposed to minimal damage. Of course, the claimant may well be quite unaware of this and does not therefore bring an action until, for some reason, he has a chest X-ray and the plaques are discovered. He will be told about the risks. At that time, time begins to run against him for limitation purposes as he has (and may have had for some years) a significant injury. It is

also almost inevitable that he will have suffered some anxiety as the result of learning about the risks which he faces. It is possible that he has had some concern about his past exposure for a long time but this will have increased when he learned the details of the risks he faces. I would hold that the cause of action is complete as the result of the development of plaques, which are an injury and/or disease together with the established risks, both caused by the same exposure. In my view it is not necessary to include any element of anxiety when deciding whether the cause of action is complete. However, anxiety can be brought into account. In any event, it is accepted that, if the cause of action is complete, damages are recoverable for associated anxiety and that should include the continuing anxiety which the claimant will almost certainly feel, however well he is reassured about the benign nature of the plaques themselves. That will be so, particularly as he will be required to attend for periodic medical examination and X-ray and is likely to worry about the results.

[135] In summary, I would hold that, in cases of pleural plaques such as are found in this group of cases, the claimant's cause of action is complete at the time when the pleural plaques formed because, by that time, he was already subject to appreciable risks of other serious conditions arising from the same wrongful act. In considering whether he has suffered material damage, it is permissible and indeed necessary to consider all the damage that he has then suffered. The sum of the very minor physical damage and the much more serious damage comprising the risks amounts to material, actionable, damage.

POLICY CONSIDERATIONS

[136] A good deal of the argument during the appeal was concerned with issues of policy. As I have indicated, I have felt able to reach a conclusion derived from established principle and do not consider that policy issues should be allowed to determine these appeals. However, if my analysis is wrong, as the majority has held, it would be appropriate to consider policy issues.

[137] At para [67] of the majority judgment, there is a summary of the policy considerations that were advanced by Mr Michael Kent QC in support of the appellants' contention that it is undesirable that the development of pleural plaques should give rise to a cause of action. Unlike the majority, I do not find those submissions persuasive.

[138] Mr Kent submitted that it was not in the public interest that, in order to protect his position on limitation, a claimant might be obliged to bring a claim for pleural plaques when he would prefer to wait until he developed symptomatic disease. There may be such claimants, although I confess I did not come across any who complained of this when, in practice at the Bar, I had to advise clients of their position. In any event, if any potential claimant wished to defer making a claim until he had a symptomatic condition, no doubt he could tell the insurers of his preference and ask that they grant him a limitation amnesty.

[139] The submission that it was undesirable that a claimant should bring a claim for pleural plaques because such proceedings are stressful and might result in an increase in the anxiety for which damages are claimed seems to me to be of potentially wide application. Legal proceedings are indeed stressful and do sometimes lead to an increase in anxiety; that can result in an increase in the damages in all sorts of cases of personal injury. That cannot amount to a policy reason why the claimant should not be permitted to claim. In any event, claimants must be treated as responsible adults. If they seek advice, they should be told the truth about their condition and the risks they face and allowed to make their own

decisions about whether they wish to sue. It smacks of paternalism to suggest that they should be shielded from proper advice and discussion about their condition.

[140] It was suggested that there is a danger that those persons who make a living out of litigation will encourage exposed workers to have CT scans to see whether they have pleural plaques and might be able to sue. There is no suggestion that this has yet happened to any appreciable extent. The evidence was that, in most cases, pleural plaques are discovered as an incidental finding during unrelated investigations. I accept that the activities of 'ambulance-chasing' claims farmers may have an adverse effect but it seems to me that the way to deal with that problem is by the regulation of their activities rather than by taking measures affecting the substantive law.

[141] Mr Kent suggested that some claimants will be tempted to claim a final award, thereby gambling that they will not contract a serious disease. In short, the imprudent claimant and his family are to be saved from his own folly. The law has never sought to protect claimants from their own folly, save where there is evidence of incapability. In any event, there will be some claimants who have quite sensible reasons for wishing to have all issues dealt with while they are in good health. If Parliament wishes to change the law so that claimants cannot claim for future risks but must wait until the risk materialises, so be it. Until then, the law is well settled and it does not seem to me that any special rules should be made in asbestos cases.

[142] It was suggested that the costs of litigation in cases such as these are disproportionate to the damages recoverable. However, the figures produced to the court, which related only to the costs paid by defendants to successful claimants did not, in my view, support that proposition. The appellants did not produce figures to prove their point. They maintained that the costs of investigation and claims handling on their own side were heavy, due to the nature of the cases. I accept that the investigation of claims of this kind may be difficult and time-consuming but that is often because employers have not kept adequate records of past employment and witnesses cannot be found or have become very old or died. But I cannot see why those difficulties should militate against the interests of the injured workman. It is not his fault if the employer did not keep proper employment records. It is not the workman's fault that there is no adequate record of the working conditions. I cannot accept that this kind of argument should be allowed to weigh in the question of whether a claimant should be entitled to sue for a particular kind of injury. If this kind of argument were to have validity, the same argument would have to be applied to many cases of noise-induced deafness and hand/arm vibration syndrome, in most of which cases the damages are modest and the costs of investigation may be substantial.

[143] It was said that it was unjust that the right to recover damages should depend on the fortuitous development of pleural plaques. I accept that, if a workman who faces risks of malignant disease with attendant worry deserves compensation, it may appear irrational to allow it to the ones who have pleural plaques but to deny it to those who do not. Arguably, if those with pleural plaques should have damages, so should all men who face these worrying risks. The law does not permit that result. There must be some physical injury or there can be no cause of action. But if (as I would hold) the law permits a man who has pleural plaques and risks of malignancy to recover damages, I do not think it right that he should be deprived of them just because the law will not permit them to another man with similar risks but no plaques. Sometimes, the law does draw apparently arbitrary lines and it may be hard to the person who falls on the wrong side of the

line. But that unfairness is not a reason for saying that everyone should be transferred to the 'non-recovery' side of the line.

[144] In addition to those points recorded in the majority judgment, Mr Kent also submitted that it is not in the public interest that claimants should be allowed to bring claims for trivial injuries; they should be required to wait until they have suffered a physical injury of substance. This would give rise to no injustice, he said, if the risks of more serious disease do not materialise. I accept that the law should not recognise trivial injuries. But I do not accept that these claimants have trivial injuries. In my view, the risks of malignant disease and attendant worry constitute present harm which should sound in damages. I think that a man in the position under discussion deserves compensation. It is interesting that all the four High Court judges who have been required to consider whether to award damages in these circumstances (Peter Pain, Otton, Simon Brown and Holland JJ) have found a way of making an award. The intellectual processes by which they have arrived at their conclusions have differed but each has arrived at the same result. I venture to suggest that that is because, having seen the claimants and having heard their evidence, they felt that it would be just to award damages and unjust not to. I also venture to suggest that most people on the Clapham omnibus would consider that workmen who have been put in the position of these claimants have suffered real harm. I do not think that they would regard these consequences of asbestos exposure as trivial and undeserving of compensation.

[145] Nor was I impressed with the suggestion that the number of claims for pleural plaques might overwhelm the courts or deplete the funds available for the compensation of more seriously injured claimants. Those problems may arise in the United States of America but there is no evidence that they have arisen here or are likely to arise. First, as I have already pointed out, it has been accepted for the past twenty years that pleural plaques are actionable. The courts have not been overwhelmed by such cases. There is no evidence that there will be a significant increase in the number of cases in the future. Nor is there any evidence that funds available for compensation have been so depleted by asbestos claims in England and Wales that they might run out. That may have happened as the result of litigation in the United States but damages are much higher there. In this country they are modest.

[146] Accordingly, if policy considerations were to play a role in the determination of this appeal, I would hold that the need to do justice to these injured claimants, in accordance with what I believe are the expectations of most reasonable people, should outweigh the policy considerations advanced by the appellants.

[147] For those reasons, I would dismiss all the appeals on the issue of actionability. That being so, there is no need for me to deal with the separate issues raised in the appeals of Mr Rothwell and Mr Grieves.

QUANTUM OF DAMAGE—INTRODUCTION

[148] In the light of the decision of the majority to allow the appeal on the issue of actionability, all questions of quantum of damage are academic, save in the case of Mr Hindson, where liability was conceded. However, it is appropriate to deal with the issues raised.

[149] As Lord Phillips CJ and Longmore LJ explained in the introduction to their judgment, of the nine claimants that Holland J found had a cause of action arising from wrongful exposure to asbestos and the development of pleural plaques, seven opted to accept provisional damages and an order pursuant to s 32A of the 1981 Act,

whereby they would be entitled to return to the court for the assessment of further damages if they were to develop a more serious asbestos-related disease in the future. The judge awarded each of them £4,000 as provisional damages, designed to reflect the anxiety which they have suffered and will suffer in future. The appellants contend that that award was too high; the respondents cross-appeal contending that the awards were too low.

[150] The other two claimants, Mr Storey and Mr Grieves and also Mr Hindson (in respect of whom liability had been admitted) opted for a full and final award of damages. Mr Storey and Mr Hindson were awarded £7,000. Mr Grieves was awarded general damages of £10,000 (plus some special damages and future wage loss as to which there is no appeal). Each of these three claimants also claimed prospective financial loss but the judge refused to make any award. The appellants have appealed all three awards of general damages contending that they were too high. Mr Grieves and Mr Hindson cross-appeal contending that the level of general damages was too low and that the judge should have been prepared to make an award of prospective financial loss.

PROVISIONAL DAMAGES AWARDS

[151] It is not necessary for the purpose of this judgment to set out the medical evidence relating to each of the individual claimants in this group. Typically, the claimants were in their sixties and had pleural plaques which were not giving rise to any symptoms. Each described the state of anxiety which he had experienced on realising that he had pleural plaques and was at risk of developing malignant disease. The judge held that the claimants were to be compensated for that anxiety. In each case he accepted that the anxiety was genuine, although he regarded it as largely misplaced and considered that, now that the claimants had been reassured that the risks they faced were only small and that the presence of pleural plaques did not indicate any increased risk of malignancy, the anxiety was likely to abate. The judge did not attempt to evaluate the anxiety suffered by each individual claimant. He appears to have thought that it would be invidious to attempt such an exercise. In any event, he had been invited to indicate the appropriate range for cases of this kind.

[152] The judge referred to the award of £1,250 in *Patterson v Ministry of Defence* (29 July 1986, unreported) and observed that, allowing for inflation, that award would now be worth about £2,500. He accepted the submission of Mr Allan Gore QC that it was appropriate to increase the sum to be awarded to reflect the increased awareness of the public and of past asbestos workers as to the serious consequences of asbestos-related cancers. He said that for that reason, he was prepared to increase the awards to a bracket of £3,500 to £4,000 but no more. He was invited to consider a range of awards made by circuit judges over the past twenty years, which showed that the usual bracket for a provisional award was between £5,000 and £7,000. He declined to follow those awards, saying that he could see no justification for departing so far from *Patterson*'s case and the early final awards of *Church v Ministry of Defence* and *Sykes v Ministry of Defence*, which were broadly consistent with *Patterson*'s case. In the event, as I have said, he awarded each claimant £4,000, saying that the top of the bracket was appropriate because these men had had to face the additional stress of involvement in protracted test litigation.

[153] To this court, the appellants made two submissions. Their first argument was a logical extension of their submission on actionability. If that submission failed and the court were to hold that these claimants had a cause of

action, the appellants submitted that that must be because the court had held that the plaques, taken together with the anxiety they engendered and the tiny risk that they themselves would become symptomatic amounted to sufficient damage to complete the cause of action. As I have said earlier, the essence of their submission was that each asbestos-related disease gave rise to a separate cause of action, even though all were caused by the same exposure. Accordingly, they submitted that a provisional award for these claimants should amount to no more than a few hundred pounds. The judge had erred in bringing into account the anxiety that the claimant had suffered and would suffer on account of the prospect that he might develop a malignant condition, which anxiety was not caused by the pleural plaques.

[154] I would reject that submission for the same reasons that I would dismiss the appeals on actionability. I am of the view that there is but one cause of action for the wrongful exposure to asbestos and that all personal injury consequences must be sued for at the same time. I reject the notion that the development of the various conditions gives rise to separate causes of action. It follows that I reject the appellants' submission that the judge erred in awarding damages for the anxiety which is related to the risks of the development of malignant diseases. In my view, he was right to do so.

[155] The appellants' second argument lay in the alternative. If their primary contention was rejected and the court were to hold that the judge was right to include in the award the effect of anxiety about the risks of malignancy, he ought to have followed the approach taken in the cases of *Patterson v Ministry of Defence* (29 July 1986, unreported), *Church v Ministry of Defence* (1984) 134 NLJ 623 and *Sykes v Ministry of Defence* (19 March 1984, unreported), updated for inflation. He ought not to have acceded to the claimants' submission that the general level of awards should be raised to reflect the judicial and public understanding of the extremely unpleasant consequences of developing mesothelioma.

[156] The respondents contended that the judge had not made sufficient allowance for this change of understanding. We were referred to the schedule of awards made by other judges since the 1980s, which, as I have said, suggests a level of award between £5,000 and £7,000. None of those awards had been challenged in the Court of Appeal. We were urged to accept that the judges who have dealt with these cases in recent years now have great experience of cases of this kind and also of other types of case where the damages are modest. That enabled the judges to put the pleural plaques cases into context. Their conclusions were the foundation for the bracket of £5,000 to £6,000 suggested in the Judicial Studies Board *Guidelines for the Assessment of General Damages in Personal Injury Cases*. In response to the suggestion advanced by the appellants that the judges sitting in the county courts did not have the same opportunity as Holland J had had to examine the facts in detail and peruse the medical records, we were shown an example of an assessment undertaken by Judge Hickinbottom, from which it was apparent that the judge had examined all the relevant material and had made a most careful assessment.

[157] The respondents also sought to draw a comparison with the awards made for injury to feelings in cases of race and sex discrimination. In *Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA Civ 1871 at [65], [2003] IRLR 102 at [65], [2003] ICR 318, this court laid down some general guidance on awards for injury to feelings. It said that awards ranging between £500 and £5,000 would be appropriate for 'less serious cases, such as where the act of discrimination is an isolated or one-off occurrence'. That, submitted the respondents, showed that the right bracket for anxiety in these cases should not be less than £5,000. Speaking for

myself, I do not find that analogy entirely helpful for two reasons. First, injury to feelings is different in kind from anxiety. Although anxiety may be an element within injury to feelings, awards in those cases must also reflect such feelings as insult and disappointment at the thwarting of honourable ambition. Second, the court in *Vento*'s case was seeking to set out broad guidelines distinguishing between very serious cases where there had been a campaign of discrimination and less serious cases where the discrimination had been short-lived. Having said that, in *Vento*'s case the court cited with approval a passage from the judgment of the Employment Appeal Tribunal in *HM Prison Service v Johnson* [1997] IRLR 162, [1997] ICR 275 (given as it happens by me) where it was said that, in assessing compensation, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This could be done either by reference to purchasing power or to earnings. Also, tribunals should bear in mind the need for public respect for the level of awards made. In my view, judges assessing damages for personal injury should also bear in mind the purchasing power of the award they have in mind and should also strive to set the award at a level which well-informed members of the public would regard as reasonable and fair.

[158] It is well established that this court will not interfere with an award of damages unless it appears that the judge has erred in principle or has made an award which is outside the appropriate bracket. This court will not interfere simply because the members of the court would have awarded somewhat more or less. After some hesitation, I have come to the conclusion that the bracket of awards set by Holland J was too low. I have hesitated because I recognise that Holland J is very experienced in the assessment of damages. The fact that the trial judge has seen the claimant usually requires this court to pay considerable deference to the view he has formed. However, in these cases, the judge expressly declined to make an individual assessment of the extent of the anxiety suffered and to be suffered by the claimants. He was asked to set a bracket and he did so by considering the claimants collectively. He set a very narrow bracket, in effect implying that all claimants will suffer in much the same way and to the same extent. That general approach is not criticised by the parties, although the respondents contend for the wider bracket of £5,000 to £7,000.

[159] In my view, the bracket of £3,500 to £4,000 is too narrow. It does not permit a judge any real leeway to recognise the different factors, which are bound to arise in some cases. It seems to me that either the courts should decide that there must be a conventional figure for anxiety (as for loss of expectation of life) or else there should be a bracket which allows the judge some real measure of discretion. I would opt for the latter because I consider that fixed sums are contrary to the compensatory principle and often give rise to dissatisfaction.

[160] What should the bracket be? Holland J accepted that the old award of *Patterson*'s case is now too low, even after updating for inflation. I agree. It was decided, in relative isolation, at a time when there was less understanding and appreciation about the effects of malignant asbestos-related disease than there is today. Holland J could not see any justification for raising the damages above £4,000. I do. I accept the submission that the circuit judges who have decided cases of this kind in recent years have substantial experience of fixing damages in modest cases of all kinds and have a good sense of what is appropriate. Damages for different kinds of injury should correlate with each other approximately. I think that regard should be given to the level of awards that has developed in recent years, unchallenged in this court until now.

[161] I also think that the well-informed member of the public, aware of the purchasing power of money and the current level or earnings would regard £3,500 as a very small award for the anxiety which will normally be suffered by anyone learning that he faces an increased risk of developing malignant disease. That is not to ignore the decision of this court in *Heil v Rankin* [2000] 3 All ER 138, [2001] QB 272, where it was held that there was no need to raise the general level of awards in cases below £10,000, in order to provide fair and reasonable compensation in the light of modern social conditions. That is right but the reason why there was no need to do that was because the court concluded that awards for modest injuries had not fallen behind in the way that the larger awards had done. It would be wrong therefore to ignore the way in which county court decisions in this type of case have progressively responded to the changing appreciation of the nature of asbestos disease and the purchasing power of money and the level of earnings.

[162] Having said that, I myself would not go quite as far as some of the county court decisions suggest. I would say that, in a typical case of a claimant with pleural plaques and anxiety about his future health, the award should usually be about £5,000. I would suggest that the bracket for the usual range of cases should be £4,000 to £6,000 but that judges should feel free to go outside that bracket for particular reasons. In the present cases, I do not feel able to distinguish between the claimants. They appear to be typical cases and £5,000 would seem appropriate. However, I think that Holland J was right to recognise the effect of involvement in this litigation and, if it were not academic, I would have awarded each of them £5,500. I would have dismissed the appeals and allowed the cross-appeals to that extent.

FINAL AWARDS

[163] As I have said, Holland J awarded £7,000 to Mr Storey and Mr Hindson. He described that as being an uplift over the provisional awards of £4,000. So the judge gave a 75% uplift to reflect the risks that each of these claimants faced of developing malignant disease in the future. Mr Grieves received more on account of his psychiatric condition. However, it appears that the judge awarded him the same amount as the others for the future risks.

[164] Mr Storey faced a 3% chance of developing mesothelioma and a 1% increased risk of developing lung cancer. Mr Grieves had a 5% risk of mesothelioma and a 3% increased risk of lung cancer. Mr Hindson's risks were much higher. He had a 5% risk of mesothelioma and 15% increased risk of lung cancer.

THE JUDGE'S APPROACH

[165] In approaching the assessment of final awards of general damages Holland J recognised that the object was to value the risks of future deterioration in the claimants' health. Nonetheless, he thought it appropriate to consider the position of a typical claimant, rather than to examine the particular circumstances of the individual claimants. That that was so can be demonstrated by the fact that, without any explanation, he made the same award of general damages for Mr Hindson, who faced a 20% risk of malignancy as for Mr Storey, who faced only a 4% risk.

[166] The judge took as his starting point the authorities of *Church v Ministry of Defence* and *Sykes v Ministry of Defence*, in each of which cases a final award of £1,500 had been made. Updated for inflation, those awards would now be about £3,500. He observed that recent cases suggested a much higher level of award, starting at

about £12,500 and going up as high as £22,500 but that in none of those cases had the judge explained why he had departed so radically from the level awarded in *Church v Ministry of Defence* and *Sykes v Ministry of Defence*. He concluded that the higher awards were probably affected by other factors such as psychiatric injury which were not apparent to him and which he was not seeking to take into account in the present exercise.

[167] In respect of an award of £12,500, the judge noted that this represented an uplift of about 100% over the level of provisional awards recently made in the county court. He said that he felt that there was continuing persuasive force in *Church v Ministry of Defence* and *Sykes v Ministry of Defence* and that he was unable to accept the correctness of the recent awards. Then he said (at [91]):

> 'The essential problem for me lies in the focus of the award. Consistently, courts seem to focus almost exclusively upon the potential condition (what is it worth, as discounted?), rather than upon that which on the balance of probability will occur.'

He then mentioned Mr Grieves, who had a 5% risk of developing mesothelioma and observed that there was a 95% chance that he would not, which was a near certainty. He said that he was not prepared to introduce a 100% uplift on the provisional award to accommodate a near minimal risk.

[168] The judge then dealt with a submission made by Mr Patrick Limb, counsel for one of the defendants, to the effect that any claimant who had opted for a final award must be taken to have received medical and legal advice and to have discounted the future risks in favour of an immediate payment. The judge posed the rhetorical question: '[W]hy should the court place such a significant value on risks that the claimant [himself] is inclined to discount on medical advice?'

[169] He did not provide an immediate answer. However, when summarising his reasons for concluding that the appropriate bracket for final awards was £6,000 to £7,000 (see [94]), he referred first to the persuasive authority of *Church v Ministry of Defence* and *Sykes v Ministry of Defence* but recognised that some uplift was necessary to take into account the current perception of asbestos and the risks arising from exposure. Second, he said that he was unable to adopt the approach current in the county courts. He could not explain or justify 'total abandonment of the early moderation'. He said that he could not equate awards starting at £12,500 with the strong overall probabilities that the identified risks would not materialise. Finally he said:

> '[T]his is an area in which moderation is at a premium. On balance of overall probabilities, any uplift over the provisional award will prove to be excessive in most cases. Further and in any event, the less the uplift the more pressure to heed responsible legal advice so as to opt for a provisional award.'

SUBMISSIONS

[170] The appellants repeated their earlier submission that, because each kind of asbestos disease gave rise to a separate tort, a final award in a pleural plaques case should be no higher than the very modest provisional award. That would be because the pleural plaques cannot of themselves give rise to any serious deterioration or other serious condition. For the reasons I have already given, I would reject that submission.

[171] In the alternative, if the judge's general approach was right, the appellants sought to uphold his approach of awarding a modest uplift over the level of the

provisional award, reflecting what the judge regarded as the overwhelming probability that the risks would not materialise.

[172] The respondents submitted that the judge's approach to the assessment of a final award was flawed. First, it was not appropriate to consider the claimants as a group. They faced different risks and a final award ought to reflect those differing risks. Second, there was no justification for taking the provisional award as a benchmark and determining a proportionate uplift for the final award. That may be a convenient way of arriving at a figure but it was not soundly based. The provisional award was intended very largely to reflect anxiety about the claimants' future health. There was no relationship between the value of that award and the appropriate value of the risks of the onset of malignant disease.

[173] The judge had also erred in his approach to the question of risk. He had been too anxious to make the point that the risks were very unlikely to materialise. Provided that the risks were not fanciful, the law required him to assess their value: see *Mallett v McMonagle* [1969] 2 All ER 178 at 191, [1970] AC 166 at 176 per Lord Diplock. If the risk was so small as to be fanciful, no award at all would be justified. The judge had not said that the risks were fanciful. It was not right to discount the risks on the ground that the events were improbable. If probability were the test, the claimants would be entitled to nothing for future risks, as none of them could show a probability.

[174] The respondents submitted that the correct principled approach to the assessment of general damages for future risks was to take an approximate full value figure for each condition and apply the appropriate percentage risk. Thus, the usual award in a case of mesothelioma is about £60,000. A claimant who faces a 1% risk would recover £600. The usual award in a case of lung cancer is about £45,000 to £50,000. Taking the higher figure for the purpose of illustration, a claimant with a 10% increased risk of lung cancer due to asbestos exposure would recover £5,000. A claimant with those combined risks would recover £5,600. If there were also a risk of asbestosis, some modest addition would have to be made for that. That was more difficult as the range of full awards for that condition was very wide. It could be anything from £25,000 to £45,000. In the event, it was submitted that a proper approach in these cases would be to take an average figure of say £50,000 as the full value of a case of malignant disease and apply the total risk factor for malignant disease. The risk of other less serious conditions such as pleural thickening and asbestosis could safely be left aside.

[175] Whatever sum was arrived at in this way would be added to the sum which would have been awarded as provisional damages. On the respondents' submission, that would be £6,000. In that way, the respondents explained the range of final awards made in recent years by judges in the county court, which fell within a bracket of £12,500 to £20,000.

[176] The respondents also submitted that the judge had been wrong to adopt reasons for keeping the awards low. He had said that in this type of case, moderation was at a premium. There was no reason why cases of pleural plaques with the risks of other diseases should be treated any differently from any other type of case. Nor was the judge right to seek to discourage claimants from taking final awards by reducing the damages below what would otherwise be right. Parliament had permitted claimants to choose whether to take a provisional or final award and it was not right to apply pressure to make them opt for a provisional award. Some claimants had perfectly sensible reasons for opting for a final award.

DISCUSSION

[177] In my view there is force in the respondents' criticisms of the judge's approach. First, I accept that, in the assessment of the value of their risks, claimants must be treated individually. It cannot be right and just, in my view, that a claimant who has a 20% risk of developing a malignant disease should receive the same amount as one with a 4% risk.

[178] Second, I accept the respondents' submission that the judge should not have sought to keep the damages down. Damages should seek to compensate so far as possible. Granted, it is virtually impossible to achieve the right figure in the assessment of risks. Yet, courts have to do their best. Unless and until Parliament decides to impose provisional awards on claimants who face future risks, the courts should do their best to assess the value of those risks without seeking to discourage claimants from opting for a final award or penalising them if they do.

[179] Third, I do not think that a standard uplift on the provisional damages award is the right approach. It may be convenient but it is not logical. I accept that the principled approach is that suggested by the respondents. That was the practice usually followed when I was at the Bar, when, before the advent of provisional damages, risks for future sequelae, such as epilepsy, often had to be assessed. I do not suggest that the calculation should be followed precisely in every case. There may be special circumstances in which it is not appropriate. For example, if a claimant has another morbid condition, unrelated to asbestos, which is likely to reduce his expectation of life substantially, it may well be appropriate to reflect that in the assessment of the damages for the risks of malignant asbestos disease. But such considerations apart, the respondents' submission seems to me to be correct. I would add, however, that I consider that the element of the award which reflects the future risk should be discounted for accelerated receipt. This submission was made by Mr Charles Feeny, counsel for the respondent (defendant) in the case of Mr Hindson. However, no obviously satisfactory way of doing this is evident. The only practicable way seems to be to assume that the onset of disease and/or death will occur about half way through the remaining span of expected life and to make an approximate adjustment.

[180] For those reasons, I would dismiss the appellants' appeals against the final awards of general damages and, in principle, allow the cross-appeals.

THE INDIVIDUAL APPEALS

[181] I now turn to consider the cross-appeal in the case of Mr Grieves and the appeal in the case of Mr Hindson, both of which challenge the judge's refusal to make any award for prospective financial loss. Although the judge stated the general proposition that, in these cases, he found such claims to be speculative, he did accept that, in some cases, a claim might be justified. For that reason, I consider it appropriate to deal with that issue as it arises in the individual cases.

MR GRIEVES

[182] Mr Grieves was estimated to be facing a 2% risk of developing symptomatic pleural thickening, a 2% risk of asbestosis, a 5% risk of mesothelioma and an increased risk of 3% of lung cancer due to asbestos exposure. He had suffered a psychiatric injury as the result of learning of his asbestos-related condition and risks. I do not propose to set out the details of that. The judge awarded an additional £3,000 over the standard level of £7,000 awarded to the other two claimants who took final awards. We heard no criticism of the judge's assessment of that aspect of the award.

[183] In my view, the correct approach to the final award of general damages in Mr Grieves's case would be to add £3,000 (for the psychiatric injury) to the sum of £5,500 which I would have awarded to the rest of these claimants who had sought provisional awards. To that, I would have added 8% of £50,000, to represent the future risks, which is £4,000, which sum would have to be discounted by the appropriate factor for accelerated receipt.

[184] Mr Grieves also claimed an award of prospective future loss. This comprised a lost years' claim for 50% of his pension amounting to £31,000 and the estimated costs of nursing care (£12,500) in the event that he developed a malignant disease. No challenge was made as to the accuracy or reasonableness of those figures as such. Counsel submitted that the correct percentage to apply was 7·85% rather than 8%. I have little doubt that the reasoning was correct but, in my view, if a calculation of prospective loss is to be made, there is no point in attempting such precision. The whole exercise is so uncertain that to differentiate between 7·85% and 8% lends a spurious degree of accuracy to the process.

[185] The real question is whether or not any award should have been made in this case. The judge held that the whole exercise was too speculative to be embarked upon. First, he said that the calculation itself was speculative. That does not appear to be so at least so far as Mr Grieves's loss of pension is concerned. The annual rates of the pensions were established. The claim for 50% for the lost years is a conventional approach. The estimate of £12,500 for care is in line with the amounts awarded in such cases and the contrary was not suggested. The real uncertainty arises as to whether these losses will ever be suffered at all as the result of asbestos exposure. But that is precisely the same uncertainty as bedevils the assessment of risk in the context of general damage. In my view, unless the risk of developing the disease is fanciful, the exercise of assessing the financial consequences of the risk must be undertaken. It is difficult and unsatisfactory but so are many aspects of the assessment of damages, for example, loss of earning capacity.

[186] I would have held that, in the case of Mr Grieves, there should have been an award of prospective financial loss based upon 8% of the sums claimed, discounted for accelerated receipt. However, all this is academic in the light of the majority judgment on actionability.

MR HINDSON

[187] Mr Hindson was born in 1948 and worked as a lagger for nearly ten years, during which time he was heavily exposed to asbestos. In 2003, he became aware that he had developed pleural plaques. That came to light as a coincidental finding while he was under investigation for a suspected heart attack. The pleural plaques cause no symptoms or loss of lung function. However, he faces risks of developing asbestosis, lung cancer and mesothelioma. He had been anxious on learning that he had developed pleural plaques.

[188] Dr Rudd provided a medical report on the instruction of Mr Hindson's solicitors. He recorded a history of asbestos exposure and of cigarette smoking. He noted that Mr Hindson had had a heart attack in 2003 and had suffered from angina since then. Mr Hindson gave evidence that, after that event, he had returned to work. Dr Rudd recorded that, in January 2004, Mr Hindson had undergone an angioplasty and a stent had been inserted into the left anterior ascending artery. Mr Hindson gave evidence that he had returned to work after that procedure. Dr Rudd advised that Mr Hindson faced a 2% risk of developing diffuse pleural thickening sufficient to cause breathlessness, a 2% risk of developing asbestosis

associated with breathlessness, a 5% risk of developing mesothelioma and a significant increase in the risk of developing lung cancer. This was assessed at 15% on the following basis. As a smoker, Mr Hindson was at a 10% risk of developing lung cancer, regardless of asbestos exposure. The effect of asbestos exposure was to increase that risk two-and-a-half-fold, thereby producing a risk of 25%. Thus, the increased risk due to asbestos exposure was 15%.

[189] Dr Rudd also advised on the effect of these risks on Mr Hindson's expectation of life. In 2003, when Dr Rudd reported, an average man aged 54 (as Mr Hindson then was) had an expectation of life of 26·3 years. Dr Rudd estimated that Mr Hindson's expectation of life was reduced by ten years on account of his heart disease and his continuing habit of cigarette smoking. He then estimated that the risks of malignant disease due to asbestos had reduced his expectation of life by a further three years.

[190] The employers instructed Dr Charles Hind. He recorded a similar history of asbestos exposure, cigarette smoking and heart disease. His estimates of the risks Mr Hindson faced and the reduction in his expectation of life due to the risks of asbestos disease were markedly different from those given by Dr Rudd. He assessed the risk of diffuse pleural thickening at 1%, asbestosis at 1% and mesothelioma at 2%. Also he considered that, unless Mr Hindson were to develop asbestosis, he would not be at any increased risk of developing lung cancer. If he were to develop asbestosis (such that it could be detected at autopsy even if not during life) Dr Hind was of the view that Mr Hindson's risk of developing lung cancer would be of the order of 15% to 20% as the result of past asbestos exposure and smoking. So far as life expectancy was concerned, Dr Hind agreed with Dr Rudd that, as Mr Hindson had not given up smoking, his loss of expectation of life due to heart disease would be ten years. Dr Hind disagreed that asbestos-related disease would further reduce expectation of life by three years; his estimate was only 6 to 12 months.

[191] It was not thought appropriate, in the context of litigation designed to determine actionability, that the judge should be asked to decide which of these two differing medical opinions was correct. The judge was asked to assess Mr Hindson's damages on both bases, leaving it to the parties to reach agreement if they could and, if not, to return to the court at a later stage. In the event, the judge did not do so. He said that the differences between the two doctors were of no real significance.

[192] For Mr Hindson, Mr Frank Burton QC submitted that, on the basis of Dr Rudd's estimate, it was plainly wrong that he should have been awarded the same sum as Mr Storey. He faced a risk five times greater than Mr Storey. Mr Burton based his submissions throughout on Dr Rudd's evidence. However, for the sake of completeness, I mention that, on the basis of Dr Hind's estimate, Mr Hindson's risk of future malignancy was only about 2%, as nothing could be added in for a risk of lung cancer that was, of itself, dependent on a 1% risk of asbestosis.

[193] Applying the principle which I set out above to Dr Rudd's estimates, Mr Hindson should have been awarded 20% of £50,000 which is £10,000 (discounted for accelerated receipt) in addition to the £5,500 which, in my view, should have been awarded for the provisional element. On the basis of Dr Hind's opinion, the additional sum should have been 2% of £60,000 (the approximate general damages figure for a case of mesothelioma) which is £1,200 (to be discounted for accelerated receipt). Thus, in my view, there was a potential difference of real significance between the opinions of the two doctors.

[194] However, as Mr Feeny for the respondent to this appeal pointed out, Mr Hindson had complicating factors not present in the case of Mr Storey or Mr Grieves. He had a co-morbid condition, namely heart disease, from which he was already suffering. He had had a heart attack; he had returned to work. He had had a stent inserted and had returned to work. He was still suffering from angina. Mr Feeny submitted that these factors could not be ignored. He submitted that, for that reason, the judge was right to treat Mr Hindson in exactly the same way as the other claimants and to award him the standard sum for future risks.

[195] I would be minded to accept Mr Feeny's submission that the co-morbid condition cannot be ignored. However, I cannot accept that the judge was right to treat him in the same way as the other claimants. As I have said, the risks of future harm must be dealt with on an individual basis. In Mr Hindson's case, that entailed consideration of the effect of heart disease.

[196] If Mr Feeny's submission is to be accepted, the problem is to say how and to what extent the award for future risks should be reduced on account of the heart disease. How, in practice, do the existing heart disease, its likely future course and the consequent loss of expectation of life impinge on the asbestos-related risks? As to this, we received no detailed submissions and it appears to me that there may be a need for further medical evidence. At the end of the hearing before this court, Mr Burton attempted to deal with these issues, but it appeared to me that the material was not available for that to be satisfactorily achieved. Without such submissions, I do not think I can do justice to the assessment of Mr Hindson's damages. Accordingly, with regret, I have concluded that I cannot make an award and, in the absence of agreement, this matter must be remitted to the judge for further consideration, in the light of the principles expounded by this court.

[197] So far as concerns the claim for prospective financial loss, I face a similar but even more acute difficulty. Holland J rejected the claim simply because he regarded it as too speculative. As I have said, in my view, that general approach was wrong. The judge should have examined the claim and made findings in respect of it. I do not think that this court can do so. For example, the claim was based on the contention that Mr Hindson would (absent the onset of asbestos disease) work until the age of 70. There is an obvious issue as to the feasibility of him being able to do that in the light of his heart disease. Apart from that, it does not appear that there were any significant challenges to the schedule of loss advanced. Nor, as I understood Mr Feeny's submissions, was there any real challenge to the validity of Mr Burton's suggested approach to the ways in which the global claim should be discounted for the asbestos-related risks and for accelerated receipt. However, as I have said, the interrelation of the effect of the heart disease and asbestos risks requires submissions and possibly further medical evidence. It may be that, when they are received, the judge would be justified in saying that the claim for prospective loss is too speculative and must be dismissed. In any event, I suspect that any assessment in his case will have to be made by the application of a broad brush, rather than a formula. It is with real regret, given that Mr Hindson is the only claimant who is entitled to damages, that I am unable to reach a final conclusion in his individual appeal. Absent agreement, the case must be remitted to the judge.

Appeals by the defendant employers in the cases of Mr Mears, Mr Jackson, Mr Downey, Mr Topping, Mr Johnson, Mr Rothwell and Mr Grieves allowed. Mr Hindson's appeal allowed.

Kate O'Hanlon Barrister.

Woodward v Abbey National plc

[2006] EWCA Civ 822

COURT OF APPEAL, CIVIL DIVISION

WARD, MAURICE KAY AND WILSON LJJ

20 MARCH, 22 JUNE 2006

Employment – Victimisation – Protected disclosure – Whether employee entitled to bring claim for being subjected to detriment on ground of protected disclosure in relation to acts of employer after employment had ceased – Employment Rights Act 1996, s 47B.

An employee made a complaint of sex discrimination against her employer, which was settled without admission of liability in 1996. In 2003, she made a further application to an employment tribunal complaining of victimisation, including a claim under s 47B[a] of the Employment Rights Act 1996 (which protected disclosure of information in the public interest ('whistle blowing')), that she had been subjected by the employer to a detriment on the ground that she had made a protected disclosure. The detriment to which she said she had been subjected had arisen long after her employment had terminated and consisted of, inter alia, the employer's failure to provide a job reference and the employee's failure to progress with job applications. The tribunal, holding itself bound by a decision of the Court of Appeal that a complaint of detriment in a health and safety case under the 1996 Act could not be brought in respect of acts which had taken place after the employment relationship had come to an end, decided as a preliminary issue that it had no jurisdiction to hear the protected disclosure claim. The Employment Appeal Tribunal dismissed the employee's appeal, holding that that Court of Appeal authority could not be distinguished, and that it had not been overruled by a subsequent decision of the House of Lords that the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1975 should be interpreted as extending to acts of discrimination and victimisation against a former employee carried out by an employer after termination of the contract of employment. The employee appealed, submitting that the court was not bound by the Court of Appeal authority since, although it had not been expressly overruled, it could not stand with the decision of the House of Lords.

Held – (1) Despite the different statutes involved, the reasoning which had driven the Court of Appeal to its conclusion in the health and safety case was inconsistent with the approach of the House of Lords in the discrimination cases. Although the language and the framework were slightly different, the four statutes were dealing with the same concept, namely protecting the employee from detriment being done to him in retaliation for his sex, race, disability or whistle-blowing. As the common theme of the statutes was victimisation it would be odd if the same sort of act could be victimisation for one purpose but not for the other. It followed that the court was free to depart from the Court of Appeal decision if it concluded it was right to do so (see [58], [59], [63], [70], [71],

a Section 47B, so far as material, is set out at [12], below

below); *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 and *Relaxion Group plc v Rhys-Harper, D'Souza v Lambeth London BC, Jones v 3M Healthcare Ltd* [2003] 4 All ER 1113 applied; *Fadipe v Reed Nursing Personnel* [2005] ICR 1760 not followed; *Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865 considered.

(2) Parliament could not have intended to afford the whistle-blower protection only in respect of acts done in retaliation while the contract of employment subsisted and not to protect him from detriment suffered after his employment had terminated. The public interest, which had led to the demand for the 1996 Act to protect individuals who made certain disclosures of information in the public interest and to give them an action in respect of that victimisation, would be sold short by allowing the former employer to victimise his former employee with impunity. The Act showed that it was in the public interest to blow the whistle and he who blew the whistle should be protected when he became victimised for doing so, whenever the retribution was exacted. The appeal would accordingly be allowed, and the matter remitted to an employment tribunal (see [66]–[71], below).

Notes

For protection from suffering detriment in employment generally and for protected disclosures, see 16(1A) *Halsbury's Laws* (4th edn reissue) paras 540, 547.

For the Employment Rights Act 1996, s 47B, see 16 *Halsbury's Statutes* (4th edn) (2005 reissue) 775.

Cases referred to in judgments

Adekeye v Post Office [1997] IRLR 105, [1997] ICR 110, CA.

Coote v Granada Hospitality Ltd Case C-185/97 [1998] All ER (EC) 865, [1999] ICR 100, [1998] ECR I-5199, ECJ.

Davis v Johnson [1978] 1 All ER 841, [1979] AC 264, [1978] 2 WLR 182, CA.

Fadipe v Reed Nursing Personnel [2001] EWCA Civ 1885, [2005] ICR 1760.

Relaxion Group plc v Rhys-Harper, D'Souza v Lambeth London BC, Jones v 3M Healthcare Ltd [2003] UKHL 33, [2003] 4 All ER 1113, [2003] ICR 867.

Wilson v Chatterton [1946] 1 All ER 431, [1946] KB 360, CA.

Young v Bristol Aeroplane Co Ltd [1944] 2 All ER 293, [1944] KB 718, CA.

Appeal

Diana Woodward appealed with permission of Ward LJ given on 20 March 2006 against the decision of the Employment Appeal Tribunal on 20 July 2005 dismissing her appeal against the decision of an employment tribunal promulgated on 23 February 2005 that it had no jurisdiction to hear her claim under s 47B of the Employment Rights Act 1996 against Abbey National plc, her former employer.

Jeffrey Bacon and *Simon Forshaw* (instructed by *Russell-Cooke*) for the employee.

John Cavanagh QC and *Richard Powell* (instructed by *DLA Piper Rudnick Gray Cary*, Birmingham) for the employer.

Cur adv vult

22 June 2006. The following judgments were delivered.

WARD LJ.

THE ISSUE

[1] In this appeal we are invited by the appellant, Mrs Diana Woodward, to rule that we are not bound by a previous decision of this court given in *Fadipe v Reed Nursing Personnel* [2001] EWCA Civ 1885, [2005] ICR 1760 because, although it was not expressly overruled, it cannot stand with the decision of the House of Lords in *Relaxion Group plc v Rhys-Harper, D'Souza v Lambeth London BC, Jones v 3M Healthcare Ltd* [2003] UKHL 33, [2003] 4 All ER 1113, [2003] ICR 867.

THE MATERIAL FACTS

[2] Mrs Woodward was employed by Abbey National's Treasury Services (ANTS) as head of financial institutions from February 1991 until she was made redundant in November 1994. She complained of sex discrimination and that complaint was settled without admission of liability in December 1996.

[3] Some years later on 10 January 2003, Mrs Woodward made a further application to the employment tribunal complaining of victimisation. The details of her complaint related largely to allegations of sex discrimination but she contended that it included a claim under s 47B of the Employment Rights Act 1996, as amended, that she had been subjected by the respondent, Abbey National plc, to a detriment done on the ground that she had made a protected disclosure.

[4] When doubt arose as to whether or not that claim was revealed in the particulars of her complaint, she submitted re-amended details of the complaint and sought leave to amend. It is unnecessary to spell out the details. In essence Mrs Woodward was alleging that the disclosure qualifying for protection consisted in her disclosure of the information that the respondent was failing to comply with legal obligations to which it was subject. She asserted that—

> 'throughout her time with the respondent the applicant was obliged to voice her concerns on regular occasions as to what she reasonably believed to be the reckless and/or negligent manner in which the respondent was handling the funds of its institutional investors, and/or the breaches of fiduciary duty of its directors . . . and/or breaches by the respondent . . . of s. 47 of the Financial Services Act 1997.'

[5] The detriment to which she said she was subjected arose long after her employment had terminated and it consisted in one or more of the following: (1) the respondent's failure to provide a reference to BUPA in July 2000 in relation to the appellant's application for a position with BUPA; (2) the appellant's failure to progress further with various job applications including those made to Barclays Bank and the Royal Bank of Scotland in February and March 2000; (3) the appellant's failure to be appointed as a consultant to ANTS whilst working for KPMG in 2001; (4) the failure of Lord Burns, the new chairman of the respondent, to respond to the appellant's letter of 10 October 2002 in which she sought employment with the respondent; and (5) the respondent's failure to make any adequate efforts to seek alternative employment for the appellant following her exchange of letters with the respondent in the latter part of 2002.

[6] It is only fair to add that none of these matters have been investigated: the case before us had to proceed as if they are true but the respondent has at all times maintained its strong denial of any wrong-doing.

[7] There was some interlocutory skirmishing which needed a ruling from the Employment Appeal Tribunal, the details of which are again immaterial. The upshot of it was that the sex discrimination matters were set on one side and have since been disposed of. By its decision promulgated on 23 February 2005 the employment tribunal decided as a preliminary issue that it had no jurisdiction to hear the protected disclosure claim because the acts of which complaint was made all took place after the appellant's employment had come to an end. Her appeal to the Employment Appeal Tribunal was dismissed by the Employment Appeal Tribunal on 20 July 2005.

[8] I gave permission to appeal stating that—

> 'Although success may be hard to achieve the chances of Parliament intervening to correct any injustice is so unlikely that the need for the Court of Appeal to look again at the problem may itself constitute a compelling enough reason to grant permission. The decision of the House of Lords in *Rhys-Harper*'s case affords the opportunity for this court to consider whether *Fadipe*'s case can be overruled or distinguished.'

THE LEGISLATIVE BACKGROUND

[9] This claim is brought under the 1996 Act and so its provisions are those which are directly relevant. The 1996 Act was amended by the Public Interest Disclosure Act 1998 which is an Act 'to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes'. In other and colloquial words, it is for the protection of 'whistle-blowers'. The 1998 Act amended the 1996 Act by inserting Pt IVA to deal with 'Protected Disclosures'. Section 43A provides that a protected disclosure means a qualifying disclosure made by a worker in accordance with any of ss 43C–43H. Section 43B defines disclosures qualifying for protection, s 43B(1)(b) being relevant to the appellant's claim in providing that:

> 'In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following . . . (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.'

[10] Section 43K extends the meaning of 'worker' for Pt IVA as follows:

> '(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—(a) works or worked for a person [in various special circumstances some of which apply here] . . .'

[11] Part V deals with 'Protection from suffering detriment *in employment*', with the emphasis added by me. It confers 'Rights not to suffer detriment'. That right is given to various persons and in various circumstances covering a wide range of activity, for example, under s 43M those employees called to jury service; under s 45 employees refusing to do Sunday working; under s 47A employees exercising the right to time off work for study or training and under s 47C those taking leave relating to pregnancy, childbirth or maternity. These are but some of the activities and the point being made on the respondent's behalf is

that they all relate to activities in which the conditions are encountered whilst the employment or work continues.

[12] The material provisions for the purpose of this appeal are s 44 relied on by Mr Fadipe and s 47B, introduced by the 1998 reform, relied on by Mrs Woodward. Both fall within Pt V. They provide as follows:

> '**44.** *Health and safety cases.*—(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that . . . (c) being an employee at a place where—(i) there was no such representative or safety committee, or (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety . . .
>
> **47B.** *Protected disclosures.*—(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (2) . . . this section does not apply where—(a) the worker is an employee, and (b) the detriment in question amounts to dismissal (within the meaning of Part X).
>
> (3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.'

[13] Section 48 deals with enforcement. Under s 48(1) an employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of s 44 among others. Under s 48(1A), also introduced in 1998, a worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of s 47B. Under s 48(3) the employment tribunal shall not consider the complaint unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates.

[14] As the title of the Act suggests, this is a wide-ranging Act on employment rights, various parts dealing with time off work, suspension from work, leave from work, termination of employment, unfair dismissal, redundancy and so forth.

[15] Section 230, which falls in Pt XIV on 'Interpretation', defines 'Employees, workers etc' as follows:

> '(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment . . .
>
> (3) In this Act "worker" . . . means an individual who has entered into or works under (or, where the employment has ceased, worked under)—(a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract . . .
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed . . .

(6) This section has effect subject to sections 43K and 47B(3); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, "worker" . . . and, in relation to a worker, "employer" . . . have the extended meaning given by section 43K.' (This subsection was introduced by the 1998 Act.)

THE EMPLOYMENT TRIBUNAL'S DECISION

[16] The nub of its decision is contained in para 10 where the tribunal said:

'... we are driven to conclude that this tribunal is bound by the judgment of the Court of Appeal in *Fadipe*'s case. That is a case which is precisely in point in the sense that the relevant statutory language in s 44 is the same as that in s 47B and both sections are contained within the part of the 1996 Act headed 'Protection from suffering detriment in employment'. The House of Lords judgment in *Rhys-Harper*'s case relates to the very different legislation in the form of the discrimination Acts and in the light of the language of the European Directives which led to the passing of the discrimination legislation. In addition, we note that the rights enshrined within the 1996 Act do not in general terms, apply to incidents occurring after the termination of employment, whereas the discrimination Acts do.'

THE DECISION OF THE EMPLOYMENT APPEAL TRIBUNAL

[17] Their decision is now reported at [2005] 4 All ER 1346 and it is, therefore, unnecessary to cite it extensively. The essential strands of Burton J's reasoning were that *Fadipe*'s case could not be distinguished on the basis that that case concerned a health and safety complaint as opposed to the case before us involving a protected disclosure. Both were in Pt V and governed by s 48. Nor was there any distinction to be drawn on the basis that the definition of 'worker' in s 47B is drawn slightly wider than it is in s 44. *Rhys-Harper*'s case had not overruled *Fadipe*'s case which was not cited in the House of Lords. The former was dealing with victimisation under the sex, race and disability discrimination Acts whereas the latter was dealing with detriment under Pt V of the 1996 Act. *Rhys-Harper*'s case was simply 'writing large' the conclusions of the Court of Justice of the European Communities in *Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865, [1998] ECR I-5199 which had been considered in *Fadipe*'s case but found not to alter the result. In the view of the Employment Appeal Tribunal, it was bound by *Fadipe*'s case and the appeal was dismissed accordingly.

WHAT DID *FADIPE*'S CASE DECIDE?

[18] Mr Fadipe was a litigant in person. His complaint of unfair dismissal need not concern us. He said that his writing to the chief executive of his employer, Reed Nursing Personnel, raising health and safety concerns caused him to be dismissed by them. His second complaint, which is material for our purposes, was that by virtue of s 44 of the 1996 Act he had the right not to be subjected to any detriment by reason of his raising those health and safety concerns (see s 44(1)(c)) and that he suffered detriment in the form of a loss of a job opportunity with the City of Westminster who offered him employment subject to satisfactory references but refused to engage him because the reference provided by Reed Nursing Personnel was not regarded by Westminster as satisfactory enough. He relied on s 230 to justify his bringing his claim where employment had ceased. The employment tribunal dismissed his claim on the basis that it had

no jurisdiction because there was no absolute right for an employee or ex-employee to demand a reference and no obligation on the employer to provide one.

[19] Mummery LJ gave the first judgment in the Court of Appeal, Buxton and Longmore LJJ agreeing with it. He held that the employment tribunal had not erred in law in concluding that it did not have jurisdiction to entertain the claim, saying ([2005] ICR 1760):

> '[25] . . . section 44 does not, on its proper construction, apply in the circumstances relied upon by Mr Fadipe. The section is in the Part of the Act that affords protection from suffering detriment *in employment* [Mummery LJ's emphasis]. Its purpose is to protect employees while they are still employed from suffering detriment, short of dismissal, by reason of having brought to their employer's attention health and safety matters of the kind referred to in section 44(1)(c). If it is a dismissal case the section does not apply: see section 44(4). The claim for unfair dismissal is made, if it is an alleged dismissal on health and safety grounds, under the unfair dismissal provisions in a different part of the 1996 Act. I am clear that this section does not apply where the facts are, as here, that the alleged detriment was inflicted and suffered *after* the employee (that is Mr Fadipe) had ceased to be employed.
>
> [26] As for Mr Fadipe's reliance on the reference in section 230(1) to "(. . . where the employment has ceased, worked under)", in my view that parenthesis in section 230(1) was inserted by Parliament for the purposes of dealing with the kind of situation which would arise under section 48(1), which entitles an employee to present a complaint at a tribunal that he has been subjected to a detriment. The person who may present a complaint under that section may still be employed; or he may have ceased to be employed, either by reason of resignation or dismissal. He does not cease to be entitled to present a complaint by reason of the fact that he has ceased to be an employee.
>
> [27] The section was not, however, intended to confer a general right on an ex-employee to complain about any acts done by his ex-employer after the employment relationship has ceased which could be described as detriment inflicted by reason of the ex-employee having raised health and safety grounds . . .
>
> [29] I should mention for the sake of completeness that reference has been made at this hearing, as reference was made at the hearing in the employment tribunal, to the decision of the European Court of Justice in [*Coote*'s case]. That was a ruling of the Court of Justice on the effect of article 6 of the Equal Treatment Directive [Council Directive (EEC) 76/207 (on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) (OJ 1976 L39 p 40)], which has no equivalent provision in [Council Directive (EEC) 89/391 (on the introduction of measures to encourage improvements in the safety and health of workers at work) (OJ 1989 L183 p 1)]. [*Coote*'s case] was dealing with the quite different situation of the need to provide judicial protection for a worker whose employer, after the employment relationship has terminated, refused to provide a reference as a reaction to legal proceedings which the employee had brought to enforce compliance with the principle

of equal treatment within the meaning of that Directive. That case is not authority for the wider proposition canvassed by Mr Fadipe that there was a general principle under which an employee who complained that he suffered retaliation from his employer or former employer, having raised health and safety matters, was entitled to bring a claim under section 44 of the 1996 Act.'

CAN *FADIPE*'S CASE BE DISTINGUISHED?

[20] When granting permission to appeal I left that open as a possible argument to be addressed to us. On the hearing of the appeal, however, Mr Jeffrey Bacon for the appellant conceded that our case could not be distinguished from *Fadipe*'s case. In both cases there was a protected disclosure under Pt IVA of the 1996 Act, the same right not to suffer detriment was conferred under Pt V of the Act and the remedy was sought under s 48. The case was squarely put before us on the basis that we were not bound to follow *Fadipe*'s case.

WHEN IS THE COURT OF APPEAL NOT BOUND BY ONE OF ITS PREVIOUS DECISIONS?

[21] The guiding principles were established in *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 at 298, [1944] KB 718 at 725–726 where Lord Greene MR, reading the judgment of the court said:

'In considering the question whether or not this court is bound by its previous decisions and those of courts of co-ordinate jurisdiction, it is necessary to distinguish four classes of case. The first is that with which we are now concerned, namely, cases where this court finds itself confronted with one or more decisions of its own or of a court of co-ordinate jurisdiction which cover the question before it, and there is no conflicting decision of this court or of a court of co-ordinate jurisdiction. The second is where there is such a conflicting decision. The third is where this court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords. The fourth (a special case) is where this court comes to the conclusion that a previous decision was given *per incuriam*. In the second and third classes of case it is beyond question that the previous decision is open to examination. In the second class, the court is unquestionably entitled to choose between the two conflicting decisions. In the third class of case the court is merely giving effect to what it considers to have been a decision of the House of Lords by which it is bound. The fourth class requires more detailed examination and we will refer to it again later in this judgment.'

It is Mr Bacon's submission that this case falls within the third class in that although *Rhys-Harper*'s case did not expressly overrule *Fadipe*'s case, nonetheless *Fadipe*'s case cannot stand with that subsequent decision of the House of Lords.

[22] There was some debate as to whether or not Scott LJ had introduced a different test in *Wilson v Chatterton* [1946] 1 All ER 431 at 433, [1946] KB 360 at 364 where he spoke of the earlier decision being 'inconsistent with general principles laid down by the House of Lords and with other decisions of this court'. In my view this formulation of the test adds nothing of significance. If there are inconsistent decisions of this court, then this court on later occasions is free to choose between them. Since Scott LJ was expressly acting on *Young v Bristol Aeroplane Co Ltd*, I can see no difference whatever in the sense being conveyed by

both phrases. Whether a previous decision can 'stand with' a subsequent decision of the House of Lords and whether the earlier decision is 'inconsistent with general principles' laid down by their Lordships are different ways of saying the same thing. The House of Lords have reaffirmed that the rule laid down in *Young v Bristol Aeroplane Co Ltd* remains binding on the Court of Appeal: see *Davis v Johnson* [1978] 1 All ER 841, [1979] AC 264. So the question for us is whether *Fadipe*'s case can stand with *Rhys-Harper*'s case.

WHAT DID *RHYS-HARPER*'S CASE DECIDE?

[23] *The facts:* there were actually six appeals before their Lordships, these falling into three groups, the first being a claim under the Sex Discrimination Act 1975, the second under the Race Relations Act 1976 and third relating to claims brought under the Disability Discrimination Act 1995. The discriminatory act alleged by Ms Rhys-Harper related to an employer's failure properly to investigate a sexual harassment complaint first made after the termination of the contract of employment. Mr D'Souza complained that he had been discriminated against on racial grounds and victimised by his former employers refusing to reinstate him. The disability discrimination cases involved victimisation and it is interesting to note that in three of the four cases the alleged victimisation concerned the provision of or failure to provide a reference after the termination of the contract of employment.

[24] So far as the legislation is concerned, the basic structure of the 1975 Act and the 1976 Act is the same and much of the language is identical. To take the 1975 Act, discrimination is defined in ss 1 and 2, and is, broadly speaking, less favourable treatment. Section 4 provides that discrimination also includes victimisation. Part II deals with discrimination in the 'Employment Field' and s 6(2) is the material provision namely:

> 'It is unlawful for a person, in the case of a woman *employed by him* at an establishment in Great Britain, to discriminate against her—(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or (b) by dismissing her, or subjecting her to other detriment.'

The italicised words are the key words to be construed the vital words in s 4(2) of the 1995 Act are that it is 'unlawful for an employer to discriminate against a disabled person *whom he employs*'.

[25] The Court of Appeal had earlier found in *Adekeye v Post Office* [1997] IRLR 105, [1997] ICR 110, a case of racial discrimination, that s 4(2) of that Act protected only those whose employment continued at the time of the act of discrimination, Peter Gibson and Pill LJJ considering that it was 'unsatisfactory' that the Act did not extend to give a remedy to an ex-employee pursuing an appeal against dismissal.

[26] *The decision in Rhys-Harper's case*: their Lordships all came to the conclusion that *Adekeye*'s case was wrongly decided and that each of the Acts should be interpreted as extending to acts of discrimination and victimisation against a former employee carried out by an employer after termination of the contract of employment. Each of their Lordships took a slightly different approach to the interpretation of the legislation and to the relevant test to be applied. For the purpose of this appeal, where the central issue is whether or not *Fadipe*'s case can stand with *Rhys-Harper*'s case, it is necessary, as I see it, to

concentrate on how each of their Lordships came the conclusions he did for giving the words a wider than literal meaning. It is less important for us to identify tests they suggested for determining whether the claim should succeed on the facts in the individual cases.

[27] *Lord Nicholls of Birkenhead's approach*: he took the context in which the expressions 'employed by him' and 'whom he employs' were used to include the benefits arising from a contract of employment. He said ([2003] 4 All ER 1113):

> '[36] . . . A contract of employment creates an employment relationship between two persons, an employer and an employee. It is a matter of ordinary experience that incidents of the employment relationship thus created often continue beyond the termination of the contract of employment which gave rise to the relationship. When a contract of employment ends the employee ceases to be obliged to work for the employer, and the employer ceases to be obliged to employ the employee. But the ending of these obligations does not normally signify a complete end to all aspects of the relationship between employer and employee. Frequently contractual obligations, express or implied, accrue or continue after the period of employment has come to an end. [For example obligations of confidentiality.] Frequently also, an employee continues to enjoy, although not as a matter of contractual entitlement, other benefits arising in respect of his employment. One important example, of everyday occurrence, is the opportunity to obtain a reference to assist the employee in obtaining a new job.'

[28] He dealt with the construction of the statute in these paragraphs:

> '[37] To my mind the natural and proper interpretation of s 6(2) of the 1975 Act and the corresponding provisions in the other two Acts in this context is that once two persons enter into the relationship of employer and employee, the employee is intended to be protected against discrimination by the employer in respect of all the benefits arising from that relationship. The statutory provisions are concerned with the manner in which the employer conducts himself, vis-à-vis the employee, with regard to all the benefits arising from his employment, whether as a matter of strict legal entitlement or not. This being the purpose, it would make no sense to draw an arbitrary line at the precise moment when the contract of employment ends, protecting the employee against discrimination in respect of all benefits up to that point but in respect of none thereafter.
>
> [38] If such a hard and fast line were drawn at this point it would mean that the employee who asks for a reference before he retires from his employment is protected but the employee who asks for a reference the day after he left is not . . . It would mean that retaliatory action taken by an employer before the contract of employment ends is within the scope of the legislation, but retaliatory action taken later, for instance, regarding bonus payments, is not.
>
> [39] This cannot have been the intention of Parliament. Dismissal is one of the matters in respect of which discrimination is expressly prohibited by the statutes. Parliament cannot have intended that this prohibition should include an appeal decision regarding dismissal if the appeal is heard before the dismissal takes effect but not if it is heard later. That would be palpably absurd. Dismissal cannot have been intended to have such an artificially

limited meaning. Nor can it have been intended that reprisals may be exacted, so long as they are postponed until after the employee has been dismissed. Nor can a sensible distinction be drawn between giving a reference the day before employment ends and giving a reference the day after.'

[29] He was concerned (at [40]) to draw a line somewhere between what is prohibited and what is not. He recognised that Parliament may well have chosen to advance cautiously keeping the law under review. But he added:

'. . . these considerations do not point to the conclusion that, when enacting this new form of legislation, Parliament intended to ban discrimination in respect of some of the benefits in respect of an employee's employment but not others, with the distinction between the two categories being self-evidently capricious.'

[30] So he disagreed with the decision in *Adekeye's* case, saying:

'[43] . . . I understand the reasoning which attracted the Court of Appeal. But I consider this reasoning attaches insufficient importance to the capricious results which follow from a too literal interpretation of the statutory language. The *Adekeye* interpretation is insufficiently purposive. It pays insufficient heed to the context.

[44] The preferable approach is to recognise that in each of the relevant statutory provisions the employment relationship is the feature which triggers the employer's obligation not to discriminate in the stated respects. This is the connection between two persons which Parliament has identified as requisite for these purposes. Once triggered, the obligation not to discriminate applies to all the incidents of the employment relationship, whenever precisely they arise. For the reasons already given, this obligation cannot sensibly be regarded as confined to the precise duration of the period of employment if there are incidents of the employment which fall to be dealt with after the employment has ended. Some benefits accrue during the period of employment, some afterwards. For the purposes of discrimination, there is no rational ground for distinguishing the one from the other. They all arise equally from the employee's employment.'

[31] His test seems to be contained at [45]:

'To be an "incident" of the employment relationship for this purpose the benefit in question must arise between employer or former employer as such and employee or former employee as such. A reference is a prime example. Further, save perhaps in exceptional circumstances which it is difficult to envisage, failure to provide a non-contractual benefit will not constitute a "detriment", or discrimination in an opportunity to receive a "benefit", within the meaning of the anti-discrimination legislation unless the non-contractual benefit in question is one which normally is provided, or would be provided, to others in comparable circumstances. This is so with regard to current employees. It is equally so with former employees. But I stress this is not to say that an employer's practice regarding current employees is to be treated as equally applicable to former employees. This is emphatically not so. The two situations are not comparable. What is comparable is the way the employer treats the claimant former employee

and the normal way he treats or would treat other former employees in similar circumstances.' *a*

[32] It is important to observe that Lord Nicholls expressly acknowledged that:

'[48] . . . I have reached the conclusion expressed above on the proper interpretation of all three Acts without regard to the impact of the Equal Treatment Directive or the decision of the European Court in [*Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865, [1998] ECR I-5199]. Having regard to the conclusion I have reached, it is not necessary to consider the issues arising out of the Equal Treatment Directive.' *b*

[33] *Lord Hope of Craighead's approach*: he was more cautious. He explained (at [78]): *c*

'. . . Experience has taught us that this is a matter which can only be dealt with by legislation, and that it requires careful regulation by Parliament . . . In the result the legislation which is under scrutiny in these appeals is designed to be specific and particular rather than universal in its application, and it is still being developed incrementally. It must, of course, be construed purposively . . . But the scope to be given to the legislation is essentially a matter for Parliament. The question which lies at the heart of these appeals is what its intention was when it enacted the provisions in each of these three Acts to deal with discrimination by employers against applicants and employees.' *d* *e*

[34] He dealt with the purposive approach to interpretation in this way:

'[88] In an area which is as sensitive and as wide-ranging in its effects as this one, the absence of information [from the advisory bodies established under these Acts] is a significant omission. It inhibits the use of the purposive approach in this case, as we have no clear guide to the scope which was intended to be given to the enactments other than the words which they themselves have used to declare it. The extent to which, if at all, the legislation was intended to apply after the ending of the employment relationship was, of course, a matter for the legislature. In this situation I believe that, subject to the guidance of the European Court of Justice as to the scope to be given to the 1975 Act in the light of the Equal Treatment Directive, your Lordships must approach these questions by examining the language which Parliament used in order to discover what its intention was when the statutes were enacted . . .' *f* *g* *h*

[35] His examination of the language led him to conclude that the word 'employed' in the phrase 'employed by him' was without more ambiguous but that as soon as one began to examine the context, the ambiguity began to recede. His conclusion was: *j*

'[99] I would hold that, taken overall and when given their ordinary meaning in their context, these provisions indicate that the phrase "employed by him" in s 6(2) of the 1975 Act includes a woman who is employed by the alleged discriminator but that it does not include a woman who is no longer employed by him.'

There was no ground for giving a different meaning to the same phrase in the 1976 Act. So far as the 1995 Act was concerned he started from the position that the ordinary and natural meaning of the phrase 'whom he employs' was that it included a person who was employed by the alleged discriminator but that it did not include a person who was no longer employed by him.

[36] He had to resort to the Community law to overcome the ordinary meaning to be given to the words. He pointed out that the directive governed the 1975 Act only but it had implications for the other cases. His reasoning in this regard is contained in these paragraphs:

> '[106] The phrase "employed by him" in s 6(2) of the 1975 Act is, as I have said, ambiguous. I think that it is *possible* to construe it as referring to a woman who is no longer employed by the alleged discriminator as well as to a person who is employed by him, although I do not think that that is what the phrase means when domestic rules of construction are applied to it and it is taken in its context . . .
>
> [113] The conclusion which I would draw from this case [*Coote's* case] is that the interpretation placed on [Directive 76/207] by the European Court does not require your Lordships to read the words "employed by him" in s 6(2) of the 1975 Act as including each and every case where the employment relationship has come to an end . . .
>
> [114] . . . But, as my noble and learned friend Lord Scott of Foscote has pointed out, the relationship between the employer and the employee does not necessarily come to an end at the precise moment when their contract terminates. There may well be things that need to be done to bring their relationship to an end after the contract has terminated . . . But the fact that [the employer will be dealing with someone who strictly speaking is a former employee] will not of itself remove that person from the scope of the directive, so long as the transactions that remain to be completed are attributable to a continuation of their relationship as employer and employee.
>
> [115] . . . Whether or not there is still an employment relationship will be for determination according to the facts of each case.'

[37] He gave the same extended meaning to the 1976 Act since the language was identical and he could see no rational ground for a different approach to be taken to the use of similar language in the context of discrimination against disability.

[38] *Lord Hobhouse of Woodborough's approach*: he asked whether *Adekeye*'s case was right. His answer was:

> '[137] . . . As a matter of the simple language of s 4(2) and its equivalent in the 1975 and 1995 Acts, there is much to be said for it and it provides a rule of simple application. But a different view is possible. The words are not used to refer to a status but to a connection. Under the Acts the discriminatory treatment does not have to be an infringement of the complainant's contractual rights. It can simply be less favourable treatment than that afforded to others in a like position. To introduce at this point into the structure of the Acts a criterion of strict contractual status would be anomalous having regard to their scheme as a whole . . . To construe the Act so that the dismissal can be the subject of a discrimination complaint but the handling of the appeal cannot is irrational and unnecessary. The scheme of

the Acts and the context in which the relevant words occur suggest that, rather than importing a crude temporal test, they describe the substantive scope within which the various duties not to discriminate under the Acts apply in the employment field.' *a*

[39] It remained necessary to define that scope and he said:

'[139] . . . Guidance upon the scope can again be derived from the content of the provision [subjecting her to any other detriment]. What are the detriments which an employer may subject an employee to which can fairly be referred to as "any other detriment" in the context of this subsection? The answer must lie in a test of proximity. Does the conduct complained about have a sufficiently close connection with her employment? Is it sufficiently similar to the other conduct mentioned in the subsection? Any criterion of proximity has as its antithesis the concept of remoteness. Remoteness can have, as an element, remoteness in time . . . *b c*

[140] I appreciate that such an approach will ultimately lead to fact-specific decisions in a number of cases but that is what is involved in the rejection of an arbitrary time-based criterion . . . The nub is that the introductory words "a woman employed by him" are to be read with the rest of sub-s (2) and relate to a substantive and proximate connection between the conduct complained of and her employment by the alleged discriminator.' *d*

[40] It is important to see how he approached the European dimension. He said (at [143]): 'What I have said in the preceding paragraphs also reflects the view of the European Court of Justice in [*Coote*'s case] . . .' He was of the view that similar reasoning governed the victimisation cases and in this regard he said (at [148]): '. . . Again the decision of the European Court of Justice is compelling . . .' *e*

[41] *Lord Scott of Foscote's approach*: he said the issue was essentially one of statutory construction. He said: *f*

'[184] . . . The language used in each of the three Acts suggests, if read literally, that ex-employees are not protected . . . [The statutory] language is indicative of a present relationship rather than a past one.'

[42] However: *g*

'[187] It has been urged upon your Lordships to adopt a purposive approach to construction of the relevant language in the three Acts. It must surely, it is said, have been the intention of the legislature to protect an ex-employee from discrimination, and a fortiori from victimisation for having previously complained of discrimination, where the discriminatory acts complained of consist of the unfair handling of appeals against dismissal . . . How can Parliament have intended that an employer, in reaching a decision as to whether an employee's dismissal should stand or should be set aside, should be free from the restraints on discrimination imposed by the Act? It seems to me that once the question is asked there can be only one answer. Of course Parliament must have intended the Acts to apply to such cases.' *h j*

[43] The question there arose as to where the line should be drawn and he said:

'[196] How is the principle to be formulated that would enable ex-employers and ex-employees to judge whether the imposition of a particular detriment, alleged to be discriminatory, was or was not covered by the Act? One answer would be to construe the Acts simply as covering all ex-employees. The participle "employed" in the 1975 and 1976 Acts would be read as meaning "has been or is employed", and the word "employs" in the 1995 Act would be read as meaning "employs or has employed". An alternative answer would be to confine the relevant words to their strict literal meaning and exclude ex-employees from protection under the Acts in all circumstances. I would, for my part, reject both these extremes. I would reject the first because it requires a purposive construction that can only be justified by attributing to Parliament an evident intention that, to my mind, is not in the least evident. I would reject the second because it introduces an arbitrary rigidity into the implementation of the Act that is unrealistic and cannot have been intended.

[197] In my opinion, the answer to the conundrum can be found by concentrating on the relationship between the employer and employee that is brought into existence when the latter enters the service of the former. The relationship is, of course, based on contract, express or implied, but does not necessarily come to an end, ipso facto, when the employment comes to an end . . .

[200] Where references or other post-employment benefits are concerned the question whether the anti-discrimination Acts apply should, in my opinion, similarly depend on whether the relationship between employer and employee brought into existence when the employee entered the employer's service is still in existence . . .

[206] I am in respectful agreement with the views about these appeals and the issues they give rise to that have been expressed by . . . Lord Hope.'

[44] *Finally, Lord Rodger of Earlsferry's approach*: in his opinion:

'[211] . . . although being employed is one of the keys which unlocks access to the rights and remedies conferred by the anti-discrimination Acts, to a considerable extent those Acts are actually concerned with discrimination in relation to the various kinds of opportunities that employees may enjoy in addition to any contractual rights . . . Since the anti-discrimination Acts are not tied to contractual rights and obligations, there is in principle no reason why the Acts should cease to have effect in respect of these continuing opportunities. I therefore have difficulty in seeing why Parliament, however cautious its approach, would ever have intended that it should be lawful for an employer to discriminate against a former employee in these respects. The idea, for instance, that Parliament intended that, after the 1976 Act was in force, an employer should still be able to bar a black former employee from entering the employer's social club while allowing white former employees to continue to enjoy the facility strikes me as untenable.

[212] The same applies to the provision of references . . . Again, I have the greatest difficulty in believing that Parliament could have intended that it should be unlawful for an employer to discriminate in giving or withholding references for existing employees but perfectly lawful for him to do so in the case of ex-employees. Parliament often has to draw lines . . . It is not hard to

see the reason for that. It is very much harder to see why Parliament would have chosen to draw an arbitrary line through the continuing effects of the employment relationship rather than leave the ban on discrimination to expire as and when those effects themselves were spent.'

[45] He dealt with the argument that the lack of any positive sign that Parliament considered the position of former employees shows that it did not in fact intend to make discrimination unlawful in their case. He said:

'[214] At first sight the argument may appear quite persuasive, on mature reflection less so. For the reasons I have given, I do not find the lack of discussion of the particular position of former employees significant. What would have been significant, not to say remarkable, would have been any hint that the government of the day, or Parliament itself, ever contemplated that it was to remain lawful for employers to discriminate against former employees on, say, racial grounds.'

[46] He acknowledged that 'employed' is a passive participle and, as such, is inherently ambiguous. The words have to be interpreted in the context of the provision as a whole. That led to the conclusion that:

'[215] . . . the wider considerations discussed above persuade me that the provisions should be interpreted as making it unlawful to discriminate against former employees as well as current employees if there is a substantive connection between the discriminatory conduct and the employment relationship. In other words the former employer must discriminate qua former employer. I find nothing in the other provisions on employment in the statutes to invalidate that interpretation . . .'

[47] In his opinion 'compelling support' for his interpretation was to be found in the Community law background.

[48] He concluded saying:

'[221] For these reasons, and for those given by Lord Nicholls of Birkenhead, I respectfully agree with his interpretation of the relevant provisions in the three Acts . . .'

AN ANALYSIS OF THESE SPEECHES

[49] The following conclusions can be drawn. First, as a matter of construction of the domestic provisions, only Lord Hope was driven to conclude that the ordinary meaning of the words in their context excluded acts of discrimination by the former employer against a former employee done after the contract of employment had terminated.

[50] Secondly, the reason for the majority concluding that an ex-employee was protected was that the context and purpose of the Act compelled that conclusion and that Parliament could not have intended such a limited application. To hold otherwise was variously described, with the paragraph number in parentheses: (1) by Lord Nicholls as making no sense to draw an arbitrary line ([37]), palpably absurd ([39]), artificially limited ([39]), not a sensible distinction ([39]), self-evidently capricious ([40]) and insufficiently purposive ([43]); (2) by Lord Hobhouse as anomalous ([137]), irrational and unnecessary ([137]), and a crude temporal test ([137]); (3) by Lord Scott as arbitrary rigidity

([169]); and (4) by Lord Rodger as an untenable argument ([211]), an arbitrary line ([212]) and a startling result ([216]).

[51] Only Lord Nicholls fully explored the purpose of the legislation. For him it was to protect the employee against discrimination by the employer in respect of all benefits arising from the employment relationship ([37]). Lord Hobhouse appeared to see the purpose to be not to discriminate in the employment field ([137]). For Lord Scott the purpose was to protect even the ex-employee from discrimination ([187]). What would have been significant, not to say remarkable, so far as Lord Rodger was concerned, would have been any hint that the government of the day or Parliament itself, ever contemplated that it was to remain lawful for employers to discriminate against former employees on, say, racial grounds ([214]). Lord Hope could not sufficiently discern the purpose to be able to rely on it ([88]).

[52] Only Lord Hope had to resort to the Equal Treatment Directive and *Coote*'s case to found his decision. Having come to his construction of the domestic legislation, Lord Hobhouse found that his views were 'reflected' in the views of the European Court of Justice ([143]), that decision being 'compelling' ([148]). For Lord Rodger the Community law background gave '[c]ompelling support' for his interpretation ([217]) and 'confirms the conclusion' ([220]). I do not understand either to be relying on the European jurisprudence to alter their view of the meaning of the Acts applying ordinary domestic principles of construction to the words in their context and with regard to their purpose. It simply bolstered their view. Lord Scott did not seem to find the decision of *Coote*'s case and the directive to be of any importance ([203]). Lord Nicholls reached his conclusion without regard to the impact of the directive or *Coote*'s case ([48]).

[53] The test to apply to decide whether or not relief should be afforded was variously described as follows: (1) for Lord Nicholls, the employment relationship triggered the employer's obligation not to discriminate in all the incidents of the employment relationship whenever they arise, provided the benefit in question arises between the employer or former employer as such and the employee or former employee as such ([44], [45]); (2) for Lord Hope the test was whether there is still a continuation of the employment relationship ([114], [115]); (3) for Lord Hobhouse the test was one of proximity: does the conduct complained about have a sufficient connection with the employment ([139]) or a substantive and proximate connection between the conduct complained of and the employment by the alleged discriminator ([140]); (4) for Lord Rodger, one must look for a substantive connection between the discriminatory conduct and the employment relationship, with the former employer discriminating qua former employer ([215]); (5) for Lord Scott, it depends on whether the relationship between employer and employee brought into existence when the employee entered into the employer's service is still in existence ([200]) or is still continuing notwithstanding the termination of the employment ([204]). In other words Lord Hope and Lord Scott seem to tie the application of the Act to the continuance of the employment relationship whereas the majority look for a connection (variously described) between the former employee as such and the former employer as such.

AN ANALYSIS OF *FADIPE*'S CASE

[54] Having just summarised *Rhys-Harper*'s case, let me summarise the reasoning in *Fadipe*'s case. The ratio of the case is contained in paras [25] and [27].

The purpose was identified to be protecting employees while they are still employed from suffering detriment ([25]). The literal meaning of 'in employment' governed the construction of the section ([25]). The section was not intended to confer a general right on an ex-employee to complain about any acts done by his ex-employer after the employment relationship has ceased ([27]). The reference to *Coote's* case (at [29]) was dealing with a quite different situation and so was obiter.

CAN *FADIPE'S* CASE STAND WITH *RHYS-HARPER'S* CASE?

[55] Mr Cavanagh QC for the respondent submits that since this claim was brought under the provisions of the 1996 Act, not the discrimination legislation, there can be no basis upon which it can be said that the two decisions are incompatible. The courts had merely decided that different outcomes should apply in different cases brought under different legislative schemes. Since the Court of Appeal has already decided that claims under the 1996 Act should be treated differently from victimisation claims, it is not open to us to decide to decide differently.

[56] For my part I agree with Mummery LJ that *Coote's* case was dealing with a 'quite different situation' where the employee was seeking to 'enforce compliance with the principle of equal treatment within the meaning of [the] Directive'. I agree with him that the case—

> 'is not authority for the wider proposition . . . that there was a general principle under which an employee who complained that he suffered from retaliation from his employer or former employer, having raised health and safety matters, was entitled to bring a claim under section 44 of the 1996 Act.'

Accordingly, in my judgment, the decision in *Coote's* case, is not itself a justification for imposing on the 1996 Act any strained interpretation of that legislation since the directive and *Coote's* case are applicable to a quite different situation and have nothing directly to do with whistle-blowing. But none of this matters. The first reason is because reference to *Coote's* case was obiter: it does not contain the ratio of *Fadipe's* case. Secondly, *Coote's* case was not necessary for the decision in *Rhys-Harper's* case, save in the opinion of Lord Hope. Its reasoning may have supported the views of Lord Hobhouse and Lord Rodger but their construction of the legislation stood without resort to it.

[57] It follows that the issue for us is whether the ratio of *Fadipe's* case contained in paras [25] and [27] can survive *Rhys-Harper's* case.

[58] Mr Cavanagh's primary submission in this regard is that *Rhys-Harper's* case can have no application at all to claims under the 1996 Act because different statutes are in play, different language falls for construction, and a different context in a different framework are involved. I am bound to say that I found this to be a powerful and compelling submission. But now I have retreated from that view for the reasons which follow.

[59] First the context is not different. Victimisation is established by showing inter alia the discrimination of the employee by 'subjecting him to any other detriment'—see s 6(2) of the 1975 Act and s 4(2) of the 1976 and 1995 Acts. Under s 47B of the 1996 Act a worker likewise has the right 'not to be subjected to any detriment'. Although the language and the framework might be slightly different, it seems to me that the four Acts are dealing with the same concept, namely, protecting the employee from detriment being done to him in retaliation

for his or her sex, race, disability or whistle-blowing. This is made explicit by the long title to the 1998 Act, which is, as I have already set out:

> 'An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action *in respect of victimisation* . . .' (My emphasis.)

All four Acts are, therefore, dealing with victimisation in one form or another. If the common theme is victimisation, it would be odd indeed if the same sort of act could be victimisation for one purpose, but not for the other.

[60] Secondly, the reasoning of the majority compels one to face the absurdity, irrationality, arbitrariness, call it what you will, of limiting the victimisation to acts during the existence of the employment contract and not extending it to events after termination. As Lord Nicholls said, no sensible distinction can be drawn between giving a reference the day before employment ends and giving a reference the day after (see [39]), or as Lord Rodger would say, one must have the greatest difficulty in believing that Parliament could have intended that it should be unlawful for an employer to discriminate in giving or withholding references for existing employees but perfectly lawful for him to do so in the case of ex-employees (see [212]).

[61] Mummery LJ simply did not confront these difficulties and if they were the reason for giving the words in the discrimination Acts a wider than literal meaning, they ought consistently to have been applied widely in *Fadipe*'s case (see [9]).

[62] Moreover in holding as he did (at [27]) that the section he was dealing with was not intended to confer a general right on an ex-employee to complain about acts done 'after the *employment relationship* had ceased', Mummery LJ was clearly confining the 'employment relationship' to the duration of the contract and that simply cannot stand with the wider scope to an employment relationship which was given to the concept by their Lordships.

CONCLUSION

[63] Not without hesitation and very mindful of Mummery LJ's vast experience in this field compared with mine, I am now driven to conclude that *Fadipe*'s case cannot stand with *Rhys-Harper*'s case and despite the different statutes involved I am now of the view that the reasoning which drove the Court of Appeal to its conclusion in *Fadipe*'s case is inconsistent with the approach of the House of Lords in *Rhys-Harper*'s case. It follows that we are free to depart from *Fadipe*'s case if we conclude it right to do so.

DOES SECTION 47B OF THE 1996 ACT GIVE A RIGHT NOT TO BE SUBJECTED TO DETRIMENT AFTER THE CONTRACT OF EMPLOYMENT HAS TERMINATED?

[64] Since s 47B falls within Pt V of the 1996 Act, which Part is entitled 'Protection from suffering detriment *in employment*' (my emphasis), there is obvious force in the argument which won the day in *Fadipe* that the detriment must be suffered whilst in employment, ie whilst employed and thus before the contract of employment is terminated. It belies the literal meaning of the words 'suffering detriment in employment' to give it the meaning 'suffering detriment when in employment as well as when not in employment'. But in the light of the elucidation of these concepts given by *Rhys-Harper*'s case, 'in employment' can also be understood to mean 'in the employment relationship' and that can

survive the termination of the contract itself. Given those two possible meanings the phrase is ambiguous.

[65] Section 47B(3) gives 'worker' the extended meaning provided by s 43K but none of the circumstances there defined apply in this case. We must, therefore, fall back upon the general definition in s 230 which covers the whole spectrum of the 1996 Act. Thus 'worker' means not only an individual who currently works under a contract of employment but one who formerly worked under such a contract. True it is that such a provision serves the purpose of giving a former employee the right to bring his claim under s 48 or a claim for unfair dismissal and so forth, but it does not follow that that is its *only* purpose. Were it so limited, one would have expected the point to have been more clearly made in a provision explaining that a right accruing during the currency of a contract of employment can be enforced by the victim after the contract is at an end. Drafted as it is, it is an omnibus definition of 'employee, worker etc' and it is accordingly more likely that the legislature intended the purpose to be served and the meaning to be ascribed to take colour from the context of the section in which 'worker' appears. So far as s 47B is concerned, the worker in its ordinary meaning is just as naturally to be construed as including a former employee. At least there is nothing clearly pointing away from that meaning and so once again the section can be seen to be ambiguous.

[66] That leads one to ask the *Rhys-Harper* question: can Parliament seriously have intended to afford the whistle-blower protection only in respect of acts done in retaliation while the contract subsists and not to protect him from detriment suffered after his employment has terminated? Is such a distinction not palpably absurd and self-evidently capricious?

[67] In striving to avert the affirmative answer, the respondent points out that the rights not to suffer detriment conferred by Pt V manifestly relate to the retaliatory action by the employer being taken because of something done in the course of the employment, for example attending for jury service, taking maternity leave etc. That *may be* a good argument for saying that the action of the employee which provokes the retaliation must be some activity during the currency of the employment but it does not follow that the retaliation must likewise be so confined. There is no sensible reason for so confining it. (I emphasise '*may be* a good argument' because I would not want it to be thought that I am excluding a remedy for blowing the whistle after the contract of employment has terminated: this is an issue which does not arise on the facts of this case.)

[68] If one seeks for the underlying purpose of s 47B one has to start with the Act which introduced the measure. The public interest, which led to the demand for this Act to protect individuals who make certain disclosures of information in the public interest and to give them an action in respect of that victimisation, would surely be sold short by allowing the former employer to victimise his former employee with impunity. It simply makes no sense at all to protect the current employee but not the former employee, especially since the frequent response of the embittered exposed employer may well be dismissal and a determination to make life impossible for the nasty little sneak for as long thereafter as he can. If it is in the public interest to blow the whistle, and the Act shows that it is, then he who blows the whistle should be protected when he becomes victimised for doing so, whenever the retribution is exacted.

THE RESULT OF THIS APPEAL

[69] In my judgment although both the employment tribunal and the Employment Appeal Tribunal were bound faithfully to follow *Fadipe*'s case, this court is not obliged to do so. In the light of *Rhys-Harper*'s case I would allow the appeal and send the matter back to the employment tribunal for its determination. We have not heard argument on the facts or whether those facts would lead to a remedy being afforded to the appellant. Although I have sought to identify the various ways in which the tests have been expressed by the House of Lords, I do not consider it right or proper for us at this stage, and in the absence of argument about it, to spell out exactly what test their Lordships have laid down. That must await another day. Sorry though I am to be so unhelpful, the employment tribunal must take its course and do its best to find the right test. That said I earnestly hope that a sense of realism is brought to bear in the analysis of the issues so that unnecessary costs are not wasted in pursing this litigation with unrelenting vigour until it comes back to us some years hence.

MAURICE KAY LJ.

[70] I agree.

WILSON LJ.

[71] I also agree.

Appeal allowed.

Kate O'Hanlon Barrister.

Walley v Stoke-on-Trent City Council

[2006] EWCA Civ 1137

COURT OF APPEAL, CIVIL DIVISION

BROOKE, SMITH AND WALL LJJ

4, 31 JULY 2006

Pleading – Striking out – Defence – Defendant making pre-action admission – Defendant withdrawing pre-action admission and filing defence – Claimant applying to strike out defence as abuse of process or likely to obstruct just disposal of proceedings – Applicable test – CPR 3.4(2).

The claimant was employed by the defendant. He suffered personal injury at work and subsequently instructed solicitors. The defendant referred the case to its loss adjustors. Y, an employee of the loss adjustors, made an admission of liability. The loss adjustors later realised that Y's work was unsatisfactory. He was dismissed. The claimant's file was reviewed and the solicitors for the defendant wrote to rescind the admission of liability. The claimant's solicitors issued proceedings and the defendant filed a defence in which it denied liability. Under CPR 3.4(2)[a] the court had power to strike out a statement of case if it appeared to the court that the statement of case was an abuse of the court's process or was otherwise likely to obstruct the just disposal of the proceedings. The claimant applied under CPR 3.4(2) to strike out the defence. The defendant cross-applied for permission to resile from its earlier admission of liability. On the hearing of the application the deputy district judge was referred only to CPR 14.1(5)[b] under which the court could allow a party to amend or withdraw an admission. He held that the defendant should be held to its admission and granted the claimant's application. The defendant appealed and the circuit judge dismissed the appeal. Subsequently, a decision of the Court of Appeal established that CPR Pt 14 applied only to admissions made in the course of proceedings and not to pre-action admissions, for which a defendant did not need the permission of the court to withdraw. The defendant accordingly appealed. It was common ground that the circuit judge's decision could not be upheld and it was accepted that an application under CPR 3.4(2) was the correct way to bring the matter before the court.

Held – For a claimant to show that the withdrawal of an admission would amount to an abuse of the process of the court within CPR 3.4(2) it would usually be necessary to show that the defendant had acted in bad faith and in order to show that the withdrawal of a pre-action admission was likely to obstruct the just disposal of the case within CPR 3.4(2) it would usually be necessary for the claimant to show that he would suffer some prejudice which would affect the fairness of the trial. In the instant case there had been no bad faith and, despite his disappointment, the claimant had suffered no prejudice. Accordingly,

a CPR 3.4 provides, so far as material: '. . . The court may strike out a statement of case if it appears to the court . . . (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings . . .'

b CPR 14.5, so far as material, provides: '. . . The court may allow a party to amend or withdraw an admission . . .'

the claimant could not demonstrate that the defendant's withdrawal of the pre-trial admission was either an abuse of the process of the court or was otherwise likely to obstruct the just disposal of the case. The appeal would therefore be allowed (see [34]–[39], below).

Sowerby v Charlton [2006] 1 WLR 568 applied.

Per curiam. There would be great force in giving the status of an admission of liability in response to a pre-action protocol letter before action in a multi-track claim more powerful effect than it at present enjoys (see [37], [38], [45], below).

Notes

For the power to strike out a statement of case, see 37 *Halsbury's Laws* (4th edn reissue) para 917.

Cases referred to in judgments

Braybrook v Basildon and Thurrock University NHS Trust [2004] EWHC 3352 (QB).
Burden v Harrods Ltd [2005] EWCA Civ 606.
Flaviis v Pauley (t/a Banjax Bike Hire) [2002] EWHC 2886 (QB), [2002] All ER (D) 436 (Oct).
Gale v Superdrug Stores plc [1996] 3 All ER 468, [1996] 1 WLR 1089, CA.
Sowerby v Charlton [2005] EWCA Civ 1610, [2006] 1 WLR 568.
Standerwick v Royal Ordnance plc [1995] CA Transcript 1888.

Appeal

Stoke-on-Trent City Council appealed with permission and extension of time given by Smith LJ from the decision of Judge Rubery on 9 August 2005 sitting in the Stoke-on-Trent County Court dismissing its appeal from the decision of Deputy District Judge Evans on 24 February 2005 granting the application of John Walley to strike out the main part of the council's defence in proceedings brought by Mr Walley against the council for damages for personal injury. The facts are set out in the judgment of Smith LJ.

Neil Block QC and *David Eccles* (instructed by *Grindleys*, Stoke-on-Trent) for the council.

Andrew Hogarth QC and *Anthony Johnston* (instructed by *Beswicks*, Stoke-on-Trent) for Mr Walley.

Cur adv vult

31 July 2006. The following judgments were delivered.

SMITH LJ (giving the first judgment at the invitation of Brooke LJ).

INTRODUCTION

[1] This appeal raised the following question: does the court have jurisdiction to enter judgment for a claimant in reliance on an admission made by a defendant before the commencement of the action, which the defendant has subsequently withdrawn. The same point was considered by another division of the Court of Appeal (Sir Anthony Clarke MR, Brooke and May LJJ) in *Sowerby v Charlton* [2005] EWCA Civ 1610, [2006] 1 WLR 568. In *Sowerby*'s case, the court held that CPR 14.1(5), which provides that a court may give permission for a party to withdraw an admission, applied only to admissions made in the course of

proceedings and not to pre-action admissions. The Court of Appeal said that the status of a pre-action admission was that it could be used only as evidence either in interlocutory proceedings or at trial but could not, of itself, found an application for summary judgment. The decision in *Sowerby*'s case is binding upon us.

[2] Following the publication of the report of that decision, this court received three applications for permission to appeal decisions of circuit judges who, before *Sowerby*'s case, had each assumed (with counsel's encouragement) that CPR 14.1(5) enabled the court to refuse to allow a defendant to withdraw a pre-action admission and to enter judgment for the claimant.

[3] In each case, permission to appeal was granted. It was apparent from the notices of appeal that counsel considered some further guidance from this court would be welcomed in cases where pre-action admissions were later withdrawn. All three appeals were listed to be heard together. However, two of the appeals settled. Only the appeal in Walley came before the court.

THE FACTS

[4] Mr Walley was employed as a refuse collector by Stoke-on-Trent City Council (the council). On 28 August 2001, he injured his knee while descending from the passenger seat of a refuse wagon. He consulted solicitors who wrote to the council alleging that the presence of plastic refuse bags within the foot well of the vehicle had caused him to miss the step and fall to the ground.

[5] The council referred the case to their loss adjusters, who initially denied liability. However, on 13 June 2003, after considering a statement by the driver of the wagon, Mr Yates, an employee of the loss adjusters, wrote to say that 'liability would not be in issue in this case'. Mr Yates had authority to make that admission. However, during the ensuing months, the loss adjusters realised that Mr Yates's work was unsatisfactory and he was dismissed. Thereafter, Mr Walley's file (among others) was reviewed and, on 12 May 2004, solicitors instructed for the council wrote to rescind the admission of liability.

THE PROCEEDINGS

[6] Mr Walley's solicitors issued proceedings. The council filed a defence in which they denied liability. They alleged that Mr Walley had injured himself by jumping from the vehicle rather than climbing down. The plastic bags were stored behind the passenger seat rather than in the foot well and, in any event, there were not many of them. The council alleged contributory negligence. Shortly after the defence was filed, the case was allocated to the multi-track. Soon after that, Mr Walley applied under CPR 3.4(2) to strike out the defence on the ground that it was an abuse of the process of the court or was otherwise likely to obstruct the just disposal of the proceedings. The council cross-applied for permission to resile from their earlier admission of liability.

THE DEPUTY DISTRICT JUDGE'S DECISION

[7] The application came before Deputy District Judge Evans on 24 February 2005. It appears from the transcript of his judgment that the deputy district judge was referred not to CPR 3.4(2) but to CPR Pt 14, which deals with admissions and, in particular to CPR 14.1(5) which provides that the court may allow a party to amend or withdraw an admission. The judge was referred to and followed a line of authority including *Gale v Superdrug Stores plc* [1996] 3 All ER 468, [1996] 1 WLR 1089 and *Flaviis v Pauley (t/a Banjax Bike Hire)* [2002] EWHC 2886 (QB), [2002] All ER (D) 436 (Oct).

[8] In *Gale*'s case, the defendant had admitted liability before action but, when proceedings were begun shortly before the limitation period expired, it filed a defence denying liability. The district judge granted the plaintiff's application to strike out the defence. The judge dismissed the defendant's appeal, holding that the defendant's withdrawal of its admission had caused the plaintiff prejudice by reason of delay and disappointment. The Court of Appeal allowed the defendant's further appeal, saying that, when determining whether to strike out a defence, following the withdrawal of a pre-action admission, the court had to balance the prejudice which the defendant would suffer if deprived of his 'prima facie right' to resile, against the prejudice the plaintiff would suffer if the admission were withdrawn. The court had a general discretion and should take all the circumstances of the case into account. It was for the plaintiff to prove any prejudice she claimed to have suffered. There was no evidence of any prejudice to the plaintiff other than disappointment and, accordingly, the defence should not be struck out.

[9] The existence of the broad discretionary power to hold a defendant to a pre-action admission or to allow him to resile from it had been assumed in High Court proceedings for many years before *Gale*'s case. The power was supposedly based (somewhat doubtfully in my view) upon the effect of three nineteenth century cases, cited in many successive editions of the *Supreme Court Practice*. Although those cases were doubtful authority for the proposition in support of which they were cited, the principle was accepted by the Court of Appeal (Roch and Swinton Thomas LJJ) in *Standerwick v Royal Ordnance plc* [1995] CA Transcript 1888. In that case the court had to consider the scope of RSC Ord 27 which governed 'Admissions' and in particular r 3 which provided:

> 'Where admissions of fact or of part of a case are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties and the Court may give such judgment, or make such order, on the application as it thinks just.'

[10] Roch LJ, with whom Swinton Thomas LJ agreed, held that RSC Ord 27, r 3 could be applied to a pre-action admission provided that, by the time the power came to be exercised, proceedings had begun and the person who had made the admission was a party. The exercise of discretion should take all the circumstances of the case into account.

[11] In *Gale*'s case, counsel on both sides agreed that, although the County Court Rules did not contain a provision equivalent to RSC Ord 27, r 3, the court could and should apply the same principles as would have been applied had the case been brought in the High Court. As I have already said, the court exercised its discretion to permit the defendant to resile from its admission.

[12] Following the introduction of the CPR, CPR Pt 14 replaced RSC Ord 27. It was in different terms. The provision which appeared to be analogous to RSC Ord 27, r 3 was CPR 14.1(5), which, as I have said, provides simply that the court may allow a party to amend or withdraw an admission. It is apparent from those words that CPR 14.1(5) permits the court to exercise a broad discretion, but, of course, only in cases which fall within the scope of the rule.

[13] The deputy district judge was referred to a post-CPR case, *Flaviis v Pawley*, in which Nelson J, purporting to act under the power in CPR 14.1(5) had exercised a general discretion and had allowed the defendant to resile from a

pre-action admission of liability. However, it is apparent from the transcript that counsel had agreed that he should approach the case in that way and no one had suggested to him that CPR 14.1(5) applied only to admissions made in the course of the proceedings.

[14] Unsurprisingly, therefore, in the present case, the deputy district judge was satisfied that this was the right approach. Everyone seems to have lost sight of the fact that the claimant's application had been made under CPR 3.4.

[15] The deputy district judge directed himself that he must ask first whether the council's withdrawal of their admission had been made in good faith and whether it would be appropriate to permit the withdrawal. If it was or might be appropriate, he had to consider two further questions. These were whether the council had a good prospect of defending the claim and finally what prejudice would be caused to the parties if he allowed the withdrawal of the admission; he had to carry out a balancing exercise.

[16] The district judge then considered whether the admission was binding on the council. He referred to CPR 14.1(5). He reminded himself that there was no admission on the pleadings and he was dealing with a pre-action admission. He then referred to the pre-action protocol for personal injury actions, which, after setting out the requirements for the claimant's letter of claim and the defendant's response to it, provides at para 3.9: 'Where liability is admitted, the presumption is that the defendant will be bound by this admission for all claims with a total of up to £15,000.'

[17] The deputy district judge noted that, in fast-track cases, where the objective was to keep costs down and deal with cases quickly and efficiently, it was appropriate for the court to be stricter with a party who had made an admission. He considered that greater flexibility might be allowed in a multi-track case.

[18] The deputy district judge then considered Mr Yates's position when he made the admission. He had had the opportunity to investigate the case adequately and he had authority to make the admission. The judge regarded the admission as one which was not so far out of the ordinary that no reasonable person would have made it. He considered that the council ought to be bound by it. Strictly speaking therefore, he said, he did not need to make any findings on the other issues. However, he expressed the view that the council would have a reasonable prospect of success if allowed to defend. Also, he did not consider that the claimant would suffer any evidential prejudice if the admission were withdrawn. There would be some disappointment but that was all. However, because he had held that the council should be held to its admission, the deputy district judge granted Mr Walley's application to strike out the main part of the defence. He entered judgment with damages to be assessed.

THE DECISION OF THE CIRCUIT JUDGE

[19] The council appealed and the appeal came before Judge Rubery on 9 August 2005. Both parties were represented by counsel. The same line of authority was cited to the judge as had been cited to the deputy district judge. Once again, everyone seems to have lost sight of the fact that the original application had been made under CPR 3.4. The thrust of the submission on behalf of the council was that the district judge had not correctly applied the test in *Flaviis v Pauley*. The judge was plainly referred to CPR 14.1(5), as that was to form the starting point for the reasoning in his judgment. The judge considered that CPR 14.1(5) allowed him a broad discretion to hold the council to their

admission or to allow withdrawal. He then considered the facts very briefly, noted that Mr Yates had had time and opportunity to investigate the case and had made a considered decision to admit liability, which decision was within his authority. He held that, in those circumstances, the council should be bound by their admission. He agreed with the district judge that, if permission to resile were to be granted, the council would have a reasonable prospect of success. He disagreed with the district judge in assessing the importance of the disappointment Mr Walley would feel if the admission were withdrawn and he were then to face a trial on liability. He considered that that disappointment was a matter of some significance. However, he maintained his view that the council should be bound by their admission and dismissed the appeal.

SOWERBY v CHARLTON

[20] The council did not immediately apply for permission to appeal Judge Rubery's decision. One can readily see why. It did not appear that any point of principle was at stake. However, in December 2005, the decision of this court in *Sowerby v Charlton* [2006] 1 WLR 568 was promulgated. It was reported in March 2006. It put a new complexion on the case of Mr Walley.

[21] In *Sowerby*'s case, the claimant fell over the edge of a flight of stone steps leading from the pavement to the front door of a residential property. One side of the steps was unguarded. The claimant fell eight feet and suffered severe injury. Following a letter of claim, the defendant admitted primary liability, leaving contributory negligence in issue. After proceedings had begun, the defendant sought to put primary liability in issue. On application by the claimant, the master struck out part of the defence and entered judgment, directing that contributory negligence should be tried as a preliminary issue. On appeal, the judge dismissed the appeal. He held that CPR 14.1 applied to pre-action admissions and exercised his discretion as the master had done.

[22] On appeal to the Court of Appeal, it was held that CPR Pt 14 applied only to admissions made in the course of proceedings. A defendant who wished to withdraw a pre-action admission did not need the permission of the court to do so. It might have been expected that that would have resulted in the appeal being allowed. However, the Court of Appeal took the view that, on the particular facts of the case, it was inconceivable that a judge would not find the defendant at least partly responsible for the accident. In those circumstances, summary judgment should be entered on the issue of primary liability. In the event, the appeal was dismissed.

[23] The court added that the status of a pre-action admission was evidential only; it might be used as such in either interlocutory proceedings or at trial. The court also approved the guidance given by Sumner J in *Braybrook v Basildon and Thurrock University NHS Trust* [2004] EWHC 3352 (QB).

[24] In the light of the decision in *Sowerby*'s case, the council decided to seek permission to appeal the decision of Judge Rubery. I granted permission to appeal on a paper application and also extended time. I had some hesitation in so doing as the application was five months late. However, the council had acted promptly after the judgment in *Sowerby*'s case had been reported. The respondent did not seek to set aside the extension of time.

[25] We have now been told that the judgment in *Sowerby*'s case caused some consternation among personal injury practitioners. It appeared to some that defendants were now free to withdraw pre-action admissions and there would be nothing that a claimant could do about it. The right to enter summary judgment

would only apply if the facts were sufficiently clear; that was not necessarily so in every case in which a defendant made a pre-action admission. It was felt by claimants' solicitors that the evidential use to which an admission might be put was very limited. Such was the consternation about these matters that the Civil Procedure Rule Committee was asked to consider whether any amendment of the CPR might be appropriate.

THE APPEAL TO THIS COURT

[26] At the hearing of the appeal, it was common ground that, in the light of *Sowerby*'s case, Judge Rubery's decision could not be upheld. It had been based upon the erroneous assumption that CPR 14.1(5) provided a discretionary power which permitted judges either to hold a defendant to a pre-action admission or to allow him to withdraw it.

[27] Mr Neil Block QC who appeared before this court for the appellant/defendant (but did not appear below) contended that the position was now that a defendant was entitled as of right to withdraw a pre-action admission. Its status was evidential only. This was not a case such as *Sowerby*'s case where the facts were such that summary judgment should be entered. He submitted that the appeal should be allowed and the claimant's action should be remitted to the county court for a hearing on the issues of liability.

[28] In the course of argument, the court was referred to the pre-action protocol, which stated, as I have said, that there was a presumption in a fast-track case that a defendant would be held to a pre-action admission. Apparently that would not be so in a multi-track case. There was some discussion as to how the court was to become seized of the question of what was the status and effect of such an admission. Brooke LJ suggested that the right approach would be for the claimant to apply to strike out the defence or part of it under CPR 3.4. This possibility had not apparently been discussed in *Sowerby*'s case.

[29] Mr Andrew Hogarth QC for the respondent/claimant (who appeared before us but not below) sought to uphold the judge's decision on other grounds. First, he submitted that the court had inherent jurisdiction to hear an application to strike out a defence which entailed the withdrawal of a pre-action admission. The earlier admission, he submitted, created an estoppel. Mr Block's riposte to that was that there was no room for the inherent jurisdiction in the field of civil procedure, which was governed by a comprehensive set of rules.

[30] Alternatively, Mr Hogarth submitted that the admission of liability gave rise to a binding agreement. The case of *Burden v Harrods Ltd* [2005] EWCA Civ 606 was authority for the proposition that a pre-action agreement between the parties that liability should be apportioned 75% to 25% was a binding compromise. It was submitted that there was no reason why an admission of 100% liability should not also be binding. Mr Block said that there was every reason why it should not. If liability were compromised, both sides had given consideration but if liability were admitted the claimant had given no consideration.

[31] In his skeleton argument, Mr Hogarth had mentioned the court's power under CPR 3.4(2) to strike out the defence or part of it as an abuse of process or as being otherwise likely to obstruct the just disposal of the case. This was certainly not his main submission as he must have recognised that that rule presented a much higher threshold for the claimant to cross than would be the case if the court were exercising a broad discretion under CPR 14.1(5). However, after some discussion between the bench and bar, it was accepted on all sides that

an application under that rule was the correct way of bringing the matter before the court. It was agreed that the court should determine the appeal by the application of that rule. At that stage, neither counsel was aware that Mr Walley's original application had in fact been made under that rule. That was only discovered at a very late stage in the hearing. However, in the absence of that information it was agreed that no technical objection would be raised.

[32] Mr Block submitted that the respondent could not come anywhere near crossing the high threshold. In order to rely on abuse of process, it would usually be necessary for the claimant to show that the defendant had acted in bad faith. Bad faith was not suggested in this case. In order to show that withdrawal of the admission would be likely to obstruct the just disposal of the proceedings, the claimant would have to show that he would suffer real prejudice if the admission were withdrawn. Here, both the district judge and the circuit judge had identified disappointment as the only prejudice the claimant would suffer if the admission were withdrawn. There was no evidential prejudice. Mr Block submitted that disappointment could never obstruct the just disposal of the proceedings.

[33] Mr Hogarth submitted that the prejudice here was such that the just disposal of the case would be obstructed if the admission were withdrawn. He drew attention to various matters which had been canvassed before the deputy district judge. Almost a year had passed between the admission of liability and the letter purporting to withdraw it. During that time, the claimant's solicitor had assumed that liability was not in issue and had taken no steps to prepare for a hearing on liability. Further time had elapsed since then and yet more would pass before the action could be brought to trial. However, he had to accept that it could not be said that any witness evidence had been lost during this period. Nor had any documents been destroyed. The only prejudice he could demonstrate was disappointment. However, he submitted that this was of significance, as Judge Rubery had held. Also, it was submitted that Mr Walley's position in respect of funding had been affected. The evidence of what funding arrangements had been made was not clear. However, it appeared to us that the cost of obtaining after-the-event insurance might amount to a form of prejudice. With the benefit of a pre-action admission of liability, it might well be reasonable for a claimant not to take out costs insurance. If the admission were withdrawn, insurance would be necessary and the premium might be substantial. Mr Hogarth invited the court to say that disappointment, the uncertainty of his position and potential funding difficulties amounted to sufficient prejudice to drive us to the conclusion that a withdrawal of liability would obstruct the just disposal of the case.

[34] On this issue, I accept the submissions of Mr Block. I agree that, for a claimant to show that the withdrawal of an admission would amount to an abuse of the process of the court, it will usually be necessary to show that the defendant has acted in bad faith. That could not be said here. There was before the court a statement from the solicitor for the council providing a full explanation of why it had been decided to withdraw the admission made earlier by Mr Yates. The loss adjusters who employed Mr Yates had concluded that he was incompetent and had made a thoroughly bad decision. The history suggested that the loss adjusters did not manage their staff as well as they should, but it could not be said that they had acted in bad faith.

[35] I also accept that, in order to show that the withdrawal of a pre-action admission is likely to obstruct the just disposal of the case, it will usually be

necessary for the claimant to show that he will suffer some prejudice which will affect the fairness of the trial. Examples of this kind of prejudice were discussed during the hearing. In the light of an admission, the claimant might agree to the destruction of an item of real evidence; he might agree that an expert's inspection is not necessary and it might no longer be possible for one to take place. Witnesses might have died or lost contact. The possibilities are legion. Funding difficulties might also give rise to real prejudice, if the evidence were to show that the claimant had changed his position in reliance on the pre-action admission. However, in this case, there was no evidence that that was the case. Such evidence should have been put in at the outset, as it would have been relevant whether the judges below were exercising a general discretion under CPR Pt 14 or were applying the more restricted test under CPR 3.4. Speaking for myself, I would be prepared to take judicial notice of the fact that after-the-event insurance is more expensive when entered into after a pleaded denial of liability than if taken out at an early stage. However, after-the-event insurance is available to claimants without the need to pay the premium in advance. Accordingly, I do not think that any effect on the funding of the withdrawal of the admission would be likely to obstruct the fair disposal of the case. There remains Mr Walley's disappointment. I do not underestimate the severity of this; the loss of an admission of full liability must create a sense of uncertainty, turmoil, even despair. However, I do not think that those feelings could ever be said to obstruct the just disposal of the case.

[36] In my judgment therefore, the respondent/claimant cannot demonstrate that the defendants' withdrawal of their pre-trial admission is either an abuse of the process of the court or is otherwise likely to obstruct the just disposal of the case. That being so, I would allow the appeal and direct that the case be remitted to the county court for case management with a view to arranging a hearing as soon as practicable.

[37] Since writing this judgment, I have read in draft the judgment of Brooke LJ. I agree with his observations about the desirability of giving the status of a pre-action admission more powerful effect than it presently enjoys.

WALL LJ.

[38] I agree.

BROOKE LJ.

[39] I also agree.

[40] It appears to me that the issues highlighted both in this judgment and in the earlier judgment of this court in *Sowerby v Charlton* [2005] EWCA Civ 1610, [2006] 1 WLR 568 warrant the early attention of the Civil Justice Council.

[41] We are concerned in these cases with the effect of an admission of liability made by or on behalf of one of the parties before legal proceedings are issued. Such an admission would always have had evidential value for the party to whom it was made. In the former procedural regime it might well have led to the entry of summary judgment under RSC Ord 14 or leave to defend being granted under stringent conditions.

[42] In neither of these two cases, however, have we been shown any judgment of any court (prior to the unreported judgment of this court in *Standerwick v Royal Ordnance plc* [1995] CA Transcript 1888) where it was held that such an admission could be the precursor, without more, to judgment on liability under RSC Ord 27, r 3.

[43] The meaning of this rule and its predecessor was discussed from time to time in the context of Chancery cases where a plaintiff was inviting the court to freeze money on an interlocutory basis pending the trial of an action or matter. In those cases the defendant was held to have made a relevant admission of fact 'either by his pleadings or otherwise', and it did not matter whether the admission (for instance that he had received money out of a testator's estate) had been made before or after the action was brought: either way, it was just that the money should be frozen pending a proper trial on the merits.

[44] The editors of the White Book (*Civil Procedure*) appear to have been unsuccessful in explaining the limited effect of these decisions in their note 27/3/2 (for instance in the 1976 White Book, a copy of which we were shown), and it is this that may have led to the judgment in *Standerwick*'s case, which would, of course, have remained binding on this court under the old procedural regime.

[45] Now that we have made the position clear as it stands under the CPR regime, there would, in my judgment, be great force in giving the status of an admission of liability in response to a pre-action protocol letter before action in a multi-track claim more powerful effect than it at present enjoys. Now that such a valuable pre-action procedure has been introduced in advance of the formalities of litigation procedure, anything that lends uncertainty to the value of a pre-action admission of liability (given in these circumstances) appears to me to run against the grain of the overriding objective, and be likely to lead to avoidable delay, expense and worry.

Appeal allowed.

Rakesh Rajani Barrister.

Pascoe v First Secretary of State (Urban Regeneration Agency and another, interested parties)

[2006] EWHC 2356 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

FORBES J

24–27 JULY 2006, 27 SEPTEMBER 2006

Compulsory purchase – Compulsory purchase order – Validity – Regeneration of under-used or ineffectively used land situated in urban area – Right to respect for private and family life – Protection of property – Order made on basis land predominantly under-used or ineffectively used – Whether order valid – Whether order breaching right to respect for private and family life and right to protection of property – Leasehold Reform, Housing and Urban Development Act 1993, s 159(2)(b) – Human Rights Act 1998, s 6(1), Sch 1, Pt I, art 8, Pt II, art 1.

The main object of the Urban Regeneration Agency was to secure the regeneration of land including, as set out in s 159(2)(b)[a] of the Leasehold Reform, Housing and Urban Redevelopment Act 1993, land which was situated in an urban area and which was under-used or ineffectively used. The agency made a compulsory purchase order which covered the area in which the claimant owned a house and lived (the order land). A public inquiry was held and an inspector issued a report. The inspector considered that the evidence established that the order land was predominantly under-used or ineffectively used urban land. He considered that the interference by the order with rights to respect for private and family life and to protection of property under art 8[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and art 1[c] of the First Protocol to the convention were justified. He recommended that the defendant Secretary of State confirm the order, which the Secretary of State did. The claimant issued proceedings questioning the validity of the order. She contended, inter alia, (i) that the Secretary of State had misdirected himself by deciding that the criteria in s 159(2) of the 1993 Act were satisfied in respect of all the parcels of land in the area covered by the order provided that there was evidence that a predominant number came within the criteria and by deciding that there was no need to establish that specific parcels of land came within the criteria; and (ii) that the interference with her rights under art 8 of the convention and art 1 of the First Protocol was not justified and breached s 6(1)[d] of the 1998 Act under which it was unlawful for a public authority to act in a way which was incompatible with a convention right.

a Section 159, so far as material, is set out at [13], below

b Article 8 is set out at [51], below

c Article 1 is set out at [52], below

d Section 6, so far as material, provides: '(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right . . .'

Held – (1) In making an order relying on s 159(2)(b) of the 1993 Act the inspector and the Secretary of State were required to reach a view as to whether the order land, when considered as a unified and coherent whole, fell within the description 'land which is situated in an urban area and which is under-used or ineffectively used'. There was no requirement to consider each of the units that went to make up the whole area and come to a conclusion with regard to each such unit as to whether it was under-used or ineffectively used. In the instant case the inspector's conclusion, with which the Secretary of State had agreed, had been that the order land, considered as a whole, was 'predominantly' under-used or ineffectively used. They had therefore fallen into error by engaging in an impermissible dilution of the statutory requirement that had to be satisfied before the agency was empowered to acquire the land in question compulsorily in order to secure its regeneration (see [34]–[36], [39]–[44], below).

(2) As the defendant had erred in confirming the order the interference which it constituted with the claimant's rights under art 8 of the convention and art 1 of the First Protocol, in that it deprived her of her home, was not in accordance with law and therefore was not justified and constituted a breach of s 6(1) of the 1998 Act. Accordingly, the application would be allowed (see [54], [112], below).

Notes

For the objects and general powers of the Urban Regeneration Agency, see 47 *Halsbury's Laws* (4th edn) (2001 reissue) paras 846, 847, and for the right to respect for private life, and the right to property see 8(2) *Halsbury's Laws* (4th edn reissue) paras 150, 165.

For the Leasehold Reform, Housing and Urban Development Act 1993, s 159, see 46 *Halsbury's Statutes* (4th edn) (2004 reissue) 1095.

For the Human Rights Act 1998, s 6, Sch 1, Pt I, art 8, Pt II, art 1, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 707, 712.

Cases referred to in judgment

Airey v Ireland (1979) 2 EHRR 305, ECt HR.

Andronicou v Cyprus (1997) 3 BHRC 389, ECt HR.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Baker v First Secretary of State [2003] EWHC 2511 (Admin), [2003] All ER (D) 234 (Oct).

Berkeley v Secretary of State for the Environment [2000] 3 All ER 897, [2001] 2 AC 603, [2000] 3 WLR 420, HL.

Blecic v Croatia (2005) 41 EHRR 185, ECt HR.

Chapman v UK (2001) 10 BHRC 48, ECt HR.

de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, [1998] 3 WLR 675, PC.

Dombo Beheer BV v Netherlands (1993) 18 EHRR 213, ECt HR.

Dudgeon v UK (1981) 4 EHRR 149, ECt HR.

Handyside v UK (1976) 1 EHRR 737, [1976] ECHR 5493/72, ECt HR.

Howard v UK (1987) 52 DR 198, E Com HR.

Howard v UK App No 10825/84 (18 October 1985, unreported), E Com HR.

James v UK (1986) 8 EHRR 123, ECt HR.

London Borough of Bexley v Secretary of State for the Environment, Transport and the Regions, Sainsbury's Supermarkets Ltd v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 323, [2001] All ER (D) 152 (Apr).

Lough v First Secretary of State [2004] EWCA Civ 905, [2004] 1 WLR 2557.
McVicar v UK (2002) 12 BHRC 567, ECt HR.
Meyrick Estate Management Ltd v Secretary of State for Environment, Food and Rural Affairs [2005] EWHC 2618 (Admin), [2005] 45 EG 169 (CS).
R v Secretary of State for the Environment, Transport and the Regions, ex p Challenger [2001] Env LR 12.
R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389.
R (on the application of Clays Lane Housing Co-operative Ltd) v Housing Corp [2004] EWCA Civ 1658, [2005] 1 WLR 2229.
R (on the application of Daly) v Secretary of State for the Home Dept [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.
R (on the application of Fisher) v English Nature [2004] EWCA Civ 663, [2004] 4 All ER 861, [2005] 1 WLR 147; *affg* [2003] EWHC 1599 (Admin), [2003] 4 All ER 366, [2004] 1 WLR 503.
R (on the application of Hadfield) v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 1266 (Admin), [2002] All ER (D) 47 (Jun).
R (on the application of Samaroo) v Secretary of State for the Home Dept [2001] EWCA Civ 1139, [2001] UKHRR 1150.
Steel v UK (2005) 18 BHRC 545, ECt HR.
Winer v UK (1986) 48 DR 154, E Com HR.
X v UK (1982) 28 DR 177, E Com HR.

Application

The claimant Elizabeth Susan Pascoe, as a person aggrieved by the Urban Regeneration (Edge Lane West, Liverpool) Compulsory Purchase Order 2005 (the order), made an application under s 23(1) of the Acquisition of Land Act 1981 questioning the validity of the order. The First Secretary of State was the defendant to the application. The Urban Regeneration Agency and Liverpool City Council appeared as interested parties. The facts are set out in the judgment.

Robert McCracken QC and *Katherine Olley* (instructed by *Public Interest Lawyers*) for the claimant.
James Maurici (instructed by the *Treasury Solicitor*) for the Secretary of State.
Neil Cameron (instructed by *Eversheds LLP*) for the agency.
Ms Sasha Blackmore (instructed by the *Solicitor to Liverpool City Council*) for the council.

Cur adv vult

27 September 2006. The following judgment was delivered.

FORBES J.

INTRODUCTION

[1] Section 158 of the Leasehold Reform, Housing and Urban Development Act 1993 established a new agency, the Urban Regeneration Agency (the first interested party, hereafter referred to as 'the agency'). The agency came into existence on 10 November 1993 and in May 1999, when it was merged with the Commission for the New Towns, the agency adopted the operating name 'English Partnerships'. In these proceedings, brought pursuant to s 23(1) of the Acquisition

of Land Act 1981, the claimant challenges the validity of the Urban Regeneration (Edge Lane West, Liverpool) Compulsory Purchase Order 2005 (the order), purportedly made by the agency pursuant to powers conferred by s 162(1) of the 1993 Act. I understand that this is the first time that the agency has used these statutory powers and the first time that their use has been challenged.

[2] Section 23(1) of the 1981 Act (as amended) provides that if any person aggrieved by a compulsory purchase order desires to question its validity on the ground that the authorisation of a compulsory purchase order is not empowered to be granted under either the 1981 Act or (inter alia) the 1991 Act, he may make an application to the High Court.

[3] Section 24(2) of the 1981 Act provides as follows:

> 'If on the application the court is satisfied that—(a) the authorisation granted by the compulsory purchase order is not empowered to be granted under this Act or any such enactment as is mentioned in section 1(1) of this Act, or (b) the interests of the applicant have been substantially prejudiced by any relevant requirement ... not having been complied with, the court may quash the compulsory purchase order or any provision contained therein ... either generally or in so far as it affects any property of the applicant.'

[4] The order in question is one in a series of compulsory purchase orders that the agency plans to make in deprived inner city areas. These areas are known as 'Pathfinder' areas. I am told that there are about 250 other Pathfinder areas in the Midlands and the north of England and about 2·5 million people are and/or will be directly affected by the making of such orders.

[5] The order was made by the agency on 10 January 2005. A public inquiry was held between 11 and 28 October 2005 and the First Secretary of State's inspector issued a report dated 10 January 2006 ('the inspector's report', also referred to as 'IR' for reference purposes). The First Secretary of State is the defendant in these proceedings, although his functions in this field have now been transferred to the Secretary of State for Communities and Local Government. Hereafter I will refer to the defendant as 'the Secretary of State'.

[6] In his report the inspector recommended that the order be confirmed without qualification. The inspector considered that a compelling case in the public interest had been demonstrated and that this justified the interference with the human rights of those with an interest in the land affected (see IR, para 503). The inspector did not think that the inclusion of properties within the order land which did not fall within the s 159 of the 1993 Act descriptions (as to which, see below) should be fatal to the confirmation of the order (see IR, para 440), nor did he consider that his conclusions on the condition of the properties undermined the general contention of the need for regeneration (see IR, para 460).

[7] In a succinct decision letter dated 15 February 2006 (hereafter referred to as 'DL' for reference purposes), the Secretary of State confirmed the order, having accepted the inspector's findings and agreed with his conclusions (see DL, para 14).

[8] The claimant is the owner/occupier of 11 Adderley Street, Liverpool. This is a residential property named in the order and is situated towards the edge of the order area. The claimant was also the principal organiser of BEVEL (Better Environmental Vision for Edge Lane), a group formed in June 2005 to oppose the confirmation of the order and to give evidence at the inquiry. Whilst BEVEL has no formal constitution, the group comprised members who were all statutory objectors. It should be noted that BEVEL and the other objectors accepted that there was a need for regeneration within the area generally (see IR, paras 438 and

452, quoted below), although there was disagreement that certain properties needed to be acquired and demolished to effect the required regeneration (see IR, para 452). As the inspector stated, the question was not so much whether there should be regeneration, but the methods by which it should be achieved and, in particular, whether it was necessary to acquire the amount of land/property that was proposed (see IR, para 452).

[9] In her witness statement of 6 April 2006, the claimant describes her home, which is in good condition. The claimant is disabled and her home has been adapted to help her to manage. The claimant also describes her street, which is said to comprise old but good quality housing and is within walking distance of the city centre, and the local community. In her statement (paras 59–63), the claimant says this:

> 'I have lived here 10 years and I know all the neighbours in my street. We rely on each other. The local community is really diverse and there is a real sense of community spirit, which has suffered as a result of the CPO [compulsory purchase order].
>
> 60. I have student lodgers, including overseas students. They prefer to stay with me instead of staying in purpose built student accommodation . . . About 40% of my income comes from my lodgers . . .
>
> 61. I lost my previous home, that I loved, after my divorce. It has taken years to get to know my neighbours, be trusted, know the city (I am a very nervous driver). Having been extremely low before, I know losing my house would be very damaging to me. The modest compensation which is on offer would not be enough to enable me to buy another similar property in the area if the houses were demolished and re-built. (Many others are in a similar position to me.) In any event, it will take years to re-develop the area, and I could not face the upheaval of two moves. And if I did come back, the people I know would all have been dispersed and it would just not be the same. I am already 60 years of age, and the thought of losing my home and starting again somewhere new is very distressing to me.
>
> 62. . . . I consider that our community is being swept away by acquisition of each of our interests and homes, to make way for something unknown and different, both socially and physically. However, it will take a very long time to build a new community from scratch, if ever, and the destruction of the existing community seems completely at odds with the declared objective of regeneration. It is difficult to understand how compulsory exclusion of the community is regeneration.
>
> 63. I believe that we are being asked to pay too high a price for this "scheme", with the loss of our homes, our friends and our community. In practical terms, the displacement will be difficult for everyone, particularly because the statutory compensation levels are low. We are thereby prohibited financially from moving back into this area and achieving equivalence of accommodation or community. People are unlikely to be able to afford to return, even if that was practical for them after a wait of several years . . .'

[10] It is therefore clear that the claimant is a 'person aggrieved' by the order within the meaning of s 23(1) of the 1981 Act. I am therefore satisfied that she is entitled to make this application and I did not understand either Mr Maurici, on behalf of the Secretary of State, or Mr Cameron, on behalf of the agency, to suggest otherwise.

SUMMARY OF THE GROUNDS OF CHALLENGE

[11] There are three grounds of challenge to the order. The first ground is to the effect that the defendant, the Secretary of State, erred in concluding that, in the circumstances of this case, the agency had the necessary statutory power to make the order in question. The second ground raises issues relating to the consideration of an individual's rights under art 8 of, and art 1 of the First Protocol to, the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) in the context of the making of a compulsory purchase order. The third ground raises issues under art 6 of the convention relating to proper and effective representation at a compulsory purchase order inquiry.

THE STATUTORY FRAMEWORK

[12] The agency's powers are contained in Pt III of the 1993 Act entitled 'Development of Urban and Other Areas'. As I have already indicated, s 158 provides for the establishment of the agency.

[13] Section 159 of the 1993 Act deals with the objects of the agency in the following terms:

> '*Objects of Agency.*—(1) The main object of the Agency shall be to secure the regeneration of land in England—(a) which is land of one or more of the descriptions mentioned in subsection (2); and (b) which the Agency (having regard to guidance, and acting in accordance with directions, given by the Secretary of State under section 167) determines to be suitable for regeneration under this Part.
>
> (2) The descriptions of land referred to in subsection (1)(a) are—(a) land which is vacant or unused; (b) land which is situated in an urban area and which is under-used or ineffectively used; (c) land which is contaminated, derelict, neglected or unsightly; and (d) land which is likely to become derelict, neglected or unsightly by reason of actual or apprehended collapse of the surface as the result of the carrying out of relevant operations which have ceased to be carried out; and in this subsection "relevant operations" has the same meaning as in section 1 of the Derelict Land Act 1982.
>
> (3) The Agency shall also have the object of securing the development of land in England which the Agency—(a) having regard to guidance given by the Secretary of State under section 167; (b) acting in accordance with directions given by the Secretary of State under that section; and (c) with the consent of the Secretary of State, determines to be suitable for development under this Part.
>
> (4) The objects of the Agency are to be achieved in particular by the following means (or by such of them as seem to the Agency to be appropriate in any particular case), namely—(a) by securing that land and buildings are brought into effective use; (b) by developing, or encouraging the development of, existing and new industry and commerce; (c) by creating an attractive and safe environment; (d) by facilitating the provision of housing and providing, or facilitating the provision of, social and recreational facilities.'

[14] Section 160 of the 1993 Act sets out the general powers of the Agency, which include the following:

> '*General powers of Agency.*—(1) Subject to the following provisions of this Part, for the purpose of achieving its objects the Agency may—(a) acquire, hold, manage, reclaim, improve and dispose of land, plant, machinery, equipment

and other property; (b) carry out the development or redevelopment of land, including the conversion or demolition of existing buildings; (c) carry out building and other operations ... (l) generally do anything necessary or expedient for the purposes of its objects or for purposes incidental to those purposes ...

(4) In this section—"improve", in relation to land, includes refurbish, equip and fit out ... and in this section and the following provisions of this Part references to land include land not falling within subsection (1) or (3) of section 159.'

[15] Section 162 of the 1993 Act deals with the acquisition of land by the Agency in the following terms (inter alia):

'*Acquisition of land.*—(1) The Agency may, for the purpose of achieving its objects or for purposes incidental to that purpose, acquire land by agreement or, on being authorised to do so by the Secretary of State, compulsorily ...'

[16] Section 167(1) of the 1993 Act provides as follows:

'The Agency shall have regard to guidance from time to time given by the Secretary of State in deciding—(a) which land is suitable for regeneration or development under this Part; and (b) which of its functions under this Part it is to exercise for securing the regeneration or development of any particular land and how it is to exercise those functions ...'

[17] Guidance was originally issued by the Secretary of State in 1994. However, ODPM circular 06/2004 'Compulsory Purchase and the Crichel Down Rules' (the circular) now applies and App C specifically refers to compulsory acquisition orders made by the agency under s 162(1) of the 1993 Act.

[18] Paragraph 17 of the circular states as follows:

'A compulsory purchase order should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which it is making a compulsory purchase order sufficiently justify interfering with the human rights of those with an interest in the land affected. Regard should be had, in particular, to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of a dwelling, Article 8 of the Convention.'

Paragraph 18 of the circular is in the following terms:

'The confirming Minister has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those whose interest in land it is proposed to acquire compulsorily.'

[19] It is also helpful to refer to the following paragraphs of App C to the circular:

'1. English Partnerships ("EP") in its present form was created administratively in May 1999 by bringing together the Commission for the New Towns ("CNT") and the national structure of the Urban Regeneration Agency ("URA"). EP is therefore able to utilise the powers compulsorily to acquire land and new rights over land given to the URA respectively by sections 162(1) and (2) of the [1993 Act]. The purpose for which those powers may be used is the achievement of the URA's objectives (or purposes incidental thereto). The confirming authority (under the terms of the 1981 Act) for a compulsory acquisition by the URA is currently the Deputy Prime Minister in

his capacity as First Secretary of State (referred to as "the Secretary of State" in this Appendix).

2. The objects of the URA (and therefore the purposes for which EP may exercise compulsory powers) are set out in section 159 of the 1993 Act and are to secure:

the regeneration of land in England which is within one or more of the following descriptions:

– land which is vacant or unused;

– land which is situated in an urban area and which is under-used or ineffectively used;

– land which is contaminated, derelict, neglected or unsightly; and

– land which is likely to become derelict, neglected or unsightly by reason of actual or apprehended collapse of the surface as the result of the carrying out of relevant operations which have ceased to be carried out (section 159(1)(a));

the development of land in England which the Agency (having regard to guidance and acting in accordance with any directions given by the Secretary of State under section 167 of the 1993 Act) determines to be suitable for development under the URA's powers and to which the Secretary of State consents (section 159(1)(b) and (3)).

3. The Government has outlined a new role for EP (Parliamentary statement of the Deputy Prime Minister—24 July 2002). This identified EP as a key delivery agency in the Government's sustainable communities agenda to regenerate the towns, cities and rural areas of England and as the national catalyst for property led regeneration and development. It is charged with delivering urban renaissance and helping the Government meet its targets for accommodating household growth on brownfield land, EP is clearly in a position to utilise the URA's compulsory powers to assist it in fulfilling this role . . .

EXERCISING COMPULSORY PURCHASE POWERS

7. It is for EP to decide how best to use the URA's land acquisition powers to fulfil its purposes and in accordance with any guidance which may be issued from time to time by its sponsoring Department. The fact that the powers have been expressed in wide and general terms, together with the Government's statement mentioned above, reflects the national importance of the task facing EP. . . .

8. EP is charged with securing the regeneration of types of land which may be unattractive to existing or potential residents, developers or investors, and therefore need the catalyst of public sector commitment to turn them round. The Government's statement identified EP as the *national* catalyst for this type of initiative . . .

CONFIRMATION

14. In reaching a decision about whether to confirm an order made under section 162 of the 1993 Act the Secretary of State will have in mind the statutory purposes of the URA and will, amongst other things, consider:

i) whether EP has established the basis and justification for its actions through its Corporate Plan and any related action plan, (including any reviews thereof), which should be in general accordance with regional and local planning policies and other guidance referred to in paragraph 9 above;

ii) whether, where appropriate, EP has demonstrated that the land is in need of regeneration;

iii) any directions and guidance which may be given under section 167 and (in the case of development) any consent under section 159(3);

iv) what, if any, alternative proposals have been put forward by the owners of the land or by other persons for the use or re-use of the land; whether such proposals are likely to be, or are capable of being implemented, (including consideration of the experience and capability of the landowner or developer and any previous track record of delivery); what planning applications have been submitted and/or determined; how long the land has been unused; and the extent to which the proposals advocated by the other parties may conflict with EP's proposals as regards the timing and nature of the regeneration of the wider area concerned.

v) whether the proposed development or regeneration is, on balance, more likely to be achieved if the land is acquired by EP, including consideration of the contribution which acquiring the land is likely to make to stimulating and/or maintaining the long-term regeneration of the area;

vi) whether, if EP intends to carry out direct development, it will not thereby, without proper justification, displace or disadvantage private sector development or investment, and that the aims of the URA cannot be achieved by any other means;

vii) the condition of the land and its recent history;

viii) the quality of, and proposed timetable for completing, both the proposals for which EP is proposing to acquire the land under the URA's compulsory purchase powers and any alternative proposals.'

[20] I now turn to deal with the parties' submissions and my conclusions with regard to the three grounds of challenge.

GROUND 1

[21] The first ground of challenge is expressed in the following terms:

'The First Secretary of State wrongly concluded that [the agency] had power under s.162(1) [of the 1993 Act] to make a compulsory purchase order in respect of the Claimant's home, and misdirected himself in law by deciding that:

(i) the criteria in s 159(2) [of the 1993 Act] were satisfied in respect of all the parcels of land in the area covered by the CPO, provided that there was evidence that a "predominant" number came within the criteria;

(ii) there was no need to establish that specific parcels of land came within the criteria in s 159(2);

(iii) the description in s 159(2)(b)—"land which is situated in an urban area and which is under-used or ineffectively used"—referred to an area of land, not individual parcels of land, and could include properties which did not fall within any of the descriptions in s 159(2).'

[22] As Mr McCracken pointed out, s 159(1) of the 1993 Act provides that the main statutory object of the legislation (ie to secure the regeneration of land in England) is to be exercised in respect of land that falls within one or more of the descriptions set out in s 159(2)(a)–(d) and which the agency determines to be suitable for regeneration, having regard to the guidance and directions of the Secretary of State.

[23] It is common ground that confirmation of the order was sought only on ground (b) of s 159(2) of the 1993 Act (under-used and/or ineffectively used urban land). This was duly noted and emphasised by the inspector in that part of his

report in which he summarised the Agency's case (see IR, paras 18–190), in particular in paras 18, 19, 20, 21, 26 and 27, which are in the following terms:

> '18. The following is the general case for the Acquiring Authority and provides the basis of its response to many of the individual objections made to the confirmation of the Order.
>
> 19. Section 162(1) of the [1993 Act] . . . authorises the Urban Regeneration Agency carrying on business as English Partnerships (and hereafter referred to as EP) to acquire land compulsorily when authorised so to do by the Secretary of State for the purpose of achieving its objects, or for purposes incidental to that purpose.
>
> 20. Section 159 of the 1993 Act provides that the main object of EP shall be to secure the regeneration of land in England which is land in one or more of the descriptions mentioned in section 159(2) and which EP (having due regard to guidance, and acting in accordance with directions given by the Secretary of State) determines to be suitable for regeneration under Part III of the 1993 Act. The descriptions of land which are relevant to the Order are those specified in the Order . . . namely:
>
> (a) land which is vacant or unused;
>
> (b) land which is in an urban area and which is under-used or ineffectively used;
>
> (c) which is contaminated, derelict, neglected or unsightly.
>
> 21. Confirmation of the Order is sought on ground (b). Certain parts of the Order land are additionally vacant, unused, derelict, neglected and/or unsightly . . . These matters are relied upon in support of the contention that the lands are under-used and/or ineffectively used. The Order has been made for the purposes of securing the regeneration of land in the Kensington/Edge Hill area through the provision of new housing and related development and improvements to Edge Lane West . . .
>
> 26. The delivery of sustainable communities, delivering Pathfinder housing renewal schemes, and delivering strategic development sites of national or regional significance, cannot be effected without securing properties and land which do not fall within descriptions (a) or (c) [of s 159(2)] but fall within these general areas where regeneration is appropriate (within description (b)). A piecemeal or "pepper-potted" approach would simply not meet the statutory object of securing the regeneration of land. It is vital to the success of the scheme to bring forward its various elements in a comprehensive and integrated manner so as to create a "critical mass" to trigger a step change in the area.
>
> 27. The Acquiring Authority does not rely on Housing Act, Highways Act, or Town and Country Planning Act powers. As a result, EP does not seek to justify the Order by sole reference to housing, highways or planning issues. EP promotes this Order to secure area-wide regeneration through a scheme that would act as a catalyst for investment in both the housing and commercial sectors . . .'

[24] Having summarised the supporting submissions of Liverpool Vision (see IR, paras 191, 192), the inspector then proceeded to summarise the objections, commencing first with the case put forward by BEVEL (see IR, paras 193–265). In paras 267–426 of his report, the inspector summarised the cases of the various statutory objectors and other objections and the agency's responses thereto, before moving on to his conclusions commencing at para 427. In order better to

understand the parties' submissions with regard to the first ground of challenge, it is necessary to quote a significant amount of the inspector's conclusions, as follows:

'428. This is the first occasion on which a CPO made under the provisions of section 162(1) of the (1993 Act) . . . by the Urban Regeneration Agency (URA), carrying on business as English Partnerships (EP) has come to an Inquiry. As the appropriateness of the use of this power has been questioned I therefore start by considering this aspect, following a brief outline of EP's proposals.

429. Appendix C to the Memorandum of Circular 06/2004 provides guidance on the making of Orders by EP. It indicates at paragraph 14 that, in reaching a decision about whether to confirm an Order made under section 162 of the 1993 Act, the Secretary of State (FSS) will have in mind the statutory purposes of the URA. It also sets out other matters that will be considered by the FSS and I have used these as a structure for my conclusions. Following this, I consider the various other matters raised by Objectors, including procedural issues, such as alleged "inequality of arms".

430. Paragraph 17 of Pt 1 of Circular 06/2004 reiterates the long-established principle that a CPO should only be made where there is a compelling case in the public interest. Paragraph 19 further indicates that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss, the Human Rights Act 1998 (HRA) reinforcing this basic requirement. I [must] therefore come to an overall conclusion as to whether a compelling case in the public interest for confirmation has been established.

The reason for the making of the Order

431. The Order is promoted to secure area-wide regeneration. The regeneration scheme comprises two interlinked elements: highway corridor improvements to Edge Lane West, which are part of a wider strategy for such improvements over the entire length of Edge Lane; and transformational redevelopment, with residential and commercial components flanking the highway improvements. The highway corridor works benefit from detailed planning permission. The wider regeneration scheme has outline planning permission.

432. The details that are likely to come forward within the scheme would include the provision of residential accommodation of varying types, commercial, retail and community uses, and public spaces aimed at fostering a sustainable community. The highway corridor improvements aim to enhance environmental quality and safety for the benefit of all. They include the provision of a tree-lined boulevard "gateway" entrance to the city centre, with wider traffic lanes and footways, in order to ease traffic congestion, improve parking and reduce pedestrian severance to the north and south created by the existing road.

433. Whilst many plots of land and individual properties are already in public sector ownership, or have already been acquired by agreement, there are others which have not. These are in differing ownerships, some of it in investment property let to short-term tenants. It is unlikely that all interests could be acquired by private treaty. The land and property is required to enable the comprehensive regeneration scheme to progress within a reasonable timescale.

Powers used

434. Paragraph 2 of App C to the Memorandum of Circular 06/2004 indicates that the objects of the URA (and therefore the purpose for which EP may exercise compulsory powers) are set out in s 159 of the 1993 Act. The objects are to secure the regeneration of land in England which is within one or more of four descriptions. In this case, the three descriptions of relevance are: land which is vacant or unused; land which is situated in an urban area and which is under-used or ineffectively used; and land which is contaminated, derelict, neglected or unsightly.

435. EP seeks confirmation of the Order to secure regeneration of land which it situated in an urban area and which is under-used or ineffectively used. It maintains that certain parts of the Order land are additionally vacant, unused, derelict, neglected and/or unsightly. These latter matters are relied upon in support of the principal contention of the land falling within the category of under-used or ineffectively used urban land. Regeneration is to be secured through the provision of new housing and commercial properties and through the related development and improvements to Edge Lane West.

436. I therefore consider firstly whether the Order land falls within the claimed categories. Having regard to the matters the FSS will consider in reaching a decision as to whether to confirm the Order, I consider in paras 452–460 below whether is has been demonstrated that the land is in need of regeneration.

437. The Order land is centred around Edge Lane West itself. This is part of a principal strategic radial route linking the city centre with the M62 motorway and is defined as a Major Road Corridor within the UDP. It suffers problems of confusion in the geometry of the road layout, especially for turning traffic, parking problems for businesses and residents, and lack of highway capacity. This leads to substantial vehicular delays, particularly at peak times, pedestrian severance and safety implications. BEVEL claims that it is difficult to reconcile the "high levels of congestion" with the "under-use" of land. It further suggests that as the road appears to be over-used this falls outside the statutory qualifying factual criteria of ineffective or under-use. On the other hand, it is clear that there is a strong consensus that Edge Lane West does suffer from problems that need to be addressed through improvements to the highway. This points to the fact that the highway corridor is clearly currently used inefficiently as it is congested and poses parking problems and highway safety issues. "Inefficient" is a synonym for "ineffective". It is not therefore incorrect to describe this road corridor as being ineffectively used.

438. BEVEL and the other Objectors accept that there is a need for regeneration within the area. The numbers of vacant, unused, derelict, neglected and unsightly properties within the Order land are clearly established. There has been no challenge to this categorisation. This supports the general contention that the Order land is under-used or ineffectively used. (I consider the question of unfitness of properties, raised by BEVEL, in paras 457–460 below). The proper consideration of whether the land is "ineffectively and/or under-used" does not, in my view, entail a comparative exercise of "before" and "after", as claimed by BEVEL.

439. It is equally clear, however, that there are properties within the Order land that do not fall within any of the above descriptions. This point has been forcibly made by many individual Objectors . . . They claim that an Order under the 1993 Act cannot be made or confirmed where certain specific

properties do not qualify under any of these descriptions. However, I agree with the view of EP that, in dealing with land within an urban area which is in need of regeneration, it is likely that there will be certain properties within it that are in good condition. Furthermore, the Guidance issued in 1994 by the Secretary of State requires EP to focus on the promotion of the regeneration of areas of need. Account should be taken of areas of need as defined by the Government. Although the Guidance predates the Sustainable Communities agenda and Pathfinder initiatives by a decade or so, I accept that it is apparent that the Government now regards such areas of need as including Pathfinder areas. Similarly, by reference to App C of Circular 06/2004, it is clear that EP is charged to deliver urban renaissance, with a need for a coherent and comprehensive approach to regeneration.

440. I have not been pointed to any specific guidance indicating that the objective of securing regeneration of an area will sometimes require the acquisition and redevelopment of some properties which may not themselves be in need of intervention. Nevertheless, I consider that in trying to bring about area-wide regeneration in a comprehensive and coherent manner, the inclusion of some property not falling within the specified descriptions is, in reality, all but certain. EP's report to its Board, at which the decision was taken to make the Order, recognises that the area is not entirely composed of vacant or derelict properties. However, there is sufficient evidence to support the view that the Order land falls predominantly within the defined categories and that it is under-used or ineffectively used. To thwart a regenerative proposal on the basis that some properties within a wide-area scheme are not vacant, unused, derelict, neglected or unsightly would be counter to the thrust of the enabling powers relied upon. I therefore consider that the inclusion of properties within the Order land not falling within the specified descriptions is not in itself a matter that should be fatal to the Order's confirmation . . .

442. The Order is promoted to secure area-wide regeneration. EP does not rely on powers under Housing, Highways or Town and Country Planning Acts. Nor does it seek to justify the making of the Order by sole reference to housing, highways or planning issues. The rationale for the use of the chosen powers has been established clearly. The BEVEL contention that the use of the s 162 powers of the 1993 Act may not have been the most appropriate is not well made. From the foregoing, I consider the legislative justification of the making of the Order is sound.'

[25] In paras 444–488 of his report the inspector then turned to and dealt with each of the matters specified in App C to circular 06/2004 as matters that the Secretary of State has indicated will, amongst others, be considered in reaching a decision as to whether to confirm an order made under s 162(1) of the 1993 Act.

[26] At paras 452, 453, 459 and 460 the inspector said this (inter alia), when considering whether the agency had demonstrated that the land is in need of regeneration:

'452. There is little dispute that the area generally is in need of regeneration. Clearly there is disagreement that certain properties need to be acquired and demolished to effect regeneration. Likewise, there is disagreement with the generality of the currently proposed scheme to bring this about on an area-wide basis. In securing regeneration it is a question not so much as whether it should be done but the methods by which it should be achieved

and, in particular, whether it is necessary to acquire the amount of land/property that is proposed.

453. The basis on which it is claimed that regeneration is necessary is set out in paragraphs 435 and 437 above. It is established that the Order land is predominantly under-used or ineffectively used urban land. One element underpinning this is the claim of housing market failure within the Order land. EP's evidence is that the area was suffering housing market failure before any regeneration scheme was agreed . . .

459. I was able to see externally all the Order land properties on my site visits but in the absence of specific evidence on their individual condition I made no attempt to form a judgment on this. It is not therefore possible to say what proportion of properties within the Order land fall into any of the mentioned categories. That said, it is clearly apparent that some properties are in need of physical attention of one sort or another and that the numbers of vacant and boarded properties inevitably lend an air of neglect and unsightliness. As already mentioned in paragraph 438 above, there has been no challenge to the categorisation of properties as vacant, unused, derelict, neglected or unsightly. On the other hand, in the absence of detailed evidence from EP of the condition of properties within the Order land, I do not consider that it can be claimed that the properties there can be classified as necessarily obsolete. As I saw on my formal site visit, there are properties providing appropriate and acceptable living accommodation.

460. . . . As referred to in paragraph 438 above, there is little dispute regarding the need for regeneration. I consider the questioning of housing market failure and the condition of properties within the Order land does not undermine the general contention of need for regeneration, but goes to the heart of how this might be achieved . . .'

[27] Having completed his consideration of the matters specified in para 14 of App C to the circular (which included a consideration of alternative proposals: see IR, paras 462–471), the inspector dealt with various other matters such as 'Equality of Arms' (IR, paras 493, 494) and the effect on human rights (IR, paras 495–497), before coming to his overall conclusions, which he expressed in the following terms:

'Overall conclusions

501. The Order has been made using the correct powers under the 1993 Act. The Order land is predominantly under-used or ineffectively used. It is partly characterised also by vacant, unused, derelict, neglected and unsightly land. There is general agreement that its regeneration is necessary to address problems within the area. Whilst there is no evidential basis pointing to the number of properties within the Order land which are unfit, in substantial disrepair or non-decent, this does not deflect from the findings within the NRA for Kensington that these problems manifest themselves within this wider area.

502. There is a well advanced proposed composite regeneration scheme involving highway improvements and associated housing and environmental redevelopment. Substantial benefits would result from this scheme and would extend beyond the immediate Order land. Acquisition of land and property not already acquired by agreement would further the realisation of this scheme and such action would be in fulfilment of EP's statutory purposes. Whilst various other suggestions have been made as to how regeneration and

improvements to the area could be achieved without the need for the demolition proposed, these do not amount to realistic workable alternatives to the scheme in respect of which the Order is made.

503. The scheme accords with the national, regional and local planning and regenerational policy background. It is clearly defined, has a deliverable objective, is well advanced, and has the financial resources and partnership backing to allow it to happen. This provides confidence that there would be a realistic prospect it could be successfully implemented in a timely manner, thereby bringing land into beneficial use. I consider that the public benefit would outweigh the private loss of land and property and that a compelling case in the public interest has been demonstrated as to why the Order should be confirmed. This justifies the interference with the human rights of those who have an interest in the land affected.'

[28] As I have already indicated, the Secretary of State's letter of 15 February 2006, whereby he confirmed the order, was succinctly expressed. As Mr McCracken QC submitted on behalf of the claimant, the crux of the Secretary of State's decision is to be found in paras 8, 9, 11 and 14 of the decision letter, which are in the following terms:

'8. The Secretary of State agrees with the Inspector's conclusion that the Order has been made using the correct powers under the 1993 Act . . . In this respect, he agrees with the Inspector that the Order land is predominantly under-used or ineffectively used and is partly characterised also by vacant, unused, derelict, neglected and unsightly land. He agrees that whilst there is no evidential basis pointing to the number of properties within the Order land which are unfit, in substantial disrepair or non-decent, this does not deflect from the findings within the Neighbourhood Renewal Assessment for Kensington that these problems manifest themselves within this wider area.

9. . . . Whilst various suggestion have been made as to how regeneration and improvements to the area could be achieved without the need for the demolition proposed, the Secretary of State agrees with the Inspector that no realistic alternative proposals capable of implementation have been advanced. There are no alternative proposals that benefit from extant permissions or have funding, that are to be preferred to the existing comprehensive regeneration scheme whose delivery the Order seeks to achieve . . .

11. The First Secretary of State has carefully considered whether the purposes for which the compulsory purchase order was made sufficiently justifies interfering with the human rights of the landowners and objectors and he is satisfied that such interference is justified since, for the reasons given above, he is satisfied that there is a compelling need in the public interest for the land, the subject of the compulsory purchase order, to be compulsorily acquired. In particular he has considered the provisions of Article 8 of, and Article 1 of the First Protocol to the [convention]. In this respect the Secretary of State is satisfied that in confirming the compulsory purchase order a fair balance has been struck between the use of compulsory purchase powers, the relevant order and the rights of the landowners and objectors . . .

14. The First Secretary of State has given careful consideration to the Inspector's report and the submissions of the parties. He accepts the Inspector's findings and agrees with his conclusions. The First Secretary of State has therefore decided to accept the Inspector's recommendation and to confirm the . . . Order . . .'

[29] As Mr Maurici pointed out, there are three key points pleaded in relation to the first ground of challenge, which are as follows:

> '(1) in order for the statutory power to be used it is necessary to examine and determine whether each and every individual piece of land within the Order land is in and of itself ineffectively or underused and that if any single piece of land cannot be so categorised then there is no power to make a compulsory order in respect of an area that includes that piece of land;
>
> (2) in any event the question of whether the Order land as a whole is ineffectively or under-used was never the subject of a finding in the IR or the DL—the only finding made was that the Order land was predominantly under or ineffectively used and that this is insufficient to meet the statutory test; and
>
> (3) the only actual finding of ineffective/under-use in respect of the Order land was in respect of the road (see IR, paragraph 437 and that finding is absurd.'

[30] As to the first of these points (ie the initial part of the pleaded ground of challenge), Mr McCracken submitted that the inspector had fallen into error in accepting the agency's case on this aspect of the matter: see IR, para 22, where the inspector repeats paras 8–10 of the agency's closing submissions, as follows:

> '8. It has been claimed by certain Objectors that an Order under the 1993 Act cannot be made/confirmed where, as in the present case, certain specific properties in the Order land do not, taken by themselves, qualify under any of the statutory descriptions.
>
> 9. This claim shows a misapprehension of the scope of the powers.
>
> 10. Since paragraphs (a) and (c) specify "vacant or unused", "derelict, neglected or unsightly", it is clear that paragraph (b) must denote land which, either wholly or in part, does not qualify under paragraphs (a) and (c). Further, paragraph (b) relates, unlike paragraphs (a) or (c), to land in an urban area. It is self-evident that land in existing urban areas which arises as a candidate for regeneration, is likely to include certain properties that are in good condition.'

[31] Mr McCracken pointed out that the inspector had acknowledged that he had not been pointed to any specific guidance indicating that the objective of securing regeneration of an area will sometimes require the acquisition and redevelopment of some properties which may not themselves be in need of intervention (see IR, para 440). Mr McCracken submitted that the wording of s 159(2)(b) was perfectly clear and that for land to fall within that description, the whole of the land in question must be under-used or ineffectively used. It was his submission that, in order to come to a meaningful conclusion on such an issue in relation to order land that consists of an area made up of a many different units of land in different ownership and subject to many differing uses, it was necessary to consider each of the units that go to make up the whole area and come to a conclusion with regard to each such unit as to whether it was under-used or ineffectively used. Mr McCracken stressed that this was not done in this case and that the only part of the order land where the inspector had carried out such an exercise was in relation to Edge Lane West itself (see IR, para 437), where he concluded that congestion, parking problems and road safety issues demonstrated that the road was not effectively used.

[32] Mr McCracken's extreme position (reflecting the initial part of the pleaded ground) was to the effect that if only one of the individual units that made up the area of the order land was found to be neither under-used nor ineffectively used, the

area as a whole could not be properly described as being under-used or ineffectively used and that, therefore, the statutory requirements for compulsory purchase under s 159(2)(b) could not be satisfied. In the event, this extreme position assumed much less prominence in the course of the hearing as Mr McCracken developed his principal (and much more persuasive) submission on ground 1 (the second point identified in para [29], above, as to which, see below). However, before turning to Mr McCracken's primary submission, it is necessary to dispose of this initial aspect of his submissions on ground 1.

[33] Both Mr Maurici and Mr Cameron submitted that s 159(2)(b) of the 1993 Act is part of legislative provisions that are aimed at urban regeneration on an area-wide basis, and that it is therefore appropriate when applying that provision to examine the question whether an area, taken as a whole, satisfies the statutory precondition for the exercise of the compulsory purchase powers set out in the statute. Mr Maurici and Mr Cameron pointed out that if Mr McCracken's initial submission was correct, then the agency would be confined to a piecemeal approach to urban regeneration, on a patchwork basis of compulsory purchase confined to those plots which individually could each be said to be under-used and/or ineffectively used.

[34] Mr Maurici submitted (correctly, in my view) that this would be an unsustainable approach to the construction of the broad urban regeneration powers of which s 159(2)(b) forms part. The purpose for which the statutory compulsory purchase power has been granted in the 1993 Act is, as it seems to me, clear—namely securing area-wide regeneration. In this case, the regeneration is to be secured through the provision of new housing and commercial properties on a coherent and integrated basis and through the related development and improvements to Edge Lane West. Moreover, I agree that the concept of land being 'under-used' or 'ineffectively used' in s 159(2)(b) expressly contemplates that some of the land to be acquired is being used, if it were not then it would be land that was unused and hence would fall within s 159(2)(a). Parliament made express provision for a power to acquire land that was unused and land that was under or ineffectively used.

[35] I accept Mr Maurici's submission that, in practical terms, the regeneration of a complete area will often require the regeneration authority to take over the entire area, in order to implement a coherent and effective plan of redevelopment for regeneration. I accept the submission that Parliament cannot plausibly have intended to restrict the powers of the regeneration authority to a piecemeal or patchwork acquisition of individual plots of land in a regeneration area and I reject Mr McCracken's submissions to the contrary effect.

[36] As I have already indicated, the agency sought to rely on s 159(2)(b) of the 1993 Act as the basis for the making of the order. Accordingly, I am satisfied that what the inspector and the Secretary of State were required to do was to reach a view as to whether the order land, when considered as a unified and coherent whole, fell within the description 'land which is situated in an urban area and which is under-used or ineffectively used'. The agency maintained that certain parts of the order land were also vacant, unused, derelict, neglected and/or unsightly. Those matters were relied on as evidence supporting the agency's principal contention that the order land as a whole was under-used and/or ineffectively used. In my view that was a perfectly sound approach and one that the inspector understood (see IR, para 435).

[37] The numbers of vacant, unused, derelict, neglected and unsightly properties within the order land were established: see IR, paras 15, 38 and 438.

Thus 178 properties were considered to be vacant and unused, almost 270 neglected, 227 unsightly and over 160 derelict. There was apparently no challenge to this categorisation (see IR, para 438) and the inspector took the view (a perfectly reasonable one, in my view) that this 'supports the general contention that the Order land is under-used or ineffectively used' (see IR, para 438).

[38] However, it was Mr McCracken's submission that the inspector did not come to the conclusion that the order land (considered as a whole) was under-used and/or ineffectively used—rather his conclusion was that it was *predominantly* so, a conclusion that Mr McCracken characterised as involving an impermissible watering-down of the statutory test. Mr McCracken submitted that such is clear from the wording of paras 440, 453 and 501 and that the Secretary of State went on to make the same mistake in his decision letter (see, particular, para 8).

[39] I have given this aspect of the matter much anxious thought. I am very aware that the inspector's report and the Secretary of State's decision letter must be read as a whole, in a reasonably flexible manner and without applying the exacting and precise standards that are applied to a contract or a statute. I am also very conscious of the point made so forcefully by Mr Cameron, namely that the inspector clearly understood and recorded the agency's case correctly (which does not contain any 'impermissible watering down') and gave no indication or sign at any stage of having any intention of departing from that case. Nevertheless, I find myself driven to the conclusion that both the inspector and the Secretary of State fell into error in the manner submitted by Mr McCracken on this aspect of the first ground of challenge.

[40] In para 440 of the inspector's report the crucial sentence is as follows, 'However, there is sufficient evidence to support the view that the Order land falls predominantly within the defined categories *and* that it is under-used or ineffectively used' (my emphasis). I accept that it is arguable that the word 'and' in that sentence is disjunctive and that it is then followed by a finding of fact that the order land is under-used or ineffectively used. However, in my view, the sentence can also be read as meaning that the order land is under-used or ineffectively used to the extent that it falls predominantly within all three defined 'categories'. In my view, it would be consistent with this latter interpretation to go on to describe the order land subsequently as 'predominantly under-used or ineffectively used', which is precisely the expression used by the inspector in paras 453 and 501 of his report and by the Secretary of State in para 8 of his decision letter (as to which, see below).

[41] As it seems to me, para 453 of the inspector's report is perfectly clear. In that paragraph the inspector states unequivocally 'It is established that the Order land is *predominantly* under-used or ineffectively used urban land' (my emphasis). In my judgment, the inspector made a clear statement in that paragraph as to what he considered had been established by the evidence, namely that the order land was '*predominantly* under-used or ineffectively used urban land'. I agree with Mr McCracken that such a finding does not accord with the statutory requirements of s 159(2)(b) of the 1993 Act (ie the section relied on as empowering the agency to compulsorily acquire the land in question), namely that the land is 'under-used or ineffectively used'. I agree with Mr McCracken that the inspector's finding involves an impermissible watering down of that statutory requirement.

[42] As it seems to me, the fact that the inspector fell into error is made even more apparent by the opening words of para 501 of his overall conclusions, where he said this:

> 'The Order has been made using the correct powers under the 1993 Act. *The Order land is predominantly under-used or ineffectively used.* It is partly characterised also by vacant, unused, derelict, neglected and unsightly land.' (My emphasis.)

In my view, it is significant that the inspector has characterised the order land as being 'predominantly under-used or ineffectively used', whilst at the same time acknowledging that it is also partly characterised by vacant, unused, derelict, neglected and unsightly land. There is no doubt in my mind that the inspector's expressed conclusion as to the under or ineffectively used state of the order land (considered as a whole) was that it was 'predominantly' so. This expression was not an occasional oversight or a somewhat infelicitous use of language. I am satisfied that the conclusion reached by the inspector on the evidence that he had heard and considered was that when the order land was considered as a whole it was '*predominantly* under-used or ineffectively used'. In my view, that finding did not satisfy the requirements of s 159(2)(b) of the 1993 Act and I reject Mr Maurici's and Mr Cameron's submissions to the contrary effect.

[43] In para 14 of his decision letter, the Secretary of State accepted the inspector's findings and agreed with his conclusions without any qualification or modification. It follows that the inspector's conclusions as to whether and to what extent the order land was under-used or ineffectively used were adopted by the Secretary of State without modification. This was made doubly clear by para 8 of the decision letter in which the Secretary of State expressly stated as follows:

> 'In this respect, he agrees with the Inspector that the Order land is predominantly under-used or ineffectively used and is partly characterised also by vacant, unused, derelict, neglected and unsightly land.'

[44] I am therefore satisfied that the Secretary of State also fell into error in concluding that the requirements of s 159(2)(b) had been met. In order to meet the requirements of s 159(2)(b) it was necessary to establish that the order land, when considered as a whole, was 'under-used or ineffectively used'. In my view, for the order land to be found to be 'predominantly' under or ineffectively used plainly involves the application of a less stringent standard than that required by s 159(2)(b): see the similar decision reached by Sullivan J in *Meyrick Estate Management Ltd v Secretary of State for Environment, Food and Rural Affairs* [2005] EWHC 2618 (Admin), [2005] 45 EG 169 (CS). I therefore accept Mr McCracken's submission that both the inspector and the Secretary of State fell into error by engaging in an impermissible dilution of the statutory requirement that had to be satisfied before the agency was empowered to acquire the land in question compulsorily in order to secure its regeneration.

[45] Finally, in the alternative, Mr Maurici contended that if (contrary to his primary submissions) the Secretary of State has decided that the order land is predominantly under- or ineffectively used (as, in my view, he has), then it follows that the Secretary of State has also accepted that some of the order land is not under- or ineffectively used (ie that some of the order land falls outside the terms of s 159(2)(b): for convenience, hereafter referred to as 'the non-qualifying land'). It is important to note that neither the inspector nor the Secretary of State was able to indicate what proportion of properties within the order land fell into any of the specified descriptions (see IR, para 459). As it seems to me, it is therefore not possible to say what proportion of the order land consists of non-qualifying land.

[46] So far as concerns the non-qualifying land, Mr Maurici referred to and sought to rely on ss 160(1)(a), 160(4) and 162(1) of the 1993 Act and submitted that, since the non-qualifying land was required as part of the order land for the purpose of the agency achieving its objects or for purposes incidental to that purpose, ss 160(4) and 162(1) empowered the agency to acquire the non-qualifying land compulsorily, on being authorised to do so by the Secretary of State, notwithstanding that it did not come within the terms of s 159(1). Mr Maurici submitted that by having recourse to s 160(4) in respect of the non-qualifying land the Secretary of State's overall decision-making could be rendered lawful and the confirmation of the order would thus be valid. He therefore submitted that, since the otherwise ultra vires decision-making could be rendered lawful in this straightforward way, I should exercise my discretion against making a quashing order. In my view, to take such a course would be exceptional (see *Berkeley v Secretary of State for the Environment* [2000] 3 All ER 897 at 906–907, [2001] 2 AC 603 at 616, per Lord Hoffmann).

[47] However, as Mr McCracken pointed out, the agency had made it perfectly clear, in both opening and closing its case at the inquiry, that its case was that the objects of the agency would be furthered by the compulsory acquisition of the order land because the whole of it came within the description specified in s 159(2)(b). He submitted (correctly, in my view) that it would be wrong for me to uphold the order on what would be, in effect, a different basis (ie that part of the order land came within the description specified in s 159(2)(b) and that the balance (including the claimant's property) could be acquired under s 160(4)) because such an approach (i) would involve a degree of usurpation of the function of the specialist decision maker and (more importantly, in my view) (ii) would deprive the claimant and other objectors of the opportunity to challenge the new basis for the agency's intervention and to present evidence upon it.

[48] Given the nature and condition of the claimant's property and its location at the very edge of the order land, it seems to me that a successful challenge to the argument that its compulsory acquisition was for the purpose of achieving the agency's objects or for purposes incidental to that purpose cannot be dismissed as fanciful, particularly if its immediate neighbourhood also consists of land that is not under-used or ineffectively used. It is important to bear in mind that, in this context, the claimant's land (and possibly some of the neighbouring land) does not itself form part of an area (ie the order land) that has been found to be under-used or ineffectively used.

[49] For those reasons I prefer Mr McCracken's submissions on this aspect of the matter and I reject the arguments put forward by both Mr Maurici and Mr Cameron. In my view, the error made by the Secretary of State in confirming the order in respect of order land that had only been found to be *'predominantly* under-used or ineffectively used' cannot properly be remedied by recourse to s 160(4) of the 1993 Act. It therefore follows that, for the foregoing reasons, this first ground of challenge succeeds.

GROUND 2

[50] The second ground of challenge is pleaded in the following terms:

> 'The first Secretary of State erred in concluding that the interference with the Claimant's Convention rights under Art 8 and Art 1 Protocol 1 was justified. The Order is incompatible with her Convention rights and is therefore unlawful under s 6 Human Rights Act 1998.'

[51] Article 8 of the convention provides as follows:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[52] Article 1 of the First Protocol to the convention is in the following terms:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

[53] It was common ground that the order does constitute an interference with the claimant's rights under both articles since it deprives her of her home. It was also common ground that the onus is on the public authority to justify that interference with the claimant's rights.

[54] I accept Mr McCracken's submission that if (as I have held to be the case) the Secretary of State did err in confirming the order for the reasons given above when dealing with the first ground of challenge, it follows that the interference in question is not in accordance with the law, is therefore not justified and constitutes a breach of s 6(1) of the 1998 Act. Thus, in consequence of my conclusion on the first ground of challenge, this second ground of challenge must also succeed on that basis in any event. Accordingly, in the paragraphs that follow I propose to set out my analysis and conclusions on this second ground of challenge on the assumed basis that I was wrong to uphold the first ground of challenge for the reasons that I did.

[55] Although art 8 and art 1 of the First Protocol are differently worded in terms of justification, I accept that the effect of each is very similar (see *Chapman v UK* (2001) 10 BHRC 48). Article 8 requires any interference to be necessary in a democratic society in the interests of a number of listed aims that include 'the economic well-being of the country' and 'the protection of the rights and freedoms of others'. The latter has been held to include the preservation of the environment and the giving effect to environmental policy more generally (see *Chapman v UK* (2001) 10 BHRC 48 at 68 (paras 80–82)).

[56] As pleaded in para 50 of the grounds, it is accepted by the claimant that the agency's legitimate aim is to regenerate the Edge Lane area. In my view, that is an aim that is clearly encompassed by the expression 'the economic well-being of the country' and I also accept that the regeneration of Edge Lane would give effect to numerous environmental policies. It is beyond argument that both the inspector and the Secretary of State fully understood that the purpose of the order was to achieve the regeneration of the Edge Lane area. I therefore do not accept Mr McCracken's submission that neither the Secretary of State nor the inspector

identified which legitimate aim was relied upon for the purposes of art 8 (see para 51(2) of Mr McCracken's written skeleton argument).

[57] Mr McCracken submitted further that for an interference to be 'necessary in a democratic society', the interference must be proportionate to the aim pursued. It was Mr McCracken's submission that the word 'necessary' in the context of art 8 does not have the flexibility of meaning of such expressions as 'useful', 'reasonable' or 'desirable', but implies the existence of a 'pressing social need' for the interference in question: see *Dudgeon v UK* (1981) 4 EHRR 149.

[58] Central to his submissions on this ground of challenge was Mr McCracken's contention that it is well established that the means used must be no more than that which is necessary to accomplish the objective: ie in this case, in order to be necessary the means used to achieve the legitimate aim of the regeneration of the Edge Lane area must be the least intrusive of the claimant's convention rights that can be devised in order to meet that aim.

[59] In support of that submission, Mr McCracken referred to and relied on *R (on the application of Daly) v Secretary of State for the Home Dept* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, *R (on the application of Samaroo) v Secretary of State for the Home Dept* [2001] EWCA Civ 1139, [2001] UKHRR 1150 and *Baker v First Secretary of State* [2003] EWHC 2511 (Admin), [2003] All ER (D) 234 (Oct).

[60] In the course of his speech in *Daly*'s case, Lord Steyn said this ([2001] 3 All ER 433 at [27], [2001] 2 AC 532):

> 'The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, [1998] 3 WLR 675 the Privy Council adopted a three-stage test. Lord Clyde observed that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective." (See [1999] 1 AC 69 at 80, [1998] 3 WLR 675 at 684.)'

[61] In his judgment in *Samaroo*'s case, Dyson LJ put the matter in this way (see [2001] UKHRR 1150 at [19], [20]):

> '. . . in deciding what proportionality requires in any particular case, the issue will have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights?
>
> [20] At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons.'

[62] Mr McCracken submitted that Dyson LJ's formulation in *Samaroo*'s case was clearly consistent with the principle enunciated by Lord Steyn in *Daly*'s case and had been expressly followed by Nicholas Blake QC, sitting as a Deputy High Court Judge, in *Baker v First Secretary of State* [2003] EWHC 2511 (Admin). On the issue of proportionality, Nicholas Blake QC posed the question:

'[43] . . . was it the only alternative, or, to adopt the words of *Samaroo*'s case, was it the least intrusive means of securing the public interest? . . .

[45] That consideration has to be reflected in the decision making process. Proportionality is not simply whether at the end result the balance is fair, but whether, in getting there, it has been decided that the most appropriate course of conduct is also the least interfering with human rights, having regard to the public benefit to be achieved and the different means of achieving it.'

[63] Mr McCracken submitted that neither the inspector nor the Secretary of State had properly applied the proportionality test in respect of the interference with convention rights in this case nor, for that matter had there ever been a proper consideration of the human rights issues by the agency, the inspector or the Secretary of State. Mr McCracken referred to the agency's Board minutes for 22 September 2004 (see paras 49–51 of the minutes) and suggested that there had been only a cursory consideration of the human rights issue in this case. He submitted that the section in question consisted of nothing more than a mere recital of the most basic principles and the bald conclusion that any interference with human rights was considered to be justified in order to secure the desired regeneration and the public benefits that the regeneration proposals would bring and that the proposed compulsory purchase order would strike a fair balance between the public interest and private rights. Mr McCracken suggested that the agency appeared only to have considered the area as a whole and that it had made no assessment of any individual human rights and that the agency's statement of reasons and statement of case were similarly deficient.

[64] Mr McCracken referred to the inspector's report and to the Secretary of State's decision letter and submitted that treatment of the human rights issue by both the inspector and the Secretary of State had also been very cursory and consisted of little more than bald statements to the effect that the interference would be proportionate and that a fair balance would be struck between the public interest and the private interests. Mr McCracken argued that neither had engaged with the issue of whether the legitimate aim could be achieved by less intrusive means and submitted that, as a result, both had failed to apply the proportionality test properly. In short, he submitted that the order had been made without any, or any adequate, analysis of the interference with the claimant's convention rights (a further important aspect of which was the exclusion of the claimant from the housing market that it is said will result from the inadequacy of compensation for property in this area of housing market failure: see paras 70 and 71 of Mr McCracken's written skeleton argument) and that the interference was disproportionate and not justified.

[65] I agree with Mr Maurici's observation that, so far as concerns the second ground of challenge, the real focus or the central point of the claimant's case is the alleged lack of proportionality that the interference with the claimant's rights under both articles gives rise to. I also agree with Mr Maurici's submission that the claimant's case on this aspect of the matter rested on the following three main points: (i) that less intrusive alternatives were not considered; (ii) that there had been a failure to consider properly the human rights issues; and (iii) that compensation will be inadequate. However, before turning to consider each of these matters, it is necessary to refer first to four key points made by Mr Maurici (and adopted by Mr Cameron) with regard to the relevant legal context.

[66] (1) Mr Maurici submitted first that the policy requirement that a compulsory purchase order (CPO) will not be confirmed unless there is

a compelling case in the public interest (see also para 17 of the circular 06/2004 quoted at [18], above) fairly reflects the necessary element of balance required in the application of art 8 and art 1 of the First Protocol to the convention (see *London Borough of Bexley v Secretary of State for the Environment, Transport and the Regions, Sainsbury's Supermarkets Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 323 at [33]–[48]). Accordingly, there is no b requirement to set out in a formulaic way the extent to which rights are interfered with. The inspector's report and the Secretary of State's decision letter should be read as a whole in order to determine whether the necessary balancing exercise has been properly carried out. I accept that submission as correct.

[67] (2) Mr Maurici's second key point was that there is a wide margin of appreciation in relation to both articles in terms of proportionality: see, for c example, *James v UK* (1986) 8 EHRR 123 and *Blecic v Croatia* (2005) 41 EHRR 185. Again, I agree with that submission.

[68] (3) Mr Maurici's third key point was, as it seems to me, a crucial one in the context of this particular ground of challenge. It was Mr Maurici's submission that a measure can be proportionate even if it is not the least intrusive means possible. d In order to make that point good, Mr Maurici referred to a number of European and domestic authorities, to the main ones of which I now turn before expressing my conclusion with regard to this particular point.

[69] *James v UK* is a case that concerned an alleged violation of art 1 of the First Protocol in the context of leasehold enfranchisement legislation. The European Court of Human Rights (the ECtHR) held that the state enjoys a wide margin of e appreciation when deciding upon social and economic measures (see (1986) 8 EHRR 123 at 142–143 (para 46)). The applicant argued that the expropriation of property could only satisfy the requirements of art 1 of the First Protocol if there was no 'other less drastic remedy' to resolve the problem at which the legislation was aimed. That argument was rejected by the ECtHR in the following terms f (at 145–146 (para 51)):

> 'This amounts to reading a test of strict necessity into the Article, an interpretation which the Court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for g determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance". Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion h should have been exercised in another way.'

[70] In *Handyside v UK* (1976) 1 EHRR 737 the ECtHR observed that, in the context of art 10(2) of the convention, 'the adjective "necessary" ... is not synonymous with "indispensable"' (see 754 (para 48)). The court compared the position with that arising under art 6(1), where the words are 'strictly necessary', j and art 2(2), where the words are 'absolutely necessary'. As the Court of Appeal observed in *R (on the application of Clays Lane Housing Co-operative Ltd) v Housing Corp* [2004] EWCA Civ 1658, [2005] 1 WLR 2229 (as to which, see below), it was these more rigorous tests that were rejected by the ECtHR in *James v UK* in the context of art 1 of the First Protocol.

[71] *Handyside v UK* was cited and applied by the European Commission in *X v UK* (1982) 28 DR 177 at 184 in the context of rejecting a complaint of an alleged

violation of art 8 and art 1 of the First Protocol by reason of a CPO of a house under the Housing Act 1957. In *Howard v UK* (1987) 52 DR 198, the public interest (including the rights of future homeowners) was found to be capable of outweighing the interests of existing homeowners where the land was to be acquired for redevelopment.

[72] In *R (on the application of Fisher) v English Nature* [2003] EWHC 1599 (Admin), [2003] 4 All ER 366, [2004] 1 WLR 503, Lightman J said (at [46]) that, in the light of *James v UK*, 'The fact that there may be other even better methods of achieving the same ends does not necessarily mean that any particular measure is disproportionate under art 1'. Lightman J's formulation was cited with approval by the Court of Appeal in *R (on the application of Clays Lane Housing Co-operative Ltd) v Housing Corp* [2005] 1 WLR 2229 at [13] and his judgment was upheld on appeal (see [2004] EWCA Civ 663, [2004] 4 All ER 861, [2005] 1 WLR 147).

[73] I accept Mr Maurici's submission that the intensity of review depends upon the particular context in question in a given case. I also agree that the *Samaroo* approach is not one of universal application. Thus, in the subsequent case of *Lough v First Secretary of State* [2004] EWCA Civ 905, [2004] 1 WLR 2557, the Court of Appeal made it clear that the *Samaroo* approach was not applicable in the context of decision making in the planning field. At para [55] of his judgment in that case, Keene LJ put the matter in this way:

> 'I agree with Pill LJ that the process outlined in the *Samaroo* case . . . while appropriate where there is direct interference with article 8 rights by a public body, cannot be applied without adaptation in a situation where the essential conflict is between two or more groups of private interests. In such a situation, a balancing exercise of the kind conducted in the present case by the inspector is sufficient to meet any requirement of proportionality.'

[74] Similarly, in the *Clays Lane Housing* case, the Court of Appeal distinguished *Samaroo*'s case and made it clear that the approach adopted in that case was not one of universal application. Like the present case, the *Clays Lane Housing* case involved the compulsory expropriation of property, ie the compulsory transfer of land from one registered social landlord to another in the light of mismanagement. I agree with Mr Maurici that all the relevant case law in this area is very fully analysed in the *Clays Lane Housing* case. After making it clear that it was now established that the *Samaroo* approach was not one of universal application (see [2005] 1 WLR 2229 at [21]), Maurice Kay LJ stated as follows (at [25]):

> '. . . I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights. That accords with Strasbourg and domestic authority. It is also consistent with sensible and practical decision-making in the public interest in this context. If "strict necessity" were to compel the "least intrusive" alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as *Lough* and the present case.'

[75] I therefore reject Mr McCracken's submission that the means used to achieve the regeneration of the Edge Lane area must be the least intrusive of the claimant's convention rights. The *Samaroo* approach is not one of universal application and I approach the matter on the basis of the law as stated in the *Clays Lane Housing* case, in particular in [25], quoted above.

[76] (4) Mr Maurici's fourth key point was that, other than in exceptional circumstances, compensation is required in cases involving the deprivation of property. However, he submitted (correctly, in my view) that the Strasbourg case law shows a marked reluctance to entertain allegations that the quantum of compensation is inadequate, unless the method for its calculation is manifestly without any reasonable foundation (see *James v UK* (1986) 8 EHRR 123 at 147 (paras 53–55)).

[77] I now turn to consider the three main points on which the claimant's case on this ground of challenge rested (see [65], above).

1. THE FAILURE TO CONSIDER LESS INTRUSIVE ALTERNATIVES

[78] Mr Maurici submitted that this complaint should be rejected for the following reasons: (i) this matter was, in fact, considered by both the inspector and the Secretary of State and (ii) in any event, rejection of a less intrusive alternative does not of itself mean that there is a lack of proportionality.

[79] Turning to the first of these points, I accept that the inspector did give extensive consideration to the issue of whether the regeneration aims underlying the order could be achieved by other means (see IR, paras 462–484) and that he concluded that there were no 'realistic existing alternative proposals capable of implementation'. I am satisfied that this was a conclusion that the inspector was entitled to come to on the evidence that he heard and considered. As for the Secretary of State, in para 9 of his decision letter, he expressly agreed with the inspector's conclusion and went on to say:

> '. . . Whilst various suggestions have been made as to how regeneration and improvements to the area could be achieved without the need for the demolition proposed, the Secretary of State agrees with the Inspector that no realistic alternative proposals capable of implementation have been advanced. There are no alternative proposals that benefit from extant permissions or have funding, that are to be preferred to the existing comprehensive regeneration scheme whose delivery the Order seeks to achieve.'

[80] In my view, the following extracts from the inspector's findings are of particular importance on this aspect of the matter:

> '462. BEVEL has put forward a number of ideas, suggestions or pointers as to potential solutions for consideration relating to the regeneration of the Order land. But these are just that: they do not amount to firm "alternative proposals" either in respect of highway improvements or the refurbishment of particular properties or groups of properties. Nevertheless, these were considered at the Inquiry.
>
> 463. Ideas for road improvement have been suggested involving far less removal of the present frontage development. However, EP's evidence suggests that, for various reasons, those presented at the Inquiry would be technically unworkable. As such, they would be unlikely to gain planning permission and funding. This rebuttal evidence has not been challenged and is to be preferred. Other ideas, such as upgrading of public transport links and Park and Ride, have been merely floated as possible solutions to traffic

problems. No details of firm proposals, extant planning permissions or funding have been provided.

464. These ideas are all geared at retaining most of the existing built fabric surrounding Edge Lane West in the belief that this contributes to an essentially Victorian landscape worth saving in its own right; retention is seen be some Objectors as providing the fitting gateway entrance to the city that is desired and would assist in retaining the existing community. Renovation and refurbishment of the existing housing stock, with minimal demolition to allow junction improvements, is suggested.'

[81] In accordance with the guidance in App C to the circular, the inspector also considered whether the proposed regeneration was, on balance, more likely to be achieved if the land was acquired by the agency, including consideration of the contribution that acquiring the land was likely to make to stimulating and/or maintaining the long-term regeneration of the area (see IR, paras 472–484). In this regard, the inspector's key findings were:

(i) 'There are no other realistic alternative proposals aimed at providing the package of regenerational measures against which the present scheme can be compared. The scheme represents an integral element in the regeneration of the wider area' (see IR, para 472).

(ii) 'The CPO is necessary as many individual pieces of land and properties remain to be acquired and to ensure that the scheme could proceed in a timely manner' (see IR, para 481).

(iii) 'The road corridor element of the scheme benefits from detailed planning permission. It has received provisional funding allocation of up to a maximum of £15·85 million. Full funding approval is expected if the CPO was to be confirmed. There is no contrary evidence to suggest that this would not be so' (see IR, para 481).

(iv) 'The other elements of the regeneration scheme are also well advanced. Outline planning permission exists relating to the development to either side of Edge Lane. A developer (Bellway) has been selected for the Wavertree Zone of Opportunity as part of the New Heartlands HMRI to carry out the residential elements of the scheme. The company has substantial resources to ensure implementation. A commercial developer (Langtree Group PLC) has been appointed to carry out the commercial development. The Heads of Terms of an Overarching Agreement between Bellway, other developers and LCC have been agreed and a total of £40·435 million of funding is in place. Assembly of all the land is considered necessary for the realisation of the comprehensive regeneration scheme' (see IR, para 482).

(v) '. . . it is necessary for the whole of the land to be included in the Order to provide the quantum and layout of development proposed to achieve the benefits claimed . . .' (see IR, para 483).

[82] I accept Mr Maurici's submission that, on the whole, the 'alternatives' listed in the claimant's grounds as providing a less intrusive means of achieving the necessary regeneration merely repeat 'ideas' that were floated and rejected at the inquiry as not practicable. On this aspect of the matter, I am satisfied that the inspector and the Secretary of State made appropriate findings of fact and planning judgments as to the alternative 'proposals' and concluded that there were no

realistic existing alternatives. I accept Mr Maurici's submission that those findings and judgments cannot be said to be *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) or 'manifestly without reasonable foundation' (the relevant convention test in this context: see *James v UK* (1986) 8 EHRR 123). Accordingly, I am satisfied that the inspector's assessment (accepted in due course by the Secretary of State) that there were, in fact, no less intrusive alternatives to the proposed scheme was properly made. I reject Mr McCracken's submissions to the contrary effect.

[83] Turning to the second point made by Mr Maurici on this aspect of the matter, I also agree that, even if a practical and less intrusive alternative means of achieving the required regeneration had been available, the rejection of such an alternative in favour of the confirmation of the order does not, of itself, mean that there is any lack of proportionality. The case law cited above and, in particular, *James v UK* and *R (on the application of Clays Lane Housing Co-operative Ltd) v Housing Corp* [2005] 1 WLR 2229 make it clear that proportionality in this context does not compel the decision maker to show that he has adopted the 'least intrusive' alternative. As it seems to me, the views expressed by the Court of Appeal in the *Clays Lane Housing* case (see the passage from para [25], of the judgment, quoted at [74], above) are very apposite in relation to CPOs aimed at delivering regeneration schemes such as the present. I am therefore satisfied that the balancing exercise carried out by the inspector and the Secretary of State in this case was sufficient to meet the requirement of proportionality.

2. THE FAILURE TO CONSIDER THE HUMAN RIGHTS ISSUES PROPERLY

[84] The claimant's case is that the order will have significant effects on her personally and on her community that are not justified by its purported benefits. It was Mr McCracken's submission that neither the inspector nor the Secretary of State had given adequate consideration to the claimant's human rights and he emphasised the brevity of the specific references to that issue, describing its treatment by each as 'cursory'.

[85] As I have already indicated (see [66], [67], above), I accept that there is a margin of appreciation and that there is no need for a formulaic approach to the human rights balancing exercise, because the ordinary test of a compelling case in the public interest necessarily encompasses that exercise. I also agree with the following submissions made by Mr Maurici in the light of those propositions. (i) The inspector and the Secretary of State both properly directed themselves as to the correct test to apply (see the references to the balancing exercise required by the circular and by the 1998 Act in paras 430 and 495 of the inspector's report and para 11 of the Secretary of State's decision letter). (ii) Extensive consideration was given to the benefits of the scheme proposed (see, for example, the references given in paras 81 and 82 of the written skeleton argument prepared on behalf of the Secretary of State). (iii) The inspector and the Secretary of State weighed against these benefits the impact of the proposals on both individual residents and the wider community (see paras 489 and 491 of the inspector's report and para 11 of the Secretary of State's decision letter). (iv) Since the policy test of 'compelling reason in the public interest' fairly reflects the balancing exercise required by art 8 and art 1 of the First Protocol, this aspect of the matter should not be judged by simply considering the paragraphs in which there is specific reference to the human rights issues. The inspector's report and the Secretary of State's decision letter should be considered as a whole.

[86] I am therefore satisfied that the human rights issues were properly considered by both the inspector and the Secretary of State. I reject Mr McCracken's submissions to the contrary effect.

3. THE INADEQUACY OF COMPENSATION

[87] This can be taken very briefly. There is no doubt that compensation is payable. The amount payable will be determined in accordance with the Compensation Code applicable to all persons displaced from their homes as a result of a CPO. This compensation includes the market value of the house, a disturbance allowance and a home loss payment.

[88] The Compensation Code has been held to comply with art 8 and art 1 of the First Protocol (see *Howard v UK* App No 10825/84 (18 October 1985, unreported)). Although it appears that the amount of the compensation will be adversely affected by the local housing market failure phenomenon, this does not of itself constitute an infringement of art 8 and/or art 1 of the First Protocol because the compensation will be for the value of what is taken (ie the market value). In addition, there are elaborate procedures in this case for assistance and additional compensation beyond that which is payable under the Code. I am therefore satisfied that there is no substance in this particular point.

[89] Accordingly, other than on the limited basis set out at [54], above, I have come to the conclusion that this ground of challenge fails for the reasons expressed in [55]–[88], above, inclusive.

GROUND 3

[90] The third ground of challenge is pleaded in the following terms: 'The Claimant was deprived of her right to a fair hearing under Article 6(1) ECHR because of the unavailability of public funding for legal representation.'

[91] Article 6(1) of the convention provides as follows: 'In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

[92] I accept that the compulsory purchase procedure is a determination of the claimant's civil rights (see *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [41], [2001] 2 All ER 929 at [41], [2003] 2 AC 295, per Lord Slynn). Article 6 is therefore engaged in this case.

[93] Mr McCracken submitted that art 6 guarantees a right of 'effective' access to court and that, therefore, compliance with the convention can require the provision of legal aid for an individual in an appropriate case. In support of that submission he referred to and relied on two cases: *Airey v Ireland* (1979) 2 EHRR 305 and *Steel v UK* (2005) 18 BHRC 545.

[94] *Airey v Ireland* involved divorce proceedings that had to be prosecuted in the High Court by means of a lawyer. The ECtHR found that the applicant did not enjoy an effective right of access to the court (see (1979) 2 EHRR 305 at 318 (para 28)). The court pointed out that the absence of an express provision in the text of art 6 requiring the provision of legal aid in civil cases means that any implied obligation will be less extensive that the (express) right to legal aid in criminal cases. The court recognised that there may be occasions when appearing before a civil court in person would meet the requirements of art 6(1) and that there may be occasions when that possibility secured adequate access 'even to the High Court'

(see 316–317 (para 26)). However, the court noted that 'much must depend on the particular circumstances' and went on to state as follows:

> 'Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory . . . or by reason of the complexity of the procedure or of the case.'

[95] In *Steel v UK* the principal complaint under art 6(1) was that the applicants had been denied a fair trial because of the lack of legal aid. The trial itself involved particularly heavy and notorious libel proceedings brought by the well-known fast-food chain 'McDonalds' against the two litigants in person. The proceedings achieved the dubious distinction of having been the longest ever civil trial in English legal history. The ECtHR held as follows ((2005) 18 BHRC 545 at 567, 569):

> '59. . . . the convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial . . . It is central to the concept of a fair trial . . . that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side . . .
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> 60. Article 6(1) leaves to the state a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure.
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> 61. The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend inter alia upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively . . .
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> 62. The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate . . . It may therefore be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings . . . Moreover, it is not incumbent on the state to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary . . .
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> 69. . . . in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law . . .'

[96] The essence of the claimant's case under this ground of challenge is that the compulsory purchase inquiry was so complex, lengthy and technical that she should have received funding for legal representation and the services of professional witnesses at the inquiry, particularly in view of the fact that the agency was represented by experienced leading and junior counsel and a large and well-resourced firm of solicitors. It is said that the need for funding was heightened

by the importance of what was at stake for the claimant (namely, her home) and that the lack of sustained legal representation prevented the claimant from presenting her objections practically and effectively to the inspector, as compared with a well-resourced acquiring authority and thus contributed to an inequality of arms in breach of art 6.

[97] Mr Maurici accepted that ordinarily Community Legal Funding (legal aid) is not available in respect of inquiries. However, exceptionally funding is sometimes provided: see, for example, what was said about this by Harrison J in *R v Secretary of State for the Environment, Transport and the Regions, ex p Challenger* [2001] Env LR 12.

[98] It appears that the claimant applied for but failed to obtain legal aid. The claimant then asked the inspector at a pre-inquiry meeting to make an order on behalf of the Secretary of State for the agency to pay her, and the other statutory objectors, a reasonable amount to cover her legal costs. This was referred to as a 'pre-emptive application for costs'. The subsequent history relating to this application, its outcome and the way the matter was dealt with by the inspector in his report is accurately summarised in paras 96–101 of the written skeleton argument prepared on behalf of the Secretary of State, as follows:

> 'The Inspector invited submissions from [the agency] on the point. [The agency] responded by letter dated 22 July 2005 to the effect that the Secretary of State should not order [the agency] to fund the objectors but in the alternative, should he be minded to do so, those funds should be limited to £20,000 and be directed to an "accountable body" to ensure its fair distribution amongst the community as a whole.
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> 97. The Inspector wrote to the Claimant's solicitor by letter dated 27 July 2005 see TB/5/2/25 – 26 and also IR/1–4 and 493, stating inter alia:
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> > "The starting point in the published policy is that the parties at Inquiries normally meet their own expenses, as stated in Circular 8/93, Annex 1, paragraph 1. In the case of CPOs, awards of costs are normally made to successful, or partly successful, statutory objectors, the award to be paid by the Order-making authority or agency . . . Because of the nature of these awards which follow the event (as distinct from a costs award on the grounds of a party's unreasonable behaviour), applications have to be made formally to the Secretary of State so that the Inspector is not expected to hear submissions and report separately on costs.
> >
> > In this case the Inquiry has yet to open. I am conscious that I will be reporting to the First Secretary of State on the substantive issues arising, evidence on which has yet to be heard. While I am holding Pre-Inquiry Meetings to prepare for the smooth running of the Inquiry, I cannot 'stand in the shoes' of the Secretary of State when it comes to matters outside my remit. I therefore conclude that it is inappropriate for me to consider or comment on the intended application for a costs order, and the related legal arguments, which should properly be addressed to the First Secretary of State . . ."
>
> 98. The Inspector then proceeded, in the same letter, to provide the correct postal and email addresses for the Secretary of State's office in the north-west ("GONW").
>
> 99. The narrative of events is then taken up in the IR at IR/166–169, where the Inspector summarises the case for [the agency] on "Equality of Arms":

"166. During the course of cross-examination Ms Pascoe stated that she had written to the GONW (E Pascoe cross-examination, day 5). GONW indicated that it had received no such request (EP/25). When it was put to her that Eversheds had checked with the GONW and that the Government Office had indicated that they had received no such request or application, Ms Pascoe said that she would try and find a copy of her letter. She indicated that she would have difficultly finding the letter. During the course of cross-examination it was made plain to Ms Pascoe that the onus was on her to demonstrate that she had written such a letter.

167. Ms Pascoe later indicated that she did not send a letter to Mr Ashton at the GONW (E Pascoe, verbal comment, day 8). She then said that she sent it 'directly', but was not clear as to whether that letter related to funding or to a request that the planning applications relating to the Order land be called in. Ms Pascoe accepted that she did not go through the proper procedure. She then suggested that she may have asked Jane Kennedy MP to make the request to the FSS.

168. Ms Pascoe indicated that she was considering whether it was appropriate for her to make any letter she had written or received on the issue of costs available to the Inquiry or whether she should produce it in support of a statutory challenge at a later date. The Inspector indicated that if Ms Pascoe had evidence that a written request had been made to the FSS to make a pre-emptive award of costs he would need to have it before the close of the Inquiry. The Inspector stated to Ms Pascoe that 'the ball was in your court'. In her email dated 23rd October 2005, Ms Pascoe says that '. . . but as I knew the answer would be "NO" from GONW I didn't bother with that route, but delegated to Jane [Jane Kennedy MP], who may or may not have tried it'. (Copy of e-mail within file 5 accompanying BEV/28).

169. It appears that Ms Pascoe did not make a request to GONW, but may have asked Jane Kennedy MP to make a request for funding on BEVEL's behalf. There is, however, no evidence that Ms Kennedy did make an application to the FSS on BEVEL's behalf. In the absence of evidence that an application was made to the FSS for a pre-emptive award of costs, it must be concluded that the Objectors failed to take the most appropriate course of action available to them to secure funding."

100. The Inspector reached the following conclusions in this regard at IR/493 (see also IR/1–4):

"I indicated that consideration of the possible pre-emptive award of costs to address this matter was beyond my remit but that should there be an inclination to pursue this further then an application should be made directly to the FSS. There is no evidence to suggest that such an application was in fact made [165–169]. As this is in effect a legal matter I make no further comments upon the absence or otherwise of such an application."

101. The Secretary of State in the DL said at DL/6:

"The Secretary of State also notes that there was some discussion at the Inquiry over the question of a possible claim for Inquiry costs from the group 'BEVEL' (Better Environmental Vision for Edge Lane) under the First Secretary of State's discretionary power of section 250(5) of the Local Government Act 1972. The Secretary of State notes that no such claim has

been made from BEVEL or from any other party."'

[99] In short, the inspector declined to make the order and suggested that the application should be addressed directly to the Secretary of State and provided the correct details to enable that to be done. It appears that no application was actually made to the Secretary of State in the event.

[100] Mr Maurici submitted (correctly, in my view) that there are three reasons of principle that support a restrictive approach to examining any obligation to provide legal aid in civil cases.

[101] First, as the ECtHR observed in its judgment in *Airey v Ireland* (1979) 2 EHRR 305, the absence of an express provision in the text of art 6 requiring the provision of legal aid in civil cases means that any implied obligation will be less extensive than the (express) right to legal aid in criminal cases.

[102] Second, where there is no express obligation to provide legal aid in civil cases, the convention leaves contracting states with a free choice of means of ensuring that there is an effective right of access to court (see *Airey's* case at para 26). It is relevant that the tribunal conducting a hearing takes steps to ensure that the individual is not disadvantaged in presenting his or her case effectively and goes into matters in care and detail to ensure that the case is understood. This will be particularly relevant as a factor in the context of an inquisitorial procedure such as applies in a planning inquiry, in which the task of the inspector is to get to the real facts and form his own judgment in the light of his own inquiry (see the observations of Sullivan J in *R (on the application of Hadfield) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1266 (Admin) at [50], [51]).

[103] Third, as the ECtHR and the Commission have recognised, contracting states do not have unlimited resources to fund legal aid systems for civil cases, and therefore measures to allocate the available resources to where they are most needed are in principle legitimate (see, for example, *Winer v UK* (1986) 48 DR 154).

[104] Mr Maurici submitted that neither *Airey v Ireland* nor *Steel v UK* was analogous to the present case. I agree. The High Court proceedings in *Airey v Ireland* required the presence of a lawyer and *Steel v UK* was a quite exceptionally heavy case by any standards. Both cases involved civil litigation of the conventional, adversarial kind, in contrast to the inquisitorial approach of the inspector in the present case. The difference for the purposes of art 6 between inquisitorial and adversarial procedures was rightly and helpfully emphasised by Sullivan J in *R (on the application of Hadfield) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1266 (Admin) at [50]: see also the decision of Harrison J in *R v Secretary of State for the Environment, Transport and the Regions, ex p Challenger* [2001] Env LR 12.

[105] In my view, *R v Secretary of State for the Environment, Transport and the Regions, ex p Challenger* is a case with similarities to the present case. In *Ex p Challenger* a complaint of inequality of arms was raised in the context of a forthcoming inquiry concerning, inter alia, compulsory acquisition relating to the Thameslink 2000 rail project. At the pre-inquiry meeting, third party objectors argued that the issues to be determined were so complex and technical that they should be given funding for representation. The inspector indicated that he would go to great lengths to assist those unfamiliar with the process or those who were not represented to the same degree as the principal parties. The inspector also suggested that the objectors either apply to the Legal Services Commission or write to the Chief Planning Officer or the Secretary of State to request funding. An

application was made to the Legal Services Commission and it was refused. However, no request was made to the Chief Planning Officer or to the Secretary of State. The applicants sought permission to apply for judicial review on the basis that the denial of legal funding was a breach of art 6(1).

[106] Harrison J dismissed the application, holding that even in the absence of legal funding the claimants would have a reasonable opportunity to present their case given the duty of the inspector to facilitate the participation of the public (see [2001] Env LR 209 at 223 (para 50)). *Airey v Ireland* was distinguished as the 'high water mark of Strasbourg jurisprudence', in which its 'nature and facts' were to be distinguished from *R v Secretary of State for the Environment, Transport and the Regions, ex p Challenger* (see 222 (para 47)).

[107] I have come to the conclusion that this third ground of challenge fails for two reasons.

[108] First, in my view the Strasbourg case law upon which the claimant relies does not cover the circumstances of the present case for the following reasons.

(i) In both *Airey v Ireland* and *Steel v UK*, the applicants had exhausted all possible sources of funding. This was not the case here because neither the claimant nor anyone on her behalf contacted the Secretary of State to apply for costs as suggested by the inspector in his letter dated 27 July 2005. I accept the submission that the claimant did not face a closed door: a further avenue was suggested through which she might have been able to secure funding, but she failed to take it. I do not accept that the inspector was under any obligation or duty to forward the claimant's application to the Secretary of State of his own motion. In those circumstances, as it seems to me, it cannot be said that the claimant was 'deprived' of the funding alleged to be necessary to ensure the right to a fair trial under art 6(1) (see also *Andronicou v Cyprus* (1997) 3 BHRC 389 at 427–428 (paras 198–201)).

(ii) Neither *Airey v Ireland* nor *Steel v UK* is analogous to the present case for the reasons explained above. I accept that inquiry procedures are designed to be more user-friendly and less complex than those found in the courtroom. Individuals are enabled to present their own cases, and inspectors will normally adjust the inquiry timetable to facilitate matters for those seeking to put their case. This was done here, with the inspector readily arranging the timetable around the availability of BEVEL's witnesses, even if this led to inconveniently long adjournments.

(iii) In fact, the claimant was much better placed than many litigants in person so far as concerns being able to present her case, because she benefited from a considerable amount of legal assistance and other support from witnesses and experts in an inquisitorial rather than an adversarial procedure: contrast the position of Mr McVicar in *McVicar v UK* (2002) 12 BHRC 567.

[109] Second, looking at the 'nature and facts' of the present case, I am satisfied that the claimant was in fact given a 'reasonable opportunity to present [her] case', which is the essence of the requirement of 'equality of arms' (see *Dombo Beheer BV v Netherlands* (1993) 18 EHRR 213 at 229–230 (para 33)). I reach that conclusion based on the following principal facts.

(i) The claimant received the benefit of assistance from counsel and a solicitor in the period before the inquiry. The claimant's solicitor, a leading expert in compulsory purchase law, drafted a letter of objection in response to the agency's statement of reasons. Counsel for the claimant drafted for her the application for pre-emptive costs that was submitted at the pre-inquiry meeting on 22 July 2005.

(ii) During the inquiry itself, the claimant had at various times the assistance of two barristers, acting pro bono, who attended the inquiry for three days,

cross-examined some of the agency's witnesses and submitted opening and closing submissions to the inquiry.

(iii) The claimant has a diploma in architecture and a degree in environmental science. She would therefore have had a much better grasp of the issues at the inquiry than would the ordinary lay objector.

(iv) Another statutory objector, Mr Gwynne, who assisted the claimant at the inquiry and cross-examined a number of the agency's witnesses, holds professional qualifications in architecture. The claimant clearly benefited from his expertise during the inquiry.

(v) Despite her limited resources, the claimant was able to obtain evidence and/or appearances from many witnesses, including several high-calibre public interest groups, academics and local politicians.

(vi) Eversheds, the solicitors acting for the agency, provided substantial administrative and technical support to the claimant before, during and even after the inquiry. This was done free of charge. The details are set out in the witness statement of Ms Naylor at paras 12.1–12.8. It is clear that the claimant received very considerable assistance in this way (estimated at approximately 75 hours in all).

(vii) Although additional evidence was served by the agency on the penultimate day of the inquiry, the claimant did not seek an adjournment and, in the event, the claimant's witnesses successfully responded to the evidence by e-mail to Eversheds on the last day of the inquiry (27 October 2005). Further, it is clear that counsel for the claimant had the benefit of seeing the evidence served by the Agency on 26 October 2005 before drafting the closing submissions on the claimant's behalf.

(ix) There is no substance in the other alleged disadvantages to which Mr McCracken made reference during his submissions for the reasons given in Mr Maurici's written note of his submissions (at p 18 (paras 63.9, 63.10) as follows:

> '**63.9 The non-disclosure of the Kensington [Neighbourhood Renewal Assessment] condition schedule:** again this is put forward as a particular circumstance where lack of sustained representation counted (or may have counted against) the Claimant BUT:
>
> a Non-disclosure of NRA condition schedule only discussed once at inquiry when [the Agency] gave explanation of City Council's position—and Mr Zwart [the claimant's pro bono Counsel] present—so at key moment represented—could have pursued via s. 250 [of the Local Government Act 1972] if considered necessary, issues re non-disclosure of documentation considered in Mr Zwart's closing—so aware of position—made no application at any time;
>
> b Not alleged conclusions in [the inspector's report] could not be reached without this evidence—or unfair not provided;
>
> c Not even referred to in Grounds as pleaded (by Mr Zwart) as an example of inequality of arms.
>
> **63.10 The failure to pursue the "housing market failure"/compensation/human rights point**: Claimant had objection drafted by Mr Brand CPO specialist, [an] editor of [the Compulsory Purchase Encyclopaedia] and assistance and closing submissions from 2 barristers specialising in field—not raise point for good reason (see above).'

[110] I therefore accept that the inspector's own assessment of the 'equality of arms' issue is both fair and accurate: see para 494 of his report, which is in the following terms:

'In respect of the Inquiry itself, I am satisfied that its running allowed the Objectors fairly and reasonably to present their case with the resources available to them. These resources included advice from, and the attendance on two days of, Counsel, acting on a pro bono basis, who chose to cross-examine two of EP's witnesses. Closing submissions were also prepared on BEVEL's behalf by Counsel. The Inquiry programme was arranged to allow BEVEL witnesses to attend when convenient to them. Although fresh evidence was produced throughout the course of the Inquiry (on behalf of both EP and the Objectors) this was perhaps inevitable in the light of the nature of the case and examination and cross-examination of witnesses as the Inquiry progressed. There were no requests for any substantive adjournments to allow new material to be studied.'

[111] Accordingly, for those reasons, I am satisfied that the third ground of challenge fails.

CONCLUSION

[112] For the reasons already given, I have come to the firm conclusion that this challenge succeeds on both ground 1 and ground 2 (to the limited extent indicated in [54], above). I will hear further submissions from counsel as to the appropriate form of order and with regard to any consequential applications.

Application allowed.

Vanessa Higgins Barrister.

Toth v Jarman

Note

[2006] EWCA Civ 1028

COURT OF APPEAL, CIVIL DIVISION
SIR MARK POTTER P, ARDEN AND WALL LJJ
7–9 MARCH, 19 JULY 2006

Evidence – Expert witness – Conflict of interest – Guidance – Best practice.

In the judgment of the court on this appeal and application to adduce new evidence, delivered by **SIR MARK POTTER P** but to which all of its members contributed, the Court of Appeal made the following observations and gave the following guidance relating to conflict of interest and expert witnesses:

'**[100]** We start with the point of principle. Does the presence of a conflict of interest automatically disqualify an expert? In our judgment, the answer to that question is No: the key question is whether the expert's opinion is independent. It is now well established that the expert's expression of opinion must be independent of the parties and the pressures of the litigation. Authority for this can be found in paras 1 and 2 of the guidance which Cresswell J gave in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 at 81–82 as summarised on pp 938–939 (para 35.3.1) of the White Book (*Civil Procedure* (2006 edn)) vol 1:

"1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation ([*Whitehouse v Jordan* [1981] 1 All ER 267 at 276, [1981] 1 WLR 246 at 256–257 per Lord Wilberforce]).

2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see [*Polivitte Ltd v Commercial Union Assurance Co plc* [1987] 1 Lloyd's Rep 379 at 386 per Garland J] and [*Re J (Child Abuse: Expert Evidence)* [1991] 1 FCR 193 per Cazalet J]. An expert witness in the High Court should never assume the role of an advocate . . ."

[101] Moreover, CPR 35.3 sets out the overriding duty of an expert witness. His duty is to assist the court in relation to matters which fall within his expertise. The need for the expert to give an independent opinion flows also from this duty, which is stated to override any duty which the expert may owe to his client:

"(1) It is the duty of an expert to help the court on the matters within his expertise. (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid."

[102] However, while the expression of an independent opinion is a necessary quality of expert evidence, it does not always follow that it is sufficient condition in itself. Where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or

indeed to give permission for his evidence to be adduced. This means it is important that a party who wishes to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible . . .

[113] The obligation to disclose the existence of a conflict of interest in our judgment stems from the overriding duty of an expert, to which we have already referred and which is clearly laid down in CPR 35.3, and also from the duty of the parties to help the court to further the overriding objective of dealing with cases justly (CPR 1.3). The court needs to be assisted by information as to any potential conflict of interest so that it can decide for itself whether it should act in reliance on the evidence of that expert.

[114] We note that the practice of the court as set out in the CPR and practice directions, the valuable new Protocol for the Instruction of Experts to give evidence in civil claims (set out at pp 966–977 of *Civil Procedure*), and the commentaries in *Civil Procedure* and *Civil Court Practice* (the Green Book), do not refer in terms to the need for disclosure by an expert of a conflict or potential conflict of interest. We also note that the standard form of order used by Master Ungley and Master Yoxall, to whom clinical negligence matters in the Queen's Bench Division in London are assigned, requires the production of an expert's curriculum vitae (cv) but this is only where the court has directed a single expert, and the parties cannot agree on who it should be. As already stated, in our judgment, an expert should produce his cv when he provides his report, and that cv should give details of any employment or activity which raises a possible conflict of interest. This may indeed already be best practice.

[115] The practice direction supplementing CPR Pt 35 provides that an expert must verify his expert's report by a statement of truth in the following form:

> "I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."

[116] In addition, the practice direction also requires the expert's report to state any qualification, if the expert is not able to give his opinion without qualification, and that the expert understands his duty to the court and has complied and will continue to comply with that duty.

[117] An expert will often make a declaration at the end of his report which not only contains the statement of truth required by the practice direction but also contains other matters designed to meet other requirements of the CPR or practice directions, or other issues which have arisen in practice. No doubt, in principle these declarations serve the valuable purpose of focusing the mind of the expert on all these matters . . .

[119] In our judgment, the Civil Procedure Rules Committee should consider extending the requirement for an expert's declaration at the end of his report. Its present form is directed to ensuring that the contents of the report represent the independent and unvarnished opinion of the expert making the report. But, as we have explained above, there is another side to independence. The expert should not leave undisclosed any conflict of interest which might bring into question the suitability of his evidence as the basis for the court's decision. The conflict of interest could be of any kind,

including a financial interest, a personal connection, or an obligation, for example, as a member or officer of some other body. But ultimately, the question of what conflicts of interest fall within this description is a question for the court, taking into account all the circumstances of the case.

[120] Without wishing to be over-prescriptive or to limit consideration by the Civil Procedure Rules Committee, we are of the view that consideration should be given to requiring an expert to make a statement at the end of his report on the following lines: (i) that he has no conflict of interest of any kind, other than any which he has disclosed in his report; (ii) that he does not consider that any interest which he has disclosed affects his suitability as an expert witness on any issue on which he has given evidence; (iii) that he will advise the party by whom he is instructed if, between the date of his report and the trial, there is any change in circumstances which affects his answers to (a) or (b) above.

[121] As we see it, a form of declaration to this effect should assist in reminding both the expert and the party calling him of the need to inform the other parties and the court of any possible conflict of interest. Thus pending any further consideration by the Civil Procedure Rules Committee, we give the guidance set out above.'

The full text of the judgment in this case, in which *George Pulman QC* and *Clive Rawlings* (instructed by *RadcliffesLeBrasseur*) acted for the appellant claimant Arpad Toth and *Mary O'Rourke* (instructed by the *Medical Defence Union*) acted for the defendant respondent David Michael Jarman, can be found in All England Reporter ([2006] All ER (D) 271 (Jul)) on the LexisNexis Butterworths online service.

Celia Fox Barrister.

Jameel and another v Wall Street Journal Europe SPRL

[2006] UKHL 44

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD SCOTT OF FOSCOTE AND BARONESS HALE OF RICHMOND

26–28 JUNE, 11 OCTOBER 2006

Libel and slander – Parties – Right to sue – Corporation – Foreign corporation – Right to freedom of expression – Common law presumption of damage under English law once publication of libel established – Whether right to freedom of expression modifying common law presumption in relation to foreign corporation – Human Rights Act 1998, Sch 1, Pt I, art 10(2).

Libel and slander – Qualified privilege – Common law privilege – Duty to publish – Public interest – Whether exercise of responsible journalism equating to test for qualified privilege.

The first claimant was the general manager and president of the second claimant, a Saudi Arabian trading company. They brought a libel action against the defendant publisher which had published an article in which they were named. The defendant advanced a defence of qualified privilege of the type identified by the House of Lords in *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 on the basis that the essence of the test of whether that defence applied was whether the publisher had exercised 'responsible journalism'. The defendant also applied to strike out the second claimant's claim, challenging the principle that a trading company which itself conducted no business in England and Wales, but had a trading reputation in the jurisdiction, was entitled to sue in libel without pleading or proving special damage. It considered that that domestic principle infringed the right to freedom of expression in art 10[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The judge refused to strike out the claim and gave judgment for the claimants. The defendant appealed unsuccessfully to the Court of Appeal and then to the House of Lords.

Held – (1) (Lord Hoffmann and Baroness Hale of Richmond dissenting) The domestic rule entitling a trading corporation to sue in libel when it could prove no financial loss was not an unreasonable restraint on the right to publish protected by art 10 of the convention. The right guaranteed by the article was not unqualified; it could be circumscribed by restrictions prescribed by law and necessary and proportionate if directed to ends including the protection of the reputation or rights of others. Under the current domestic law a trading company with a trading reputation in England and Wales could recover general damages without pleading or proving special damage if the publication complained of had a tendency to damage it in the way of its business. There was no reason to change the existing rule so that a corporation would be entitled to

a Article 10 is set out at [18], below

sue in its own right only if it could prove financial loss. The good name of a company, as that of an individual, was a thing of value; there was nothing repugnant in the notion that that was a value which the law should protect (see [17]–[20], [22], [25]–[27], [92], [98], [104], [120], [122], [125], [126], below); *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 applied; *Steel v UK* (2005) 41 EHRR 403 considered.

(2) In applying the *Reynolds* defence the first question was whether the subject matter of the article, considered as a whole, was a matter of public interest. The *Reynolds* defence had been developed from the traditional form of privilege by a generalisation that in matters of public interest there could be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it; that generalisation should be regarded as a proposition of law and not decided every time as a question of fact. It was thus not helpful to apply the classic test for the existence of a privileged occasion and to ask whether there was a duty to communicate the information and an interest in receiving it. If the publication was in the public interest the duty and interest were taken to exist. The next question, if the article as a whole concerned a matter of public interest, was whether the inclusion of the defamatory statement was justifiable. But whereas the question of whether the story as a whole had been a matter of public interest had to be decided by the judge without regard to what the editor's views may have been, the question of whether the defamatory statement should have been included was often a matter of how the story should have been presented. On that question allowance had to be made for editorial judgment. If the publication, including the defamatory statement, passed the public interest test, the inquiry shifted to whether the steps taken to gather and publish the information were responsible and fair. The question in each case was whether the defendant had behaved fairly and responsibly in gathering and publishing the information. The standard of conduct required of the newspaper had to be applied in a practical and flexible manner having regard to practical realities. In the instant case, there had been no basis for rejecting the defendant's *Reynolds* defence. The appeal would therefore be allowed (see [35], [37], [48], [51], [53], [54], [56], [79]–[85], [92], [138], [141], [144], [145], [149], [150], below); *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 applied; *Bonnick v Morris* (2002) 12 BHRC 558 adopted.

Decision of the Court of Appeal [2005] 4 All ER 356 reversed.

Notes

For whether damage must be shown in libel and for the defence of qualified privilege, see 28 *Halsbury's Laws* (4th edn reissue) paras 18, 109, 121, 123, for the right to freedom of expression, see 8(2) *Halsbury's Laws* (4th edn reissue) para 107.

For the Human Rights Act 1998, Sch 1, Pt I, art 10, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 707.

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Blackshaw v Lord [1983] 2 All ER 311, [1984] QB 1, [1983] 3 WLR 283, CA.

Bognor Regis UDC v Campion [1972] 2 All ER 61, [1972] 2 QB 169, [1972] 2 WLR 983.

Bonnick v Morris [2002] UKPC 31, (2002) 12 BHRC 558, [2003] 1 AC 300, [2002] 3 WLR 820.

Campbell v MGN Ltd [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 AC 457, [2004] 2 WLR 1232.

Castells v Spain (1992) 14 EHRR 445, [1992] ECHR 11798/85, ECt HR.

Cox v Feeny (1863) 4 F&F 13, 176 ER 445.

Derbyshire CC v Times Newspapers Ltd [1993] 1 All ER 1011, [1993] AC 534, [1993] 2 WLR 449, HL; *rvsg* [1992] 3 All ER 65, [1992] QB 770, [1992] 3 WLR 28, CA; *rvsg* [1991] 4 All ER 795, [1992] QB 770.

English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd [1940] 1 All ER 1, [1940] 1 KB 440, CA.

Harrison v Bush (1855) 5 E&B 344, 119 ER 509.

Horrocks v Lowe [1974] 1 All ER 662, [1975] AC 135, [1974] 2 WLR 282, HL.

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Märkt Intern and Beerman v Germany (1989) 12 EHRR 161, [1989] ECHR 10572/83, ECt HR.

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Reynolds v Times Newspapers Ltd [1999] 4 All ER 609, [2001] 2 AC 127, [1999] 3 WLR 1010, HL; *affg* [1998] 3 All ER 961, [1998] 3 WLR 862, CA.

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Bergens Tidende v Norway (2001) 31 EHRR 430, [2000] ECHR 26132/95, ECt HR.

Blackshaw v Lord [1983] 2 All ER 311, [1984] QB 1, [1983] 3 WLR 283, CA.

Chase v News Group Newspapers Ltd [2002] EWCA Civ 1772, [2003] EMLR 218.

Chauvy v France (2005) 41 EHRR 610, [2004] ECHR 64915/01, ECt HR.

Collins Stewart Ltd v Financial Times Ltd [2004] EWHC 2337, [2005] EMLR 64.
Comingersoll SA v Portugal (2001) 31 EHRR 772, ECt HR.
Cumpana v Romania (2005) 41 EHRR 200, [2004] ECHR 33348/96, ECt HR.
Gaddafi v Telegraph Group plc [2000] EMLR 431, CA.
Galloway v Telegraph Group Ltd [2006] EWCA Civ 17, [2006] EMLR 221.
Gertz v Robert Welch Inc (1974) 418 US 323, US SC.
GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd [2000] 2 All ER 931, [2001] 1 WLR 2571, CA.
Goodwin v UK (1996) 1 BHRC 81, ECt HR.
Jameel v Dow Jones & Co Inc [2005] EWCA Civ 75, [2005] QB 946, [2005] 2 WLR 1614.
Jersild v Denmark (1994) 19 EHRR 1, [1994] ECHR 15890/89, ECt HR.
Joyce v Sengupta [1993] 1 All ER 897, [1993] 1 WLR 337, CA.
Kroch v Rossell et Compagnie Société des Personnes à Responsibilité Limitée; Kroch v Société en Commandité par Actions le Petit Parisien [1937] 1 All ER 725, CA.
Lion Laboratories Ltd v Evans [1984] 2 All ER 417, [1985] QB 526, [1984] 3 WLR 539, CA.
Lonrho plc v Fayed (No 5) [1994] 1 All ER 188, [1993] 1 WLR 1489, CA.
Mark v Associated Newspapers Ltd [2002] EWCA Civ 772, [2002] EMLR 839.
McVicar v UK (2002) 12 BHRC 567, ECt HR.
Metropolitan Saloon Omnibus Co v Hawkins (1859) 4 H&N 87, [1843–60] All ER Rep 430, 157 ER 769, Exch Ct.
Miloslavsky v UK (1995) 20 EHRR 442, [1995] ECHR 18139/91, ECt HR.
Multigroup Bulgaria Holding AD v Oxford Analytica Ltd [2001] EMLR 737.
Panday v Gordon [2005] UKPC 36, [2006] 3 LRC 252, [2006] 1 AC 427, [2006] 2 WLR 39.
Prosecutor v Brdjanin & Tadic Case No IT-99-36-AR73.9, ICTY.
Roberts v Gable [2006] EWHC 1025 (QB), [2006] All ER (D) 182 (May).
S (a child) (identification: restriction on publication), Re [2004] UKHL 47, [2004] 4 All ER 683, [2005] 1 AC 593, [2004] 3 WLR 1129.
Selisto v Finland [2005] EMLR 178, ECt HR.
Steel v McDonald's Corp [1999] All ER (D) 384, CA.
Stern v Piper [1996] 3 All ER 385, [1997] QB 123, [1996] 3 WLR 715, CA.
Thoma v Luxembourg (2003) 36 EHRR 359, [2001] ECHR 38432/97, ECt HR.
Thorgeirson v Iceland (1992) 14 EHRR 843, [1992] ECHR 13778/88, ECt HR.

Appeal

The appellant Wall Street Journal Europe Sprl, the defendant in libel proceedings brought by Mohammed Abdul Latif Jameel (the first respondent) and Abdul Latif Jameel Co Ltd (the second respondent), appealed with permission of the House of Lords Appeal Committee given on 4 May 2005 from the decision of the Court of Appeal (Lord Phillips of Worth Matravers MR, Sedley and Jonathan Parker LJJ) on 3 February 2005 dismissing the appellant's appeals (i) from the decision of Eady J on 5 December 2003 ([2003] EWHC 2945 (QB), [2004] 2 All ER 92) dismissing the appellant's application to strike out the claim of the second respondent on the ground that it should not be permitted to rely on the presumption of damage; and (ii) from the decision of Eady J on 19 December 2003 with reasons given on 20 January 2004 ([2004] EWHC 37 (QB), [2004] All ER (D) 127 (Jan)) rejecting the defence of qualified privilege advanced by the appellant and awarding damages of £30,000 to the first claimant and £10,000 to

the second claimant. The facts are set out in the opinions of Lord Bingham of Cornhill and Lord Hoffmann.

Geoffrey Robertson QC, Rupert Elliott and *Guy Vassall-Adams* (instructed by *Finers Stephens Innocent*) for the appellants.

James Price QC and *Jacob Dean* (instructed by *Carter-Ruck*) for the respondents.

Their Lordships took time for consideration.

11 October 2006. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, this appeal raises two questions on the law of libel. The first concerns the entitlement of a trading corporation such as the second respondent to sue and recover damages without pleading or proving special damage. The second concerns the scope and application of what has come to be called *Reynolds* privilege, an important form of qualified privilege (see *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 12).

[2] The appellant is the publisher of the Wall Street Journal Europe, a respected, influential and unsensational newspaper (the newspaper) carrying serious news about international business, finance and politics. It is edited, published and printed in Brussels for distribution throughout Europe and the Middle East. It shares some editorial and journalistic personnel and facilities with its elder sister in New York, the Wall Street Journal, which has a large circulation in the United States.

[3] The respondents, claimants in the proceedings, are Saudi Arabian. The first respondent is a prominent businessman and president of the Abdul Latif Jameel Group, an international trading conglomerate based in the Kingdom of Saudi Arabia comprising numerous companies and with interests in cars, shipping, property and distribution of electronic goods. The second respondent is a company incorporated in Saudi Arabia and is part of the group. The first respondent is the general manager and president of the company, which does not itself own property or conduct any trade or business here, but which has a commercial reputation in England and Wales.

[4] On 6 February 2002 the newspaper published the article which gave rise to these proceedings. It was headed 'Saudi Officials Monitor Certain Bank Accounts' with a smaller subheading 'Focus Is on Those With Potential Terrorist Ties'. It bore the by-line of James M Dorsey, an Arabic-speaking reporter with specialist knowledge of Saudi Arabia, and acknowledged the contribution of Glenn Simpson, a staff writer in Washington. The gist of the article, succinctly stated in the first paragraph, was that the Saudi Arabian Monetary Authority, the Kingdom's central bank, was, at the request of United States law enforcement agencies, monitoring bank accounts associated with some of the country's most prominent businessmen in a bid to prevent them from being used, wittingly or unwittingly, for the funnelling of funds to terrorist organisations. This information was attributed to 'U.S. officials and Saudis familiar with the issue'. In the second paragraph a number of companies and individuals were named, among them 'the Abdullatif Jamil Group of companies' who, it was stated later in the article, 'couldn't be reached for comment'.

[5] The jury in due course found that the article referred to was defamatory of both respondents. They may have understood the article to mean that there

were reasonable grounds to suspect the involvement of the respondents, or alternatively that there were reasonable grounds to investigate the involvement of the respondents, in the witting or unwitting funnelling of funds to terrorist organisations. For present purposes it is immaterial which defamatory meaning the jury gave the passage complained of, neither of which the newspaper sought to justify.

[6] The article was published some five months after the catastrophic events which took place in New York and Washington on 11 September 2001. During the intervening months the United States authorities had taken determined steps, with strong international support, to cut off the flow of funds to terrorist organisations, including Al Qa'ida. These steps were of particular importance in relation to Saudi Arabia, since a large majority of the suspected hijackers were of Saudi origin, and it was believed that much of their financial support came from Saudi sources. Yet the position of the Saudi authorities was one of some sensitivity. The Kingdom was an ally of the United States and condemned terrorism. But among its devoutly Muslim population there were those who resented the Kingdom's association with the United States and espoused the cause of Islamic jihad. Thus there were questions about whether, and to what extent, the Kingdom was co-operating with the United States authorities in cutting off funds to terrorist organisations. This was, without doubt, a matter of high international importance, a very appropriate matter for report by a serious newspaper. But it was a difficult matter to investigate and report since information was not freely available in the Kingdom and the Saudi authorities, even if co-operating closely with those of the United States, might be embarrassed if that fact were to become generally known.

[7] The trial of the action before Eady J and a jury lasted some three working weeks and culminated in verdicts for the respondents and awards of £30,000 and £10,000 respectively. Much evidence was called on both sides, of which the House has been referred to short excerpts only. The judge rejected the newspaper's argument on the damage issue ([2003] EWHC 2945 (QB), [2004] 2 All ER 92) and the Court of Appeal agreed with him ([2005] EWCA Civ 74, [2005] 4 All ER 356, [2005] QB 904). The judge also rejected the newspaper's claim to *Reynolds* privilege ([2004] EWHC 37 (QB), [2004] EMLR 196). On this question also the Court of Appeal upheld his decision, but on a more limited ground. This calls for more detailed consideration.

[8] The judge put a series of questions to the jury which, so far as relevant to *Reynolds* privilege, were directed to two matters: the sources on which Mr Dorsey, as reporter, relied; and his attempt to obtain the respondents' response to his inclusion of their names in his proposed article. Mr Dorsey testified that he had relied on information given by a prominent Saudi businessman (source A), confirmed by a banker (source B), a United States diplomat (source C), a United States embassy official (source D) and a senior Saudi official (source E). In answer to the judge's questions the jury found that the newspaper had proved that Mr Dorsey had received the information he claimed to have received from source A, but had not proved that Mr Dorsey had received the confirmation he claimed from sources B–E inclusive. The judge attached significance to these negative findings, since Mr Dorsey said in evidence that he would not have written the article in reliance on source A alone. In the Court of Appeal, the judge's reliance on these negative findings was criticised by the newspaper. At the outset of his direction to the jury the judge had pointed out that there was no plea of justification and that therefore, if the jury found the

article defamatory of the respondents, they should assume it to be untrue. This direction, it was said, may well have infected the jury's approach to the questions concerning sources B–E. The Court of Appeal refused the newspaper leave to raise a new ground of misdirection, and thought (at [66]) that the jury had 'almost certainly' based their answers on the impression made by witnesses in court. But the Court of Appeal preferred to base its decision on the other ground relied on by the judge to deny privilege.

[9] Mr Dorsey described attempts to obtain a response from the group about his proposed article. He said he had telephoned the group office at about 9 am and left a recorded message. The jury found that the newspaper had not proved on the balance of probabilities that that was so. There was, it was agreed, a telephone conversation between Mr Dorsey and Mr Munajjed, an employee of the group, on the evening of 5 February, the day before publication. During that conversation, according to Mr Munajjed, he had asked Mr Dorsey to wait until the following day for a comment by the group. He had, he said, no authority to make a statement and the first respondent was in Japan, where the time was 3 am. Mr Dorsey denied that Mr Munajjed had asked him to wait. But the jury found that Mr Munajjed had made that request. It was on this ground, as I understand, that the Court of Appeal upheld the judge's denial of *Reynolds* privilege:

> '[82] We turn to the judge's observation that the Jameels were not given sufficient time to comment on the proposed publication. It was to this matter that the jury's questions (6) and (7) were addressed. Mr Dorsey had given evidence that he had telephoned the Jameels' offices on the morning before the publication and left a recorded message. The jury found that this did not take place. What the jury did find had taken place was that Mr Dorsey had spoken to the Jameels' representative, Mr Munajjed, on the evening before publication, that the latter had asked for the publication to be postponed so that he could contact Mr Jameel, who was in Japan on business, and that Mr Dorsey had declined this request. The judge found that there was no compelling reason why Mr Jameel could not have been afforded 24 hours to comment on the article. We can see no basis for challenging this conclusion, nor did Mr Robertson suggest that there was one.'

[10] I turn to the two issues raised in the appeal.

I DAMAGE

[11] The issue under this head is whether a trading company which itself conducts no business but which has a trading reputation within England and Wales should be entitled to recover general damages for libel without pleading and proving that the publication complained of has caused it special damage. To resolve this question it is helpful to distinguish three sub-issues: (1) whether such an entitlement exists under the current law of England and Wales; (2) whether, if so, art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) requires revision of the current domestic law; and (3) whether, if not, the current domestic law should in any event be revised.

(1) *The current domestic law*

[12] The tort of libel has long been recognised as actionable per se. Thus where a personal plaintiff proves publication of a false statement damaging

to his reputation without lawful justification, he need not plead or prove special damage in order to succeed. Proof of injury to his reputation is enough.

[13] It was argued in *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, [1891–4] All ER Rep 548 that this rule did not apply to trading companies. The newspaper in that case had published an article strongly critical of the way in which the plaintiff, a colliery owner, housed its workers, and the company had not pleaded or proved any actual damage. It was argued for the publisher that a corporation could have no personal character, and that the article had not related to the business of the company ([1894] 1 QB 133 at 134, 137). The Court of Appeal unanimously rejected this argument. Lord Esher MR held the law of libel to be one and the same for all plaintiffs ([1894] 1 QB 133 at 138, [1891–4] All ER Rep 548 at 550). While he referred to obvious differences between individuals and companies ([1894] 1 QB 133 at 138–139, [1891–4] All ER Rep 548 at 550), his conclusion ([1894] 1 QB 133 at 139, [1891–4] All ER Rep 548 at 551) was clear:

> 'Then, if the case be one of libel—whether on a person, a firm, or a company—the law is that damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case.'

There need be no evidence of particular damage ([1894] 1 QB 133 at 140, [1891–4] All ER Rep 548 at 551). Lopes LJ agreed ([1894] 1 QB 133 at 138 at 141, [1891–4] All ER Rep 548 at 552): a company may maintain an action for a libel reflecting on the management of its business without alleging or proving special damage. Kay LJ also agreed ([1894] 1 QB 133 at 138 at 148, [1891–4] All ER Rep 548 at 555): a trading corporation may sue for a libel calculated to injure them in respect of their business, and may do so without any proof of damage general or special, although, where there is no such evidence, the damages given will probably be small.

[14] In *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 156, [1964] AC 234 at 262, Lord Reid pointed out that a company cannot be injured in its feelings but only in its pocket. There was, however, no challenge in that case to the principle laid down in the *South Hetton* case, which was not cited in either party's printed case, or in argument, or in any judgment.

[15] Mr Robertson QC, for the newspaper, pointed out, quite correctly, that the Faulks Committee, in its *Report of the Committee on Defamation* (Cmnd 5909 (March 1975)), p 90 (para 336), recommended amendment of the *South Hetton* rule. The amendment recommended was, however, only to limit libel actions by trading corporations to cases where the trading corporation could establish either that it had suffered special damage or that the defamation was likely to cause it financial damage. This recommendation was made after considering trenchant criticisms of the existing rule made by Mr JA Weir ('Local Authority v Critical Ratepayer—a Suit in Defamation' (1972A) CLJ 238). It is not a recommendation to which Parliament has chosen to give effect.

[16] In *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011, [1993] AC 534 the issue concerned the entitlement of a local authority, not a trading corporation, to sue in libel. But at first instance the *South Hetton* case was cited, and contributed to Morland J's conclusion that a local authority could sue: [1991] 4 All ER 795 at 804–807, [1992] QB 770 at 781, 783–788. On appeal, counsel for the newspaper distinguished the *South Hetton* case on the ground of the colliery

company's trading character and counsel for the local authority relied on it ([1992] QB 770 at 792, 797). No member of the Court of Appeal questioned the decision. Balcombe LJ accepted the *South Hetton* case as binding for what it decided, but also (despite Mr Weir's criticism) expressed his agreement with it ([1992] 3 All ER 65 at 75, [1992] QB 770 at 809). In the House, counsel for the local authority cited the decision ([1993] AC 534 at 536–537). Counsel for the newspaper did not criticise it, but distinguished it as applicable to a company with a business reputation which a local authority did not have ([1993] AC 534 at 538). In his leading opinion, with which the other members of the House agreed, Lord Keith of Kinkel (who had been a member of the Faulks committee) cited the *South Hetton* case at some length, and also *National Union of General and Municipal Workers v Gillian* [1945] 2 All ER 593, [1946] KB 81, in which a non-trading corporation (a trade union) had been assimilated to a trading corporation. He then continued:

> 'The authorities cited above clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. Examples are those that go to credit such as might deter banks from lending to it, or to the conditions experienced by its employees, which might impede the recruitment of the best qualified workers, or make people reluctant to deal with it. The *South Hetton Coal Co* case would appear to be an instance of the latter kind, and not, as suggested by Browne J, an authority for the view that a trading corporation can sue for something that does not affect it adversely in the way of its business. The trade union cases are understandable upon the view that defamatory matter may adversely affect the union's ability to keep its members or attract new ones or to maintain a convincing attitude towards employers. Likewise in the case of a charitable organisation the effect may be to discourage subscribers or otherwise impair its ability to carry on its charitable objects. Similar considerations can no doubt be advanced in connection with the position of a local authority. Defamatory statements might make it more difficult to borrow or to attract suitable staff and thus affect adversely the efficient carrying out of its functions.' (See [1993] 1 All ER 1011 at 1017, [1993] AC 534 at 547.)

Lord Keith then went on to give his reasons for concluding that a local authority was to be distinguished from other types of corporation, whether trading or non-trading.

[17] In the *Derbyshire CC* case the correctness of the *South Hetton* case was not challenged, but acceptance of its correctness was an important step in Lord Keith's reasoning and I find no ambiguity in the proposition he propounded: the authorities clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. In *Shevill v Presse Alliance SA* [1996] 3 All ER 929, [1996] AC 959, decided some three years later by a differently constituted committee of the House, one of the plaintiffs was a trading corporation and the presumption of damage in libel cases was treated as part of our national substantive law. I conclude that under the current law of England and Wales a trading company with a trading reputation in this country may recover general damages without pleading or proving special damage if the publication complained of has a tendency to damage it in the way of its business.

(2) *Article 10*

[18] Article 10 of the convention provides:

> '1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

The central importance of this article in the convention regime is clear beyond question, and is reflected in s 12 of the 1998 Act. Freedom to publish free of unjustifiable restraint must indeed be recognised as a distinguishing feature of the sort of society which the convention seeks to promote. The newspaper in this case relies on art 10 to contend that a domestic rule entitling a trading corporation to sue in libel when it can prove no financial loss is an unreasonable restraint on the right to publish protected by art 10.

[19] This is not an unattractive argument, and it would be persuasive if, in such a case, excessive, punitive or exemplary damages were awarded. But the damages awarded to the second claimant in this case were not excessive, and the argument encounters three problems of principle. First, as the text of art 10 itself makes plain, the right guaranteed by the article is not unqualified. The right may be circumscribed by restrictions prescribed by law and necessary and proportionate if directed to certain ends, one of which is the protection of the reputation or rights of others. Thus a national libel law may, consistently with art 10, restrain the publication of defamatory material.

[20] Secondly, the national rule here in question, pertaining to the recovery of damages by a trading corporation which proves no financial loss, has been the subject of challenge before the European Commission and court in the context of libel proceedings brought by two corporate plaintiffs against two individual defendants. In *S v UK* (1993) 18 EHRR CD 172 at 173, the challenge to the rule was somewhat oblique and the Commission made the points summarised in [19], above. In *Steel v UK* (2005) 41 EHRR 403 at 419 (para 31 (quoted paras (a) and (b)) the challenge was direct. The court accepted (at 422 (para 40)) that the domestic rule was as stated in the *Derbyshire CC* case but held (at 435 (para 94)) that:

> 'The state therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation.'

The court cited and echoed observations in an earlier decision, *Märkt Intern and Beerman v Germany* (1989) 12 EHRR 161 at 174–176 (paras 33–38). Thus the court did not hold the current rule to be necessarily inconsistent with art 10: it was a matter for the judgment of the national authorities.

[21] Thirdly, the weight placed by the newspaper on the chilling effect of the existing rule is in my opinion exaggerated. Among the arguments it advances is that the rule is unnecessary since, it is said, defamation of a company involves defamation of directors and individuals who are free to sue as personal plaintiffs. I very much doubt if this is always so, although in some cases it will be. But, to the extent that it is so, I question whether the possibility of a claim by the company will add significantly to the chilling effect of a claim by the individuals.

[22] I would accordingly answer this question in the negative.

(3) Revision of the current law

[23] Since the European court accords a generous margin of appreciation to the judgment of national authorities, and these include courts, it is appropriate for the House to review the merits of the *South Hetton* rule as re-stated in the *Derbyshire CC* case. The newspaper argues that, in accordance with the trend towards enhanced recognition of freedom of expression, the rule should be abrogated. Parliament could of course have legislated to abrogate or modify the rule, but it has not done so. It is accordingly necessary to revert to basic principles.

[24] The tort of defamation exists to afford redress for unjustified injury to reputation. By a successful action the injured reputation is vindicated. The ordinary means of vindication is by the verdict of a judge or jury and an award of damages. Most plaintiffs are individuals, who are not required to prove that they have suffered financial loss or even that any particular person has thought the worse of them as a result of the publication complained of. I do not understand this rule to be criticised. Thus the question arises whether a corporation with a commercial reputation within the jurisdiction should be subject to a different rule.

[25] There are of course many defamatory things which can be said about individuals (for example, about their sexual proclivities) which could not be said about corporations. But it is not at all hard to think of statements seriously injurious to the general commercial reputation of trading and charitable corporations: that an arms company has routinely bribed officials of foreign governments to secure contracts; that an oil company has wilfully and unnecessarily damaged the environment; that an international humanitarian agency has wrongfully succumbed to government pressure; that a retailer has knowingly exploited child labour; and so on. The leading figures in such corporations may be understood to be personally implicated, but not, in my opinion, necessarily so. Should the corporation be entitled to sue in its own right only if it can prove financial loss? I do not think so, for two main reasons.

[26] First, the good name of a company, as that of an individual, is a thing of value. A damaging libel may lower its standing in the eyes of the public and even its own staff, make people less ready to deal with it, less willing or less proud to work for it. If this were not so, corporations would not go to the lengths they do to protect and burnish their corporate images. I find nothing repugnant in the notion that this is a value which the law should protect. Nor do I think it an adequate answer that the corporation can itself seek to answer the defamatory statement by press release or public statement, since protestations of innocence by the impugned party necessarily carry less weight with the public than the prompt issue of proceedings which culminate in a favourable verdict by judge or jury. Secondly, I do not accept that a publication, if truly damaging to a corporation's commercial reputation, will result in provable financial loss, since

the more prompt and public a company's issue of proceedings, and the more diligent its pursuit of a claim, the less the chance that financial loss will actually accrue.

[27] I do not on balance consider that the existing rule should be changed, provided always that where a trading corporation has suffered no actual financial loss any damages awarded should be kept strictly within modest bounds.

II *REYNOLDS* PRIVILEGE

[28] The decision of the House in *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127 built on the traditional foundations of qualified privilege but carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues. Both these aspects are, I think, important in understanding the decision.

[29] Underlying the development of qualified privilege was the requirement of a reciprocal duty and interest between the publisher and the recipient of the statement in question: see, for example, *Harrison v Bush* (1855) 5 E&B 344 at 348, 119 ER 509 at 511; *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 528; *Adam v Ward* [1917] AC 309 at 334, [1916–17] All ER Rep 157 at 170; *Watt v Longsdon* [1930] 1 KB 130 at 147, [1929] All ER Rep 284 at 290, all cases cited in *Duncan & Neill on Defamation* (2nd edn, 1983) pp 93–94 (paras 14.04–14.05). Some of these cases concerned very limited publication, but *Adam v Ward* did not, and nor did *Cox v Feeny* (1863) 4 F&F 13, 176 ER 445; *Allbutt v General Council of Medical Education and Registration* (1889) 23 QBD 400; *Perera v Peiris* [1949] AC 1 and *Webb v Times Publishing Co Ltd* [1960] 2 All ER 789, [1960] 2 QB 535. Thus where a publication related to a matter of public interest, it was accepted that the reciprocal duty and interest could be found even where publication was by a newspaper to a section of the public or the public at large. In *Reynolds* the Court of Appeal restated these tests ([1998] 3 All ER 961 at 994–995, 1004, [2001] 2 AC 127 at 167, 177), although it suggested a third supplemental test which the House held to be mistaken.

[30] I do not understand the House to have rejected the duty/interest approach: see Lord Nicholls of Birkenhead ([1999] 4 All ER 609 at 615–617, 618, 625, [2001] 2 AC 127 at 194–195, 197, 204); Lord Steyn ([1999] 4 All ER 609 at 633, [2001] 2 AC 127 at 213); Lord Cooke of Thorndon ([1999] 4 All ER 609 at 637, 664, 647, [2001] 2 AC 127 at 217, 224, 227); Lord Hope of Craighead ([1999] 4 All ER 609 at 648–649, 654, [2001] 2 AC 127 at 229, 235); Lord Hobhouse of Woodborough ([1999] 4 All ER 609 at 657, 658, [2001] 2 AC 127 at 237, 239). But Lord Nicholls ([1999] 4 All ER 609 at 619, [2001] 2 AC 127 at 197) considered that matters relating to the nature and source of the information were matters to be taken into account in determining whether the duty-interest test was satisfied or, as he preferred to say 'in a simpler and more direct way, whether the public was entitled to know the particular information'.

[31] The necessary pre-condition of reliance on qualified privilege in this context is that the matter published should be one of public interest. In the present case the subject matter of the article complained of was of undoubted public interest. But that is not always, perhaps not usually, so. It has been repeatedly and rightly said that what engages the interest of the public may not be material which engages the public interest.

[32] Qualified privilege as a live issue only arises where a statement is defamatory and untrue. It was in this context, and assuming the matter to be one

of public interest, that Lord Nicholls proposed ([1999] 4 All ER 609 at 623, [2001] 2 AC 127 at 202) a test of responsible journalism, a test repeated in *Bonnick v Morris* [2002] UKPC 31 at [22]–[24], (2002) 12 BHRC 558 at [22]–[24], [2003] 1 AC 300. The rationale of this test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord Hobhouse observed with characteristic pungency ([1999] 4 All ER 609 at 657, [2001] 2 AC 127 at 238), 'No public interest is served by publishing or communicating misinformation'. But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.

[33] Lord Nicholls ([1999] 4 All ER 609 at 626, [2001] 2 AC 127 at 205) listed certain matters which might be taken into account in deciding whether the test of responsible journalism was satisfied. He intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege. Lord Nicholls recognised ([1999] 4 All ER 609 at 623–624, [2001] 2 AC 127 at 202–203), inevitably as I think, that it had to be a body other than the publisher, namely the court, which decided whether a publication was protected by qualified privilege. But this does not mean that the editorial decisions and judgments made at the time, without the knowledge of falsity which is a benefit of hindsight, are irrelevant. Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner.

[34] Some misunderstanding may perhaps have been engendered by Lord Nicholls's references ([1999] 4 All ER 609 at 616, 619, [2001] 2 AC 127 at 195, 197) to 'the particular information'. It is of course true that the defence of qualified privilege must be considered with reference to the particular publication complained of as defamatory, and where a whole article or story is complained of no difficulty arises. But difficulty can arise where the complaint relates to one particular ingredient of a composite story, since it is then open to a plaintiff to contend, as in the present case, that the article could have been published without inclusion of the particular ingredient complained of. This may, in some instances, be a valid point. But consideration should be given to the thrust of the article which the publisher has published. If the thrust of the article is true, and the public interest condition is satisfied, the inclusion of an inaccurate fact may not have the same appearance of irresponsibility as it might if the whole thrust of the article is untrue.

[35] These principles must be applied to the present case. As recorded at [8], above, the Court of Appeal upheld the judge's denial of *Reynolds* privilege on a single ground, discounting the jury's negative findings concerning Mr Dorsey's sources: that the newspaper had failed to delay publication of the respondents' names without waiting long enough for the respondents to comment. This seems to me, with respect, to be a very narrow ground on which to deny the privilege, and the ruling subverts the liberalising intention of the *Reynolds* decision. The subject matter was of great public interest, in the strictest sense. The article was written by an experienced specialist reporter and approved by senior staff on the newspaper and the Wall Street Journal who themselves sought to verify its contents. The article was unsensational in tone and (apparently) factual in content. The respondents' response was sought, although at a late stage, and the newspaper's inability to obtain a comment recorded. It is very

unlikely that a comment, if obtained, would have been revealing, since even if the respondents' accounts were being monitored it was unlikely that they would know. It might be thought that this was the sort of neutral, investigative journalism which *Reynolds* privilege exists to protect. I would accordingly allow the appeal and set aside the Court of Appeal judgment.

[36] I am in much more doubt than my noble and learned friends what the consequence of that decision should be. The House has not, like the judge and the jury, heard the witnesses and seen the case develop day after day. It has read no more than a small sample of the evidence. It seems to me a large step for the House, thus disadvantaged, to hold that the publication was privileged, and I am not sure that counsel for the newspaper sought such a ruling. But I find myself in a minority, and it serves no useful purpose to do more than express my doubt.

LORD HOFFMANN.

THE ISSUE

[37] My Lords, on 6 February 2002 the Wall Street Journal Europe published an article claiming that Saudi Arabian Monetary Authority (SAMA), at the request of the United States Treasury, was monitoring the accounts of certain named Saudi companies to trace whether any payments were finding their way to terrorist organisations. The jury found the article to be defamatory of the claimants, who are respectively the principal director and holding company of a group named in the article. The principal question is whether the newspaper was entitled to the defence of publication in the public interest established by the decision of this House in *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127. The judge (Eady J; [2004] EWHC 37 (QB), [2004] EMLR 196) and the Court of Appeal (Lord Phillips of Worth Matravers MR, Sedley and Jonathan Parker LJJ; [2005] EWCA Civ 74, [2005] 4 All ER 356, [2005] QB 904) rejected it. But in my opinion they gave it too narrow a scope. It should have been upheld and the action dismissed.

[38] Until very recently, the law of defamation was weighted in favour of claimants and the law of privacy weighted against them. True but trivial intrusions into private life were safe. Reports of investigations by the newspaper into matters of public concern which could be construed as reflecting badly on public figures domestic or foreign were risky. The House attempted to redress the balance in favour of privacy in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 AC 457 and in favour of greater freedom for the press to publish stories of genuine public interest in *Reynolds*. But this case suggests that *Reynolds* has had little impact upon the way the law is applied at first instance. It is therefore necessary to restate the principles.

THE ARTICLE

[39] The background to the article was the defining event of this century, the destruction of the World Trade Center and the other atrocities of 11 September 2001. It was quickly established that 15 out of the 19 hijackers had come from Saudi Arabia and it was strongly suspected that sources in the same country had financed them. Efforts to trace terrorist funds were high on the United States and international agenda. On 28 September 2001 the Security Council passed Resolution 1373 requiring all states to prevent and suppress the financing of terrorist acts. The United States made strong diplomatic efforts to secure the co-operation of SAMA. In the months that followed, there was much speculation

and controversy about the extent to which the Saudi government was really helping. Some United States newspapers and prominent politicians such as Senators McCain and Lieberman accused the Saudis of doing very little, appeasing domestic supporters of the terrorists in the controlled domestic media while publicly denouncing them in statements for overseas consumption. 'Time to give Saudis an ultimatum' said the Boston *Globe* headline on 13 January 2002. But the official United States government line was that they were co-operating fully with the United States Treasury. The subject was one of very considerable public interest, not least to the financial community served by the Wall Street Journal.

[40] The article was written by Mr James Dorsey, the paper's special correspondent in Riyadh and checked by Mr Glenn R Simpson, a journalist based in Washington who was concentrating almost exclusively on terrorist funding and had daily contact with sources at the United States Treasury. It was published in the New York edition but the claimants have brought their proceedings in this country against the publishers of the European edition, the Wall Street Journal Europe, in which it also appeared. The defendants are based in Brussels but some 18,000 copies of the paper are sold daily in the United Kingdom. The article was not the lead story but appeared on the front page:

> 'Saudi Officials Monitor Certain Bank Accounts
>
> FOCUS IS ON THOSE WITH POTENTIAL TERRORIST TIES
>
> RIYADH, Saudi Arabia—The Saudi Arabian Monetary Authority, the kingdom's central bank, is monitoring at the request of U.S. law-enforcement agencies the bank accounts associated with some of the country's most prominent businessmen in a bid to prevent them from being used wittingly or unwittingly for the funnelling of funds to terrorist organizations, according to U.S. officials and Saudis familiar with the issue.
>
> The accounts—belonging to Al Rajhi Banking & Investment Corp., headed by Saleh Abdulaziz al Rajhi; Al Rajhi Commercial Foreign Exchange, which isn't connected to Al Rajhi Banking; Islamic banking conglomerate Dallah Al Baraka Group, with $7 billion (8.05 billion) in assets and whose chairman is Sheik Saleh Kamel; the Bin Mahfouz family, separate members of which own National Commercial Bank, Saudi Arabia's largest bank, and the Saudi Economic Development Co.; and the Abdullatif Jamil Group of companies—are among 150 accounts being monitored by SAMA, said the Saudis and the U.S. officials based in Riyadh.
>
> The U.S. officials said the U.S. presented the names of the accounts to Saudi Arabia since the Sept. 11 terrorist attacks in America. They said four Saudi charities and eight businesses were also among 140 world-wide names given to Saudi Arabia last month.
>
> The U.S. officials said the U.S. had agreed not to publish the names of Saudi institutions and individuals provided that Saudi authorities took appropriate action. Many of the Saudi accounts on the U.S. list belong to legitimate entities and businessmen who may in the past have had an association with institutions suspected of links to terrorism, the officials said. The officials said similar agreements had been reached with authorities in Kuwait and the United Arab Emirates. "This arrangement sends out a warning to people," a U.S. official said.
>
> SAMA couldn't be reached for comment. In a recent report to the United Nations about combating terrorism, however, the Saudi government said:

> "The Kingdom took many urgent executive steps, amongst which SAMA sent a circular to all Saudi banks to uncover whether those listed in suspect lists have any real connection with terrorism."'

[41] The article went on to say that some of the named companies had denied that they were being monitored but that 'the Abdullatif Jamil Group of companies couldn't be reached for comment'. Abdul Latif Jameel Co Ltd, the second claimant, is a very substantial Saudi Arabian trading company with interests in a number of businesses, including the distribution of Toyota vehicles. It is part of an international group owned by the Jameel family which includes Hartwell plc, a company which distributes vehicles in the United Kingdom. Mr Mohammed Abdul Latif Jameel, the first claimant, is general manager and president of the second claimant and the principal figure in the group.

[42] The jury found that the article was defamatory of both claimants. The newspaper did not attempt to justify any defamatory meaning and there is no appeal against the finding that it was defamatory. The absence of a plea of justification is not surprising. In the nature of things, the existence of covert surveillance by the highly secretive Saudi authorities would be impossible to prove by evidence in open court. That does not necessarily mean that it did not happen. Nor, on the other hand, does it follow that even if it did happen, the Jameel group had any connection with terrorism. The US intelligence agencies sometimes get things badly wrong.

THE *REYNOLDS* DEFENCE

[43] The newspaper's principal defence was based on *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127. It is called in the trade '*Reynolds* privilege' but the use of the term privilege, although historically accurate, may be misleading. A defence of privilege in the usual sense is available when the defamatory statement was published on a privileged occasion and can be defeated only by showing that the privilege was abused. As Lord Diplock said in a well-known passage in *Horrocks v Lowe* [1974] 1 All ER 662 at 668–669, [1975] AC 135 at 149:

> 'The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny, has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters with respect to which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused.'

[44] Misuse of the privileged occasion is technically known as 'malice' and the burden is upon the claimant to prove it. In *Reynolds*, counsel for the newspaper invited the House to declare a similar privilege for the publication of political information. But the House refused to do so. Lord Nicholls of Birkenhead said that to allow publication of any defamatory statements of a political character, subject only to proof of malice, would provide inadequate protection for the reputation of defamed individuals.

[45] Instead, Lord Nicholls said ([1999] 4 All ER 609 at 623, [2001] 2 AC 127 at 202) that—

> 'the common law solution is for the court to have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public. Its value to the public depends upon its quality as well as its subject matter. This solution has the merit of elasticity. As observed by the Court of Appeal, this principle can be applied appropriately to the particular circumstances of individual cases in their infinite variety. It can be applied appropriately to all information published by a newspaper, whatever its source or origin.'

[46] Although Lord Nicholls uses the word 'privilege', it is clearly not being used in the old sense. It is the material which is privileged, not the occasion on which it is published. There is no question of the privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged. The burden is upon the defendant to prove that those conditions are satisfied. I therefore agree with the opinion of the Court of Appeal in *Loutchansky v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 1805 at [35], [2002] 1 All ER 652 at [35], sub nom *Loutchansky v Times Newspapers Ltd (Nos 4 and 5)*, *Loutchansky v Times Newspapers Ltd (Nos 2, 3 and 5)* [2002] QB 783 that '*Reynolds* privilege' is 'a different jurisprudential creature from the traditional form of privilege from which it sprang'. It might more appropriately be called the *Reynolds* public interest defence rather than privilege.

[47] In *Reynolds* itself, the publication failed by a very considerable margin to satisfy the conditions for the new defence. The House was therefore able to deal with those conditions only in very general terms. Lord Nicholls offered guidance in the form of a non-exhaustive, illustrative list of matters which, depending on the circumstances, might be relevant. 'Over time', he said ([1999] 4 All ER 609 at 626, [2001] 2 AC 127 at 205), 'a valuable corpus of case law will be built up'. This case, in my opinion, illustrates the circumstances in which the defence should be available.

APPLYING REYNOLDS

(a) *The public interest of the material*

[48] The first question is whether the subject matter of the article was a matter of public interest. In answering this question, I think that one should consider the article as a whole and not isolate the defamatory statement. It is true that Lord Nicholls said, in the passage which I have quoted above, that the question is whether the publication of 'particular material' was privileged because of its value to the public. But the term 'particular material' was in my opinion being used by contrast with the generic privilege advocated by the newspaper. It was saying that one must consider the contents of each publication and not decide the matter simply by reference to whether it fell within a general category like political information. But that did not mean that it was necessary to find a separate public interest justification for each item of information within the publication. Whether it was justifiable to include the defamatory statement is a separate question, to which I shall return in a moment.

[49] The question of whether the material concerned a matter of public interest is decided by the judge. As has often been said, the public tends to be

interested in many things which are not of the slightest public interest and the newspapers are not often the best judges of where the line should be drawn. It is for the judge to apply the test of public interest. But this publication easily passes that test. The thrust of the article as a whole was to inform the public that the Saudis were co-operating with the United States Treasury in monitoring accounts. It was a serious contribution in measured tone to a subject of very considerable importance.

[50] In answering the question of public interest, I do not think it helpful to apply the classic test for the existence of a privileged occasion and ask whether there was a duty to communicate the information and an interest in receiving it. The *Reynolds* defence was developed from the traditional form of privilege by a generalisation that in matters of public interest, there can be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it. The House having made this generalisation, it should in my opinion be regarded as a proposition of law and not decided each time as a question of fact. If the publication is in the public interest, the duty and interest are taken to exist. The *Reynolds* defence is very different from the privilege discussed by the Court of Appeal in *Blackshaw v Lord* [1983] 2 All ER 311, [1984] QB 1, where it was contemplated that in exceptional circumstances there could be a privileged occasion in the classic sense, arising out of a duty to communicate information to the public generally and a corresponding interest in receiving it. The Court of Appeal there contemplated a traditional privilege, liable to be defeated only by proof of malice. But the *Reynolds* defence does not employ this two-stage process. It is not as narrow as traditional privilege nor is there a burden upon the claimant to show malice to defeat it. So far as Lord Cooke of Thorndon said in *Reynolds* [1999] 4 All ER 609 at 644, [2001] 2 AC 127 at 224 and in *McCartan Turkington Breen (a firm) v Times Newspapers Ltd* [2000] 4 All ER 913 at 931, [2001] 2 AC 277 at 301 that the principle in *Reynolds* was essentially the same, I respectfully think that he did not fully analyse the differences: see the comment in *Loutchansky*'s case [2002] 1 All ER 652 at [35].

(b) *Inclusion of the defamatory statement*

[51] If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article. But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting.

[52] In the present case, the inclusion of the names of large and respectable Saudi businesses was an important part of the story. It showed that co-operation

with the United States Treasury's requests was not confined to a few companies on the fringe of Saudi society but extended to companies which were by any test within the heartland of the Saudi business world. To convey this message, inclusion of the names was necessary. Generalisations such as 'prominent Saudi companies', which can mean anything or nothing, would not have served the same purpose.

(c) *Responsible journalism*

[53] If the publication, including the defamatory statement, passes the public interest test, the inquiry then shifts to whether the steps taken to gather and publish the information were responsible and fair. As Lord Nicholls said in *Bonnick v Morris* [2002] UKPC 31 at [23], (2002) 12 BHRC 558 at [23], [2003] 1 AC 300:

> 'Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege.'

[54] Lord Nicholls was speaking in the context of a publication in a newspaper but the defence is of course available to anyone who publishes material of public interest in any medium. The question in each case is whether the defendant behaved fairly and responsibly in gathering and publishing the information. But I shall for convenience continue to describe this as 'responsible journalism'.

[55] In this case, Eady J ([2004] EWHC 37, [2004] EMLR 196) said that the concept of 'responsible journalism' was too vague. It was, he said, 'subjective'. I am not certain what this means, except that it is obviously a term of disapproval. (In the jargon of the old Soviet Union, 'objective' meant correct and in accordance with the Party line, while 'subjective' meant deviationist and wrong.) But the standard of responsible journalism is as objective and no more vague than standards such as 'reasonable care' which are regularly used in other branches of law. Greater certainty in its application is attained in two ways. First, as Lord Nicholls said, a body of illustrative case law builds up. Secondly, just as the standard of reasonable care in particular areas, such as driving a vehicle, is made more concrete by extra-statutory codes of behaviour like the Highway Code, so the standard of responsible journalism is made more specific by the code of practice which has been adopted by the newspapers and ratified by the Press Complaints Commission. This too, while not binding upon the courts, can provide valuable guidance.

[56] In *Reynolds*, Lord Nicholls gave his well-known non-exhaustive list of ten matters which should in suitable cases be taken into account. They are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defence may fail. That is how Eady J treated them. The defence, he said (at [32]), can be sustained only after 'the closest and most rigorous scrutiny' by the application of what he called 'Lord Nicholls' ten tests'. But that, in my opinion, is not what Lord Nicholls meant. As he said in *Bonnick*'s case (2002) 12 BHRC 558 at [24] the standard of conduct required of the newspaper must be applied in a practical and flexible manner. It must have regard to practical realities.

[57] Instead, Eady J rigidly applied the old law. Building upon some obiter remarks of Lord Cooke of Thorndon in *McCartan Turkington Breen (a firm) v Times Newspapers Ltd* [2000] 4 All ER 913 at 932, [2001] 2 AC 277 at 301 to which he referred seven times in the course of his judgment (the case was actually about statutory privilege), the judge insisted that *Reynolds* had changed nothing. It was not in his opinion sufficient that the article concerned a matter of public interest and was the product of responsible journalism. It was still necessary to show, in the words of Parke B in *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193, 149 ER 1044 at 1049, that the newspaper was under a social or moral duty to communicate to the public at large not merely the general message of the article (the Saudis were co-operating with the United States Treasury) but the particular defamatory statement that accounts associated with the claimants were being monitored. A 'useful cross-check', he suggested (at [33]), was 'whether the journalists concerned might be the subject of legitimate criticism if they withheld the *ex hypothesi* false allegations'. In my opinion this approach, equating a responsible journalist reporting on matters of public interest with an employer who has a moral duty to include in his reference the fact that his former employee was regularly drunk on duty, is quite unrealistic. Its use by Eady J on two previous occasions had already been criticised by the Court of Appeal in *Loutchansky*'s case [2002] 1 All ER 652 at [49]. In my opinion it is unnecessary and positively misleading to go back to the old law on classic privilege. It is the principle stated in *Reynolds* and encapsulated by Lord Nicholls in *Bonnick*'s case which should be applied. On this question I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond and wholeheartedly concur in her remarks.

[58] I therefore pass to the question of whether the newspaper satisfied the conditions of responsible journalism. This may be divided into three topics: the steps taken to verify the story, the opportunity given to the Jameel group to comment and the propriety of publication in the light of United States diplomatic policy at the time.

VERIFICATION OF THE STORY

(a) *In Saudi Arabia*

[59] Mr James Dorsey, the correspondent in Riyadh, said that his story was derived from five sources whom, in accordance with journalistic practice, he did not identify by name. The first was 'a prominent Saudi businessman', referred to as A, whose information was secondhand, and the others were 'a banker', 'a US diplomat', 'a US embassy official' and 'a senior Saudi official', all of whom were in a position to know and were referred to as B–E respectively. In *Reynolds*, Lord Nicholls said ([1999] 4 All ER 609 at 626, [2001] 2 AC 127 at 205) that any disputes of primary fact about matters relevant to the defence should be left to the jury. The judge therefore asked the jury whether the defendant had proved, on a balance of probabilities, that Mr Dorsey had been informed by source A that the Abdul Latif Jameel group was on an unpublished list of names whose accounts were being monitored by SAMA at the request of the United States and whether this had been confirmed by sources B–E.

[60] That was a perfectly proper question to leave to the jury, but what in my opinion vitiated the answers was the assumption which the judge instructed the jury to make in considering it. He said:

> 'If . . . you come to the view, after due consideration, that the article does in some way link one or other or both of them to the funding of terrorism, then we accept, as an absolute fundamental assumption in this case, that such allegation is untrue . . . You and I therefore proceed on the basis that neither claimant was being monitored nor suspected nor on any list of suspects provided to the Saudis by the United States Government or anyone else . . . To put it simply, what Mr Price argues is that if in fact it was not true that they were on the list and it is not true they were being monitored, how can his sources have given him that information? What matters at this stage is that I am stating, as the law requires me to state, that they are fully entitled to the presumption that they are not guilty of funding terror or on any list or suspected of doing so.'

[61] In other words, the jury were told that in deciding whether sources B–E had given the information, they were to assume that they would have known that it was false. In the circumstances, it is not surprising that they were unconvinced that sources B–E had confirmed the story. It is true that they accepted that source A had provided Mr Dorsey with his lead, but that may have been because source A did not have first-hand knowledge and could not therefore be treated as having known that the information was false.

[62] Telling the jury to make that assumption was, as the Court of Appeal decided ([2005] 4 All ER 356 at [59]), a misdirection. The fact that the defamatory statement is not established at the trial to have been true is not relevant to the *Reynolds* defence. It is a neutral circumstance. The elements of that defence are the public interest of the material and the conduct of the journalists at the time. In most cases the *Reynolds* defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true but there are cases ('reportage') in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth. In either case, the defence is not affected by the newspaper's inability to prove the truth of the statement at the trial.

[63] Although the Court of Appeal accepted that this was a misdirection, they refused leave to appeal on the point, partly because counsel for the newspaper had not raised the matter at the trial and partly because they thought it would have made no difference to the outcome. But they agreed (at [72]) that they should not rule out the *Reynolds* defence on the basis of the jury's answers to the questions about Mr Dorsey's sources and that 'If this appeal is to be dismissed, it should be on the basis of the findings in favour of the Jameels in respect of the other issues before us'. I agree and one can therefore leave the answers to the questions about sources B–E on one side.

(b) *In Washington*

[64] In New York, the news editor Ms Blackshire had Mr Simpson in Washington check it with the United States Treasury, which was alleged to have provided SAMA with the list of accounts including those of the companies named in the story. The Washington staff reporter Mr Simpson gave evidence that he had given his contact at the Treasury the names provided by Mr Dorsey and that the Treasury had confirmed to him that they were on the list.

[65] This was evidence of such importance that I must explain at some length why it seems to have received such little attention both at the trial and in the Court of Appeal. For this purpose, it is necessary to quote a number of passages from the transcript of Mr Simpson's evidence. He was asked to check the story

on the morning of 5 February and recorded the outcome of his first conversation with his Treasury contact in an email at 10.13 a m, Washington time:

> 'Treasury sounds like it will issue a partial denial. Off the record so far, they confirm they've asked the Saudis to monitor some accounts, and that one of the names we have is someone who's of interest to them. But the other players, they insist, they've never heard of. They add that other US agencies have a lot of dealings with the Saudis on this issue, including FBI, so some of the folks we name could be of interest to other agencies. I asked them to look into it a little more and give us an on the record denial if that's what they want to do and they're going to get back to me. My sense is that James's story is mostly on the money but if they come back with a strong denial we may need to rethink/rejigger.'

[66] In evidence, Mr Simpson added:

> 'A. On the record, off the record, however they want to do it, we needed to get some kind of answer from them. I made that clear to my contact . . . I said "You know, look, if you do not think these names were turned over, I would like to get that on the record, that kind of denial, so that we can take appropriate action . . . there is nothing casual about this process. It is very deliberate and the Wall Street Journal has pretty thorough procedures for story verification, especially with official outlets like the US Government."'

[67] Mr Simpson went on to say that he had known his source at the Treasury for some years and at this time was often speaking to her several times a day. Her information had been consistently reliable and she had access to the 'senior intelligence official who is involved in developing lists of names which are of interest to the US government in financing terrorism'.

[68] Critically for the purposes of this case, he said that he and his contact communicated with each other in a code ('ritual' was what he called it) which was well understood in dealings between journalists and government departments:

> 'A. Washington has developed elaborate rituals for relationships between journalists and government officials to circumvent laws on secrecy, to avoid embarrassment . . . The official does not act or does not say "This story is right", does not say "This story is true." He just does not object, he says, and that is done so that, if later on, if the information comes out and there is a big fuss, the government official can say "I did not actually tell them anything."
>
> Q. This is a well known formula between government officials and reporters in Washington?
>
> A. It is a sign of confirmation—a term for it.'

[69] Later in the day, Mr Simpson's source came back to him with further news:

> 'A. This person replied that they had indeed looked into this and that the Treasury had elected not to make a public comment or dispute in any way. Essentially, that is a confirmation.'

[70] Mr Simpson immediately telephoned the news editor:

> 'A. When I heard from the Treasury person again, I picked up the phone and called her back and said they have decided they are just not going to

a object to any of this—and there we go . . . They have no problem with the story. I will just reiterate that this is a very deliberate process. It is the Wall Street Journal. It is the United States Treasury and it is terrorism, and we are all gravely serious about what we do.'

b [71] He went on to explain that although his source provided information off the record and on terms of confidentiality, that did not mean that she was acting without authority. That was how the Treasury chose to distribute certain information:

c 'A. You would not really characterise this as a leak. This was a fully authorised procedure for distributing information. It was clearly vetted through the Treasury management . . . This person was not the type to engage in freelance activities, and they would not really even be able to freelance an answer like this because they had to contact other people in the security apparatus to check my question. The only answer they could give me would be one which they were authorised to give me.'

d [72] It was put to Mr Simpson in cross-examination that he had misunderstood what his Treasury source had said. It was not confirmation but simply a decision to make no comment—perhaps because the United States government had agreed not to disclose the identities of the accounts which they had asked to be monitored. But Mr Simpson stood his ground:

e 'Q. I just want to get it absolutely clear. What your evidence is, is that "We are not going to make a public comment" must be taken as meaning "We do not dispute the story at all."

A. My position is that, in this context, that is the meaning of that.

Q. Why?

f A. Because, as I explained, I had frequent dealings with this person. We had a close working relationship and this is the method by which information is conveyed in Washington where there are frequent government inquiries into where reporters get their information.'

[73] Later, counsel for the claimants put the point again:

g 'Q. Are you able to tell the jury now, as you sit there, that you are confident that the four names that were initially denied were in fact later confirmed? Is that your evidence to the jury?

A. Yes . . . It is my testimony. I am confident that those names are confirmed.'

h [74] In the discussion about the questions to be left to the jury, Mr Robertson QC (for the defendants) suggested that they should be asked whether Mr Simpson's Treasury source had confirmed the story: see [75] of the judgment of the Court of Appeal. Mr Price QC for the claimants objected on the ground that there was no issue of primary fact about what the Treasury source had said: 'the issue was as to the implications to be drawn from this'. As a result, the jury was not asked any question about Mr Simpson.

j [75] Eady J dealt with his evidence quite shortly ([2004] EMLR 196 at [15]):

'It is true that Mr Dorsey and Mr Glenn Simpson, based in Washington, also gave evidence of some degree of confirmation of the story (or at least of answers or declination to comment, which they interpreted as confirmation). That evidence was, however, fundamentally disputed in

cross-examination and the parties did not suggest formulating any question for the jury's decision on any of these points.'

[76] It is true that in cross-examination Mr Price suggested more than once that the words used by the Treasury contact could not have meant what Mr Simpson said that they were intended and understood to mean. But Mr Simpson was not shaken on this point. He insisted that there was nothing ambiguous about the communication which he had received. No evidence was called to contradict his statement that there was a well-recognised Washington code by which 'we are not going to make a public comment' meant 'we have checked your story and as far as we are concerned it is correct'. Nor was it suggested that he was being dishonest in testifying to the existence of this code. All that was put to him was that this was not, in normal usage, what the words meant. That of course is true.

[77] The Court of Appeal said that Eady J's concluding words indicated that he must have forgotten Mr Robertson's proposed question. But, they said (at [77]):

> 'Mr Simpson's evidence was not that his Treasury source confirmed the story that the Jameel group was on the list, but that his failure expressly to deny this was tantamount to confirmation. Having been referred to the evidence we consider that the judge was entitled to attach no more weight to it than he did.'

[78] That is a misunderstanding of Mr Simpson's evidence. He said loud and clear that his Treasury source confirmed the story. But the source did so in words which, in normal usage, would not be regarded as words of confirmation. If there was the ritual or code to which Mr Simpson testified, it was nevertheless confirmation. The meaning of a communication depends not only upon the dictionary meaning of words but upon the common assumptions between the parties about what words will be used to mean. If it is clearly understood between two parties to a conversation that the word black will be used to mean white, then when one of them says black, he intends to use and knows that he will be understood to have used the word to mean white. There was therefore an issue of primary fact in relation to Mr Simpson's evidence, namely whether there was a convention among journalists and their Washington government sources by which 'We are not going to make a public comment' would be intended and understood to mean 'We confirm our understanding that your story is correct'. If it was to be challenged, the claimants could have called evidence on the point and in any event the question should have been left to the jury. As it was, Mr Simpson's evidence of the convention stood unshaken and uncontradicted.

OPPORTUNITY TO COMMENT

[79] One of the matters which Lord Nicholls of Birkenhead in *Reynolds* said should be taken into account was the opportunity, if any, which the claimant had been given to comment on the allegations before they were published. Items on the list ([1999] 4 All ER 609 at 626, [2001] 2 AC 127 at 205) were:

> '(7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story.'

[80] But Lord Nicholls ([1999] 4 All ER 609 at 624, [2001] 2 AC 127 at 203) rejected the suggestion that failure to obtain and report a comment should always be fatal to the defence:

> 'Failure to report the plaintiff's explanation is a factor to be taken into account. Depending upon the circumstances, it may be a weighty factor. But it should not be elevated into a rigid rule of law.'

[81] In this case, Mr Dorsey telephoned to ask for a comment at 5 pm (Saudi time) on 5 February, the day before publication. (He said in evidence that he had left a recorded message that morning, but the jury did not accept this.) He spoke to Mr Jameel's secretary, who referred the call to a Mr Munajjed in Jeddah, who described himself as Mr Jameel's adviser. Mr Munajjed called back four hours later. Mr Munajjed said that he did not think it possible that the group's accounts would be monitored. They were a big and respectable organisation. Mr Dorsey asked whether he could quote this and Mr Munajjed said no, the only person who could speak on the record for the group was Mr Jameel. He was asleep in Tokyo and Mr Munajjed was not inclined to wake him. He asked whether publication could be postponed for 24 hours. Mr Dorsey said no, the article would be published with a statement that the Jameel group was not available for comment.

[82] The judge and the Court of Appeal regarded this refusal to delay publication as fatal to the defence. The judge in particular drew attention to the fact that Mr Jameel subsequently obtained a denial from SAMA that they were monitoring his account and, if he had been given 24 hours, would very likely have been able to produce the denial to the Wall Street Journal before publication. In that case, said Eady J (at [48]): 'the importance of this front-page story would have been considerably blunted—even to the extent, perhaps, that no such story could be published.'

[83] I am bound to say that I regard this as unrealistic. There was no way in which SAMA would admit to monitoring the accounts of well-known Saudi businesses at the request of the United States Treasury. A denial was exactly what one would inspect. (Mr Dorsey had approached SAMA directly for a comment but was unable to obtain one.) But I do not imagine that SAMA's denial would have inhibited the Wall Street Journal from publishing a story which had been confirmed by the Treasury in Washington. While it is true—and Mr Dorsey admitted—that the story would have been no better or worse 24 hours later, this is only significant if the delay would have made a difference. In my opinion it would not.

[84] Lord Nicholls said that the importance of approaching the claimant was that 'He may have information others do not possess or have not disclosed'. But that was not the case here. In the nature of things, Mr Jameel would have no knowledge of whether there was covert surveillance of his bank account. He could only say, as Mr Munajjed and the other named businesses approached by Mr Dorsey had said, that he knew of no reason why anyone should want to monitor his accounts. This Mr Dorsey would have reported if he had been allowed to do so.

[85] It might have been better if the newspaper had delayed publication to give Mr Jameel an opportunity to comment in person. But I do not think that their failure to do so is enough to deprive them of the defence that they were reporting on a matter of public interest.

DIPLOMATIC RELATIONS

[86] The article, it will be recalled, said that 'the U.S. had agreed not to publish the names of Saudi institutions and individuals provided that Saudi authorities took appropriate action'. The judge rejected the newspaper's defence on the additional ground that it could not be in the public interest for the Wall Street Journal to publish information which the United States government had agreed not to publish. In principle, I would be very reluctant to accept the proposition that it cannot be in the public interest for a newspaper to publish information which one's government had agreed not to publish. But in any case, the position of the Wall Street Journal was that they had no wish to publish anything which might be damaging to the diplomatic interests of the United States or its attempts to secure Saudi co-operation in tracing terrorist funds. If the Treasury had indicated that the information should not be published, they probably would not have done so. But the Treasury cleared the article and that was good enough for them.

[87] The Court of Appeal rejected this argument on the ground that the judge had not been convinced that the Treasury was content that the information should be released. There seems to me, however, no ground on which the judge could reject Mr Simpson's evidence on this point. If he was to be disbelieved, that should have been left to the jury.

DISPOSAL

[88] In my opinion there was no basis for rejecting the newspaper's *Reynolds* defence. For the reasons I have given, no weight can be attached to the jury's rejection of the confirmation by sources in Saudi Arabia and they were asked no question about the confirmation in Washington. The failure to delay publication and the effect on diplomatic relations are insufficient reasons. The question is then whether the case should be remitted for a new trial or whether the appeal should be allowed and the action dismissed.

[89] A new trial would in effect be to allow the jury to answer the question to which Mr Price objected, namely, whether Mr Simpson was telling the truth when he said that he had received confirmation in Washington. If this question had been answered in the newspaper's favour, it would have been bound to succeed. Indeed, such an answer, and a correction of the misdirection on the presumption of innocence, would be likely also to have affected the jury's answers to the questions on confirmation in Saudi Arabia. But Mr Simpson's evidence was, as I have said, essentially uncontradicted. I think that it is now too late for the claimants to change their minds and have the question of his veracity put to the jury. I would therefore allow the appeal and dismiss the action.

PROOF OF DAMAGE

[90] That leaves one point which was argued but in the event does not arise. Mr Robertson submitted that a commercial company like the second claimant should not be able to sue for libel unless it can prove special damage. That would involve overruling the contrary decision of the Court of Appeal in *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, [1891–4] All ER Rep 548 and the statement of the law by Lord Keith of Kinkel in *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011 at 1017, [1993] AC 534 at 547. For my part, I would accept Mr Robertson's submission but as I understand that a majority of your Lordships would reject it and I agree on this point with the opinion of my noble and learned friend Baroness Hale of Richmond, I shall not detain your Lordships long with my own reasons.

[91] In the case of an individual, his reputation is a part of his personality, the 'immortal part' of himself and it is right that he should be entitled to vindicate his reputation and receive compensation for a slur upon it without proof of financial loss. But a commercial company has no soul and its reputation is no more than a commercial asset, something attached to its trading name which brings in customers. I see no reason why the rule which requires proof of damage to commercial assets in other torts, such as malicious falsehood, should not also apply to defamation.

LORD HOPE OF CRAIGHEAD.

[92] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for all the reasons that he gives I too would allow the appeal and set aside the order of the trial judge. I wish to add only a few observations of my own.

DAMAGE

[93] This issue has been referred to as 'the presumption of damage' issue. But to describe the award of damages for libel as based on a presumption is not wholly accurate. The question in every case of libel is whether the statement complained of would tend to bring the claimant into contempt, hatred or ridicule, or to injure his character: *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 at 138, [1891–4] All ER Rep 548 at 550 per Lord Esher MR. This is a question of fact. It is the injury to the claimant's feelings or to his reputation that makes the false statement libellous. The award flows from the fact that, in the case of an individual, an injury to feelings or to reputation will always sound in damages. In the same case ([1894] 1 QB 133 at 145, [1891–4] All ER Rep 548 at 553) Kay LJ said one of the differences between libel and slander is that in an action for libel, generally speaking, damage is presumed and that special damage need not be proved or alleged. But it is the fact that the statement was calculated to injure the claimant in his character or reputation that makes the action maintainable. Proof that he has a reputation that is capable of being injured in this way is an essential element. In the case of an individual it can be presumed that he has a reputation of that kind. In all other cases this is something that must be proved.

[94] Mr Robertson QC for the respondents invited the House to depart from the decision in the *South Hetton* case that proof of special damage is not needed in the case of a trading company. It was on the decision in that case that in *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011 at 1017, [1993] AC 534 at 547 Lord Keith of Kinkel based his observation that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. In the *South Hetton* case the libel complained of fell within this description as it was an attack on the business reputation of the company. But Mr Robertson's submission was that a trading company must always prove special damage. If that submission is sound, it must follow that an action for libel will never lie at the instance of a trading company unless it is in a position to assert and prove that as a result of the statement complained of it has sustained special damage. It will no longer be enough for the company to prove that, in the words of Kay LJ in the *South Hetton* case [1894] 1 QB 133 at 145, [1891–4] All ER Rep 548 at 554, it has a trading character which may be ruined or destroyed by a libel.

[95] It is obvious, of course, that a trading company has no feelings which are capable of being injured. Trade is its business, and it is injury to its reputation in regard to its trade that is of the essence in its case. Lord Reid's comment in *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 156, [1964] AC 234 at 262 that it can only be injured in its pocket captures the way in which the principle of the law of libel applies in its case. This does not mean, however, that it can only be injured in a way that gives rise to loss which, because it can be calculated, has the character of special damage. What it means is that it must show that it is liable to be damaged in a way that affects its business as a trading company.

[96] The principle works in the same way in the case of a non-profit organisation such as a charity. In its case it is not only its pocket, due to a loss of income, that is liable to be injured. Injury to its reputation in the eyes of those with whom it must deal to achieve its charitable objects may be just as damaging to the purpose for which it exists. The principle works in the same way too in the case of other bodies, such as trade unions or other organisations which exist not to trade but to deal with others in the interests of their members or those they represent. Proof that the body has a reputation that has a tendency to be damaged is an essential element in the claim that the false statement was libellous. As the law stands nothing more need be proved to entitle it to damages.

[97] It is not impossible to imagine cases where a trading company could show that it had sustained financial loss of a kind that would entitle it to an award of special damages. But in the *South Hetton* case [1894] 1 QB 133 at 145–146, [1891–4] All ER Rep 548 at 554 Kay LJ said that if such a proof were necessary in order to lay a foundation for the action it would in many cases put the plaintiff in a position of much difficulty. The report of the Faulks Committee in its *Report of the Committee on Defamation* (Cmnd 5909 (March 1975)), p 90 (para 336) also recognised that it was very difficult for a plaintiff, whether corporate or personal, to prove actual financial damage specifically flowing from a defamation. It recommended (p 92 (para 342)) that a trading corporation should have to establish that it had suffered special damage or that the words used were likely to cause it pecuniary damage. This recommendation was not adopted by Parliament. Nevertheless Mr Robertson now invites your Lordships to go further and hold that proof of special damage is an essential requirement in every case where a trading company seeks to establish a cause of action for libel.

[98] I do not think that such a change in the law is either necessary or desirable. The argument that the change is necessary because the law is incompatible with art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) is not sustainable. This is demonstrated by the way the European court dealt with the question in *Steel v UK* (2005) 41 EHRR 403. In that case, after a very long trial during the bulk of which they had represented themselves, the applicants were found liable in damages to McDonalds, a very large multi-national company. The court said (at 436 (para 97)) that the award was disproportionate to the legitimate aim served by it. But it took a different view on the question whether the interference with the applicants' rights to freedom of expression which the English law of defamation prescribes in its pursuit of the legitimate aim of protecting the reputation or rights of others was necessary in a democratic society.

[99] Having noted that large public companies knowingly lay themselves open to close scrutiny and that the limits of acceptable criticism are wider in their case, the court said (at 435 (para 94)):

> 'However, in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The state therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation.'

The European court, then, leaves it to domestic law to determine how the balance is to be struck between these two competing objectives. In *Castells v Spain* (1992) 14 EHRR 445 at 476 (para 43) it reminded us that the pre-eminent role of the press in a state governed by the rule of law must never be forgotten. But the change in the law for which Mr Robertson contends would apply to every case where a trading company wishes to bring an action for libel. He did not suggest that there should be one law for the press and another law for everyone else in this respect.

[100] As for the question whether the change in the law which Mr Robertson has urged on us would be desirable, I would make the following points. First, as Lord Esher MR recognised in the *South Hetton* case [1894] 1 QB 133 at 138, [1891–4] All ER Rep 548 at 550, the law of libel is one and the same to all plaintiffs. As he put it, it is the same by whomsoever the action is brought—whether by a person, a firm or a company. To the examples on his list I would add the other bodies that Lord Keith referred to in the *Derbyshire CC* case [1993] 1 All ER 1011 at 1017, [1993] AC 534 at 547, such as trade unions and charities. It would not be satisfactory to single out trading companies for special treatment.

[101] Mr Robertson did not attempt to argue that the other bodies referred to by Lord Keith such as trade unions or charities, or any other business organisations apart from companies, should be treated in the same way. This feature of his argument shows that it is not soundly based in principle. In the case of those other bodies damages are at large, as Lord Esher put it ([1894] 1 QB 133 at 139, [1891–4] All ER Rep 548 at 551). This is because false statements which reflect on the way they conduct themselves affect the reputation on which they rely to perform their objects. In that respect they are no different from trading companies. In their case too reputation is something that in itself has a value which the current state of the law enables them to protect. What the law does not require them to do is to place a financial value on that reputation or to show, with the precision that this would require, that damage to it is likely to result in financial or pecuniary damage. There is no good reason why trading companies should be treated differently from the rest.

[102] Secondly, there is the difficulty that trading companies would be likely to encounter in proving that a defamatory statement has resulted, or will result, in special damages. This point goes to the root of the matter. As the European court recognised in *Steel v UK* (at 435 (para 94)), one of the main functions which the right of action for libel seeks to serve is to enable the claimant to challenge the truth, and limit the damage, of allegations which risk harming its reputation. It is to enable it to nail the lie, as it was put in argument. A requirement that special damage had to be proved in every case would deprive the trading company of

that opportunity. It would have to wait until it was in a position to show that some damage had actually been done to its business which was capable of being proved. In its case proof of a risk of harm to its reputation—of a tendency to damage it in the way if its business, as Lord Keith put it in the *Derbyshire CC* case [1993] 1 All ER 1011 at 1017, [1993] AC 534 at 547—would not be enough. The effect would be to undermine the right of action and to leave trading companies whose reputation was put at risk without a means of averting the damage that might result from the libel. This could be incalculable.

[103] At various points in his argument Mr Robertson referred to companies, or corporations, more generally—suggesting, as I understood him, that the change in the law should be extended to non-trading as well as to trading companies. But a non-trading company would be likely to find it even more difficult to claim and prove special damage. If the fact that it had a reputation which had a tendency to be damaged was not a sufficient basis for a right of action for libel, it would be likely to be left without a remedy.

[104] For these reasons I consider that the proposition that an action of libel will lie at the suit of a trading company without proof of special damage as stated in the *South Hetton* case remains sound law and that it ought not to be departed from.

REYNOLDS PRIVILEGE

[105] I should like to emphasise at the outset that the only question on which there was a difference of view in the House in *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127 on any matter of substance was whether the issues of justification and qualified privilege should be reconsidered at a new trial: see Lord Steyn ([1999] 4 All ER 609 at 636–637, [2001] 2 AC 127 at 216–217) and my own speech ([1999] 4 All ER 609 at 657, [2001] 2 AC 127 at 237). It has sometimes been suggested that *Reynolds* was a majority decision. But the primary question raised by the case was whether there should be a new category of privileged subject matter—a generic qualified privilege of political speech, as Lord Steyn called it ([1999] 4 All ER 609 at 630, [2001] 2 AC 127 at 209). On that question the House was unanimous. Everyone accepted that the duty-interest test was an essential element in the structure of the law of qualified privilege. There was no dissent from the analysis by Lord Nicholls of Birkenhead of the way in which the common law test should be adapted so as to strike a balance between the role of the media and the restrictions that are necessary in a democratic society for the protection of the reputation of the individual. Nor was there any dissent from his observation ([1999] 4 All ER 609 at 623, [2001] 2 AC 127 at 202) that the common law does not seek to set a higher standard than that of responsible journalism.

[106] Mr Robertson submitted that the standard of responsible journalism provided an insufficiently precise test. It was rejected by the trial judge, Eady J, who said (at [23]) that the primary question was whether the particular circumstances gave rise to a duty to publish. The Court of Appeal ([2005] EWCA Civ 74 at [87], [2005] 4 All ER 356 at [87], [2005] QB 904) agreed with him that the phrase 'responsible journalism' was insufficiently precise to constitute the sole test for *Reynolds* privilege. Mr Robertson said that a new test should be substituted. This was whether what had been published was the product of high quality journalism of demonstrable value to the public. If met, it would be defeated only by proof either of malice or of negligence. In effect he was

suggesting that journalists should be subjected to a higher, and certainly more elaborate, standard than that which Lord Nicholls has identified.

[107] Any test which seeks to set a general standard which must be achieved by all journalists is bound to involve a degree of uncertainty, as Lord Nicholls recognised in *Reynolds* [1999] 4 All ER 609 at 623, [2001] 2 AC 127 at 202. But, like him, I think that the extent of this uncertainty ought not to be exaggerated. 'Responsible journalism' is a standard which everyone in the media and elsewhere can recognise. The duty-interest test based on the public's right to know, which lies at the heart of the matter, maintains the essential element of objectivity. Was there an interest or duty to publish the information and a corresponding interest or duty to receive it, having regard to its particular subject matter? This provides the context within which, in any given case, the issue will be assessed. Context is important too when the standard is applied to each piece of information that the journalist wishes to publish. The question whether it has been satisfied will be assessed by looking to the story as a whole, not to each piece of information separated from its context.

[108] When he was examining the nature of privilege as shown by the cases in *Reynolds* Lord Nicholls said ([1999] 4 All ER 609 at 617, [2001] 2 AC 127 at 195) that whether the public interest requires that publication to the world at large should be privileged depends on an evaluation of the particular information in the circumstances of its publication. He then said that through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the court has regard to all the circumstances. I do not believe that he was intending by those remarks to indicate that the public's right to know each piece of information in any given article should be assessed, piece by piece, without regard to the whole context. On the contrary, each piece of information will take its colour and its informative value from the context in which it is placed. A piece of information that, taken on its own, would be gratuitous can change its character entirely when its place in the article read as a whole is evaluated. The standard of responsible journalism respects the fact that it is the article as a whole that the journalist presents to the public. Weight will be given to the judgment of the editor in making the assessment, as it is the article as a whole that provides the context within which he performs his function as editor.

[109] I would reject Mr Robertson's argument that a higher test is needed to distinguish between those stories that are in need of protection and those that are not. The cardinal principle that must be observed is that any incursion into press freedom that the law lays down should go no further than is necessary to hold the balance between the right to freedom of expression and the need to protect the reputation of the individual. It must not be excessive or disproportionate. Mr Robertson's test which introduces the criterion of 'high quality journalism', especially if it is applied to each particular piece of information that is published, would contravene that principle. But he does not need to have the benefit of a higher standard to succeed in this appeal.

CONCLUSION

[110] Like Lord Bingham, I have been troubled by the fact that the information about Mr Dorsey's sources is incomplete. His evidence as noted by Eady J ([2004] EMLR 196 at [11]) was that it would not have been possible, responsibly, to publish the story on the basis of A's information alone. This led to the judge's comment at [13] that in the light of the jury's verdict, as A was only

a lead and not a primary source, the four corners of the respondents' case on sources had been knocked away. The jury's verdict on the other sources is tainted by a misdirection, so that conclusion cannot stand. But we cannot assume that the other sources were proved. Nor are we in a position to examine all the other evidence.

[111] On the other hand, the question whether publication of the respondents' names was privileged has to be judged in the context of the article read as a whole. Taken overall it has all the hallmarks of responsible journalism. Its subject matter was of considerable interest to the public in general, and to readers of the Wall Street Journal Europe in particular. It did not seek to sensationalise or to exaggerate. The truth and accuracy of the references to the other Saudi institutions and individuals have not been challenged. Nor have Mr Dorsey's experience and qualifications as a specialist reporter or of the senior staff who approved his article been called into question. It was said that the publication of these names was needed to show how seriously the issue was being taken by the Saudi authorities as they were monitoring the leading, most prominent businessmen in the country. The editorial judgment that the respondents' names should be included, with the comment that the group could not be reached for comment, is not conclusive. But much weight must be given to it, in light of the thrust of the whole article of which that particular information forms part.

[112] On balance I am persuaded that no advantage would be gained by sending the case back for further consideration of the evidence. There is a sufficient basis in the information which we have and which my noble and learned friend Lord Hoffmann has so carefully analysed for a finding that the appellants are entitled to claim that publication of the respondents' names was protected by qualified privilege.

LORD SCOTT OF FOSCOTE.

INTRODUCTION

[113] My Lords, the facts which have given rise to these defamation proceedings have been fully set out by my noble and learned friends Lord Bingham of Cornhill (at [2]–[4] and [6], above) and Lord Hoffmann (at [39]–[42], above). To avoid tedious and unnecessary repetition I propose to refer only to the essential background necessary to explain the conclusions I have come to on the issues before the House.

[114] On 11 September 2001 there occurred the horror of the destruction of the Twin Towers in New York, the attack on the Pentagon and the frustration (brought about by the bravery of some of the passengers on the fourth hijacked airliner) of the planned attack on the White House. The loss of lives was huge. The shock to and sense of outrage felt by the citizens of the United States, shared vicariously by most of the citizens of most of the countries of the world, was immeasurable. The international repercussions of that shock and outrage were immediate, and are continuing and of a duration that none of us can foretell. Investigations soon revealed that most of the hijackers who had seized control of the four airliners came from or had a connection with Saudi Arabia. There was natural speculation about the sources of the finance that must have been available to those who had planned the 11 September atrocities. Resolution 1373 passed by the Security Council required all states to prevent and suppress the financing of terrorist acts and the co-operation of the Saudi Arabian government and its

central bank, SAMA (Saudi Arabian Monetary Authority), was sought by the United States authorities.

[115] I have mentioned these background matters (referred to also, and more fully, at [39], above of Lord Hoffmann's opinion) for the purpose of underlining the high degree of public interest, not only in the United States but also in this country and many other countries, in information indicating whether or to what extent the authorities in Saudi Arabia were taking steps to comply with Resolution 1373. Saudi Arabia is not a democracy and, so far as I am aware, does not aspire to become one. It is ruled by the sons and grandsons of Abdul Aziz ibn Saud. An institution such as the central bank, SAMA, cannot be taken to be independent of government control. And it would be foolish to suppose that either the Saudi government or SAMA would feel any obligation to be forthcoming with information to investigative journalists wishing to discover what steps were being taken to monitor bank accounts of Saudi individuals and companies with a view to identifying transfers of funds that might be going to terrorist organisations. It has to be borne in mind, also, that the dominant religion in Saudi Arabia is Wahabiism, a fundamentalist version of Islam, and that the Saudi Arabian rulers preside over a population that is not uniformly sympathetic to the United States and western culture. To the extent that Saudi Arabia may have been co-operating with the United States in trying to identify the sources of funding for terrorism by authorising, at the request of the United States, the monitoring of bank accounts of particular individuals or companies, it is not necessarily to be expected that the Saudi authorities would publicly acknowledge that this was happening.

[116] This is the background to the publication by the Wall Street Journal Europe of the article by Mr James Dorsey, its special correspondent in Riyadh, which has led to this litigation. The article is set out and the circumstances of its publication are described in [40], [41], above of Lord Hoffmann's opinion.

[117] The trial before Eady J and a jury of the libel action brought by Mr Mohammed Abdul Latif Jameel and the company he controls, Abdul Latif Jameel Co Ltd, led to a verdict in their favour and awards of £30,000 to Mr Jameel and £10,000 to the company. The defence of qualified privilege failed. The Wall Street Journal Europe's appeal to the Court of Appeal ([2005] EWCA Civ 74, [2005] 4 All ER 356, [2005] QB 904) also failed but a further appeal has been brought before your Lordships.

[118] Mr Robertson QC, for the appellant, has taken two points. First, he contends that the rule, well established in the law of defamation, that where a libel has been published damage is presumed to have been caused to the object of the libel, ought to be held to have no application to complaints of libel by corporations. In order for a corporation to succeed in a libel claim it ought, Mr Robertson submits, to be necessary for the corporation to plead and prove that some actual damage has been caused to it by the libel. This is a free-standing point of law to which the particular circumstances of and background to the publication of Mr Dorsey's article have no relevance whatever. Mr Robertson's second point is the qualified privilege point. If an investigative journalist, or anyone else for that matter, uncovers, or fortuitously comes across, a story of genuine public interest and importance, in what circumstances can the publisher of the story claim the protection of qualified privilege? The question assumes that the story contains a defamatory statement or innuendo and that the publisher cannot, or does not, prove that the sting of the libel is true.

THE PRESUMPTION OF DAMAGE

[119] Defamation constitutes an injury to reputation. Reputation is valued by individuals for it affects their self-esteem and their standing in the community. Where reputation is traduced by a libel 'the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights' (see *Ratcliffe v Evans* [1892] 2 QB 524 at 528, [1891–4] All ER Rep 699 at 702 per Bowen LJ). It is accepted that the rule applies and should continue to apply to individuals. But it is argued that it should no longer be applied to corporations. Corporations, it is said, have no feelings to be hurt and cannot feel shame. If they are to sue for libel they should be required to show that the libel has caused them actual damage.

[120] These arguments, in my opinion, miss the point. The reputation of a corporate body is capable of being, and will usually be, not simply something in which its directors and shareholders may take pride, but an asset of positive value to it. Why else do trading companies pay very substantial sums of money in advertising their names in TV commercials which usually say next to nothing of value about the services or products on offer from the company in question but endeavour to present an image of the company that is attractive and likely to cement the name of the corporation in the public memory? Why do commercial companies sponsor sporting competitions, so that one has the XLtd Grand National or the YLtd Open Golf Championship or the ZLtd Premiership? It is surely because reputation matters to trading companies and because these sponsorship activities, associating the name of the company with popular sporting events, are believed to enhance the sponsor's reputation to its commercial advantage. The organisers of a variety of activities some sporting, some cultural, some charitable, are constantly on the look-out for sponsorship of the activity in question by some commercial company. The choice of sponsor and the reputation of the sponsor matter to these organisers. Who would these days choose a cigarette manufacturing company to sponsor an athletic event or a concert in aid of charity? If reputation suffers, sponsorship invitations may be reduced, advertising opportunities may become difficult, customers may take their custom elsewhere. If trade suffers, profits suffer.

[121] It seems to me plain beyond argument that reputation is of importance to corporations. Proof of actual damage caused by the publication of defamatory material would, in most cases, need to await the next month's financial figures, but the figures would likely to be inconclusive. Causation problems would usually be insuperable. Who is to say why receipts are down or why advertising has become more difficult or less effective? Everyone knows that fluctuations happen. Who is to say, if the figures are not down, whether they would have been higher if the libel had not been published? How can a company about which some libel, damaging to its reputation, has been published ever obtain an interlocutory injunction if proof of actual damage is to become the gist of the action?

[122] There is no doubt that, as the case law now stands, a libel is actionable per se at the suit of a corporation as it is at the suit of an individual, without the need to prove that any actual damage has been caused. In *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, [1891–4] All ER Rep 548 the plaintiff, a colliery company, complained of a libel that had attacked the company in respect of its management of company houses in which some of its colliery workers lived. The Court of Appeal held that the libel was actionable per se and ([1894] 1 QB 133 at 140, [1891–4] All ER Rep 548 at 551) that

'. . . the plaintiffs would be entitled to damages at large, without giving any evidence of particular damage'.

[123] *English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 All ER 1, [1940] 1 KB 440 was a case in which a society registered under the Industrial and Provident Societies Act 1893 complained of an article in the *Daily Herald* commenting on the way in which the society had kept its accounts and insinuating that the figures had been deliberately falsified and that the society had carried on business 'by dishonest methods' ([1940] 1 All ER 1 at 5, [1940] 1 KB 440 at 450). Slesser LJ commented that 'A more terrible indictment of a society of this kind it is difficult to imagine' ([1940] 1 All ER 1 at 5, [1940] 1 KB 440 at 450–451). The jury found these insinuations to be false. But the society had neither alleged nor proved any special damage and the jury, inadequately directed by the trial judge, had awarded damages of one farthing. The society successfully appealed and the case was remitted for a retrial limited to the issue of quantum of damages. Slesser LJ said ([1940] 1 All ER 1 at 8, [1940] 1 KB 440 at 455) that:

> 'I cannot help feeling that . . . the jury must have come to the conclusion that, in so far as they were not satisfied that the company had lost any business, they must treat the damages as quite nominal or trivial. If they did go into their deliberations with that point of view, they were entirely in error. A libel by the invasion of a legal right gives a right to damages. It is the duty of the jury to assess those damages, which may be punitive or contemptuous, or, in an ordinary case, may be such as would recompense the plaintiff for the wrong done to his reputation.'

Goddard LJ said ([1940] 1 All ER 1 at 12, [1940] 1 KB 440 at 461) that:

> 'There is no obligation on the plaintiffs to show that they have suffered actual damage. A plaintiff can, if he likes, by way of aggravating damages, show that he has suffered actual damage . . . but in every case he is perfectly entitled to say: "Here is a serious libel upon me. The law assumes that I must have suffered damage, and I am entitled to substantial damages."'

All of this was said of a corporate industrial and provident society whose reputation had been besmirched by the libel. And it is to be borne in mind that the primary purpose of an award of damages in a libel action, where no actual damage caused by the libel has been pleaded or proved, is not compensation but vindication of reputation.

[124] *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011, [1993] AC 534 established the important principle that institutions of central or local government have no right at common law to maintain actions for damages for defamation. But no doubt was cast on the right of corporations to do so. The leading speech was given by Lord Keith of Kinkel who ([1993] 1 All ER 1011 at 1015, [1993] AC 534 at 544–545) cited the *South Hetton* case with approval.

[125] My Lords I can see no good reason why your Lordships should now disqualify corporations from bringing libel actions unless able to allege and prove actual damage caused by the libel. Every corporation is incorporated for some purpose. In the constitution of every corporation its principal objects will be set out. A trading company's principal object will be to carry on trade. A charitable corporation's principal object will be the promotion or pursuit of some charitable object. Some companies are incorporated as holding companies, holding subsidiary companies or other assets for the benefit of the group of which

they form part. Whether publications containing disparaging or derogatory remarks about a company can be complained of by the company as being defamatory will depend upon the nature of the remarks and the nature of the corporation's objects and reputation. It might be quite difficult to defame a holding company. But a holding company's reputation might be indistinguishable from that of the corporate group to which it belonged. If, however, the conclusion can be reached that the remarks in question were indeed defamatory, damaging to the reputation of the company and apt to damage its ability to pursue its trading or charitable or other objects, I can see no reason of principle why the long-standing rule of law enabling the company to pursue a remedy in a defamation action without the need to allege or prove actual damage should be changed.

[126] And, in particular, I can see nothing in art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) that requires a different conclusion. The right to freedom of expression was never intended, in my opinion, to allow defamatory statements, whether of individuals or companies, to be published with impunity. If a defamer can neither justify the statement nor claim the protection afforded by the law to fair comment on matters of public interest or to statements that qualify for privilege, he must, in my opinion, be prepared to answer for the libel. On this issue I am in full agreement with the opinions that have been expressed by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead.

QUALIFIED PRIVILEGE

[127] I have found it instructive to remind myself of the reason why qualified privilege emerged from the case law of the nineteenth century as a defence in defamation actions. The reason was given by Parke B in *Toogood v Spyring* (1834) 1 Cr M & R 181, [1824–34] All ER Rep 735. Parke B was explaining ((1834) 1 Cr M & R 181 at 193, [1824–34] All ER Rep 735 at 737) why there were 'cases where the occasion of the publication affords a defence in the absence of express malice'. He said this:

> 'In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.' (See (1834) 1 Cr M & R 181 at 193, [1824–34] All ER Rep 735 at 737–738.)

Parke B's references to 'malice' were explained by Lindley LJ in *Stuart v Bell* [1891] 2 QB 341 at 345:

'A privileged occasion is one which is held in point of law to rebut the legal implication of malice which would otherwise be made from the utterance of untrue defamatory language.'

—and (at 347) citing Erle CJ in *Whiteley v Adams* (1863) 15 CBNS 392 at 414:

'"I take it to be clear that the foundation of an action for defamation is malice. But defamation pure and simple affords presumptive evidence of malice. The presumption may be rebutted by showing that the circumstances under which the libel was written or the words uttered were such as to render it justifiable."'

[128] It would be convenient to be able to extract from these dicta the principle that any circumstances attending the publication that render the publication 'justifiable' would rebut the 'presumptive evidence of malice' and attract the protection of qualified privilege. But to do so would be to overlook subsequent authority that appears to place fairly rigid limits on the occasions that can attract qualified privilege. In *Adam v Ward* [1917] AC 309 at 334, [1916–17] All ER Rep 157 at 170 Lord Atkinson said that—

'a privileged occasion is . . . an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.'

[129] My Lords, however accurate Lord Atkinson's statement of law may be where the defamatory communication has been made to a relatively limited number of people, it does not, as it seems to me, cater for the role of the press, at the end of twentieth century and the beginning of the twenty-first, in reporting on matters of public importance. Newspapers address their contents to the public at large. Some, like the Wall Street Journal Europe, have an international readership, but the relationship between a newspaper and the members of the public who choose to read it is essentially the same, whether the readership be international or local. The publication is to the public at large. To insist on a reciprocity of duty and interest between the publisher of a newspaper and the reader of the newspaper, who may be in New York, London, Rome, or anywhere, either makes the requirement of reciprocity meaningless or deprives any defamatory statement in the paper, no matter how important as a matter of public interest the content of the statement may be, of the possibility of the protection of qualified privilege. It was this undesirable rigidity of the law of qualified privilege that, to my mind, the seminal judgment of Lord Nicholls of Birkenhead in *Reynolds* [1999] 4 All ER 609, [2001] 2 AC 127 was designed to meet.

[130] Lord Nicholls did not turn his back on the reciprocal duty/interest test for qualified privilege. Instead he moulded the test so as to cater for the publication of information that the public as a whole, as opposed to a specific individual or individuals, was entitled to know. He said ([1999] 4 All ER 609 at 619, [2001] 2 AC 127 at 197) that the court should take into account the nature, status and source of the material published and the circumstances of the publication and continued:

'These factors are to be taken into account in determining whether the duty-interest test is satisfied or, as I would prefer to say in a simpler and more direct way, whether the public was entitled to know the particular information. The duty-interest test, or the right to know test, cannot be carried out in isolation from these factors and without regard to them. A claim to privilege stands or falls according to whether the claim passes or fails this test. There is no further requirement.'

[131] Under the heading 'Conclusion' ([1999] 4 All ER 609 at 625–626, [2001] 2 AC 127 at 204), Lord Nicholls rejected the notion that a new category of qualified privilege needed to be developed. He emphasised that:

'The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.'

He then ([1999] 4 All ER 609 at 626, [2001] 2 AC 127 at 205) gave some illustrative examples of matters that should be taken into account by the court when judging whether a particular publication attracted qualified privilege, but warned that: 'This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case.' And that—

'The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know ... Any lingering doubts should be resolved in favour of publication.'

[132] Lord Steyn, in his speech, in *Reynolds* said ([1999] 4 All ER 609 at 634, [2001] 2 AC 127 at 214) that a publication should be entitled to the protection of qualified privilege if '... it can fairly be said to be in the public interest that the information about political matters should be published' and ([1999] 4 All ER 609 at 636, [2001] 2 AC 127 at 215) that he '... would uphold qualified privilege of political speech, based on a weighing of the particular circumstances of the case'. And Lord Cooke of Thorndon, in an important passage said that:

'Hitherto the only publications to the world at large to which English courts have been willing to extend qualified privilege at common law have been fair and accurate reports of certain proceedings or findings of legitimate interest to the general public. In *Blackshaw v Lord* [1983] 2 All ER 311, [1984] QB 1, *Templeton v Jones* [1984] 1 NZLR 448 and now the present case, the law is being developed to meet the reasonable demands of freedom of speech in a modern democracy, by recognising that there may be a wider privilege dependent on the particular circumstances.' (See [1999] 4 All ER 609 at 645, [2001] 2 AC 127 at 225.)

Lord Hobhouse of Woodborough expressed his full agreement with what Lord Nicholls had said.

[133] In effect, in my opinion, the House was, in the context of journalistic reporting, re-investing qualified privilege with the flexibility that Parke B in *Toogood*'s case (1834) 1 Cr M & R 181, [1824–34] All ER Rep 735 and Lindley LJ in *Stuart*'s case [1891] 2 QB 341 would appear to have accorded it. As Erle CJ said in *Whiteley*'s case (1863) 15 CBNS 392 at 414: 'The presumption [of malice] may be rebutted by showing the circumstances under which the libel was

written . . . were such as to render it justifiable.' This view of the effect of *Reynolds* accords with remarks by Lord Cooke of Thorndon in *McCartan Turkington Breen (a firm) v Times Newspapers Ltd* [2000] 4 All ER 913 at 931, [2001] 2 AC 277 at 301:

> '. . . until *Reynolds*' case it would seem that the legal profession in England may not have been fully alive to the possibility of a particular rather than a generic qualified privilege for newspaper reports where *the circumstances warranted a finding of sufficient general public interest*.' (My emphasis.)

—and ([2000] 4 All ER 913 at 932, [2001] 2 AC 277 at 301): 'It seems to me that the *Reynolds*' case was less a breakthrough than a reminder of the width of the basic common law principles as to privilege . . .'

[134] A somewhat different, though no less welcoming, view of *Reynolds*, was expressed by the Court of Appeal in *Loutchansky v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 1805, [2002] 1 All ER 652, sub nom *Loutchansky v Times Newspapers Ltd (Nos 4 and 5)*, *Loutchansky v Times Newspapers Ltd (Nos 2, 3 and 5)* [2002] QB 783. The judgment of the court said (at [33]):

> 'Whereas previously it could truly be said of qualified privilege that it attaches to the occasion of the publication rather than the publication, *Reynolds* privilege attaches, if at all, to the publication itself: it is impossible to conceive of circumstances in which the occasion of publication could be privileged but the article itself not so. Similarly, once *Reynolds* privilege attaches, little scope remains for any subsequent finding of malice.'

And:

> '[35] . . . Once *Reynolds* privilege is recognised, as it should be, as a different jurisprudential creature from the traditional form of privilege from which it sprang, the particular nature of the "interest" and "duty" which underlie it can more easily be understood.
>
> [36] The interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed . . . The corresponding duty on the journalist (and equally his editor) is to play his proper role in discharging that function. His task is to behave as a responsible journalist. He can have no duty to publish unless he is acting responsibly any more than the public has an interest in reading whatever may be published irresponsibly. That is why in this class of case the question whether the publisher has behaved responsibly is necessarily and intimately bound up with the question whether the defence of qualified privilege arises. Unless the publisher is acting responsibly privilege cannot arise.'

[135] My Lords I am in respectful and complete agreement with the explanation of *Reynolds* privilege given by the Court of Appeal in [36], cited above. But I would not myself accept the conclusion that *Reynolds* privilege is 'a different jurisprudential creature' from traditional qualified privilege. The 'interest' and 'duty' referred to in [36] and the criteria for establishing their existence do no more, in my opinion, than give expression in a particular journalistic context to the principle expressed by Erle CJ that qualified privilege arises where 'the circumstances under which the libel was written . . . were such as to render it justifiable'.

[136] The advice of the Privy Council, written by Lord Nicholls, in *Bonnick v Morris* [2002] UKPC 31, (2002) 12 BHRC 558, [2003] 1 AC 300, represented, again in a journalistic context, a further move away from rigidity. There were two issues before the Board. One was as to the meaning to be attributed to the statement complained of. A defamatory meaning was one possibility but was not the only meaning that might be conveyed to a reasonable reader. The Board took the view the natural and ordinary meaning of the words used in the statement carried with them a defamatory implication. The other issue was whether a defence of qualified privilege was available. Lord Nicholls explained (at [22]), the dilemma produced by the ambiguity of the words used in the statement in question:

> 'It is one matter to apply this [single meaning] principle when deciding whether an article should be regarded as defamatory. Then the question being considered is one of meaning. It would be an altogether different matter to apply the principle when deciding whether a journalist or newspaper acted responsibly. Then the question being considered is one of conduct.'

He continued:

> '[23] Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals . . . If they are to have the benefit of the privilege journalists must exercise due professional skill and care.
>
> [24] To be meaningful this standard of conduct must be applied in a practical and flexible manner . . . a journalist should not be penalised for making a wrong decision on a question of meaning on which different people might reasonably take different views . . . If the words are ambiguous to such an extent that they may readily convey a different meaning to an ordinary reasonable reader, a court may properly take this other meaning into account when considering whether *Reynolds* privilege is available as a defence. In doing so the court will attribute to this feature of the case whatever weight it considers appropriate in all the circumstances.'

In the event the Board held (at [28]) that the 'article was a piece of responsible journalism to which the defence of qualified privilege is available'. In my opinion, this appeal presents an opportunity which your Lordships should take to confirm that the approach taken in *Bonnick*'s case was an approach which accords with the principles expressed by the House in *Reynolds*.

[137] My Lords, in my opinion the judgments in the courts below which have led to this appeal have not correctly applied the principles for which the *Reynolds* case stands as authority. In [23] of his judgment Eady J said that it was not possible to construe what Lord Nicholls had said in *Reynolds* [1999] 4 All ER 609 at 623, [2001] 2 AC 127 at 202 'as supplanting the common law touchstone of "social or moral duty" by a different test such as "responsible journalism" or the exercise of "due professional skill and care"'. However the touchstone of a reciprocal interest and duty between the receiver and the giver of the defamatory statement was a judicial construct of the twentieth century designed to produce certainty as to the circumstances in which a defamatory statement made by A to B could be accorded the protection of qualified privilege. It is a touchstone that

makes little sense in relation to statements, typically those contained in the pages of newspapers, made to the world at large. *Reynolds* was not supplanting the duty/interest touchstone for situations to which that touchstone was intended to apply and could sensibly be applied. It was supplementing that touchstone in order to provide the protection of qualified privilege, where the circumstances warranted that protection, to statements published to the world at large. The expression 'responsible journalism' has been usefully coined as a succinct summary—but only a summary—of the circumstances in which a defamatory article in a newspaper can claim that protection.

[138] Journalists, and the editors and publishers of the newspapers in which journalists' articles appear, may or may not regard themselves as under a 'social and moral duty' to publish the information contained in their articles. If the impulsion to publish is to be expressed in 'duty' terms, it would be nearer the mark to describe the duty as a 'professional duty'. Newspapers exist to supply information to the public. The information may be interesting but trivial; it may be lacking in much interest but none the less important. Newspapers may decide to publish information that would be interesting to the public but that is essentially unimportant or, as it might be put, of very little public interest. It would be a misuse of the word 'duty' to describe a newspaper as having a 'duty' to publish information of that character. But there is other information the public interest of which is real and unmistakable. In relation to information of that character it makes sense to speak of newspapers having a 'duty' to publish. They, and their reporters, should, of course, take such steps as are practicable to verify the truth of what is reported. Fairness to those whose names appear in newspapers may require, if it is practicable, an opportunity to comment being given to them and/or an opportunity to have a response published by the newspaper. These are all circumstances the weight of which in assessing whether a report should be protected by qualified privilege will vary from case to case. Lord Nicholls made all of this clear in *Reynolds*.

[139] Eady J, having (at [36]), posed for himself the question whether Mr Dorsey or the Wall Street Journal Europe had a 'social or moral duty' to write and publish the article and, in it, to name the Jameel group, said (at [41]) that 'more is required for privilege than that the subject of defamatory allegations should be of public interest'. But that must depend on the nature of the public interest, the degree of its importance. The 11 September 2001 background to the story and the importance, as a matter of public interest, of whether the Saudi authorities were, at the request of the United States authorities, monitoring the bank accounts of Saudi companies or individuals, entitled Mr Dorsey's report to be ranked as of very high public interest indeed. Mr Dorsey had, as the jury accepted, been given the names of some of those whose accounts were said to be being monitored. Mr Dorsey's ability to give the names added verisimilitude to his report. He endeavoured to check, both by inquiries in Saudi Arabia and by inquiries in Washington DC, the accuracy of the information he had been given. He received that confirmation in Washington, and I agree entirely with Lord Hoffmann's criticism (at [65]–[78], above) of the judge's and the Court of Appeal's treatment of Mr Dorsey's and Mr Simpson's evidence about that confirmation. Mr Dorsey said that he had received that confirmation also from four different sources in Saudi Arabia. But, the judge having directed the jury that they must assume that the story that the Jameel group was on the list of those whose accounts were being monitored was false, the jury not surprisingly said that they did not accept that Mr Dorsey had had that story confirmed.

[140] The direction was a misdirection. It perpetrated much the same sort of error that was exposed by Lord Nicholls in *Bonnick*'s case. In deciding whether or not the criterion of responsible journalism had been met, the court should apply the standard of conduct expected of the journalist 'in a *practical* and flexible manner' (my emphasis). The question the jury should have been asked was whether Mr Dorsey had received the confirmation he claimed to have had that the name of the Jameel group was on a list of those whose accounts were to be monitored that had been provided to the Saudis by the United States authorities. To preface the question by requiring the jury to assume the list to be non-existent deprived the jury's answers of any value.

[141] Another matter the judge took into account was that a response to the story had not been obtained from Mr Jameel. He had been unavailable and a comment that Mr Dorsey had obtained from one of Mr Jameel's subordinates could not be used. The judge concluded, and the Court of Appeal confirmed the conclusion, that the criterion of 'responsible journalism' required that publication of the article be postponed until Mr Jameel could be contacted. I disagree. Mr Jameel did not know that his group's accounts were being monitored. He was not in a position to deny that they were being monitored. He could say no more than his subordinate had already told Mr Dorsey, namely, that his companies had no connection of any sort with terrorism and there was no reason for their accounts to be monitored. He could have requested, or demanded, publication in the next edition of the Wall Street Journal Europe, of a response on those lines, but he never did so. In the circumstances the newspaper's refusal to postpone publication of the story was not, in my opinion, a circumstance of any real weight in the scale for measuring the presence or absence of 'responsible journalism'.

[142] Finally the judge appears to have regarded it as reprehensible or, at least, inconsistent with 'responsible journalism' for the Wall Street Journal Europe to have published a story disclosing the names on a list that the United States authorities had undertaken to keep confidential. Coupled with this is the denial by SAMA and the Saudi banks that the list existed (see [2004] EMLR 196 at [54]). The judge said (at [58]) that—

> 'where there was an inter-governmental agreement not to reveal the names of those being investigated in the fight against terror, cogent grounds are required to show why the public interest called for that agreement to be breached.'

I would, for my part, answer that point in two ways. First the importance of the story was not the identity of the names on the list but that there was such a list, evidencing the highly important and significant co-operation between the United States and the Saudi authorities in the fight against terror. The names gave credibility to the story. Second, I know of no government that discloses information to which sensitivity may attach otherwise than with great reluctance. Subject to D notices and the like, it is no part of the duty of the press to co-operate with any government, let alone foreign governments, whether friendly or not, in order to keep from the public information of public interest the disclosure of which cannot be said to be damaging to national interests.

[143] This is a case in which, as it seems to me, the information disclosed in Mr Dorsey's article was information of high importance and public interest not only, or even particularly, in this country but worldwide. The public had a right to the disclosure of the information and the newspaper had a professional duty to disclose it. The circumstances attending the writing of the story by Mr Dorsey

and its publication by the Wall Street Journal Europe satisfied, in my opinion, the criterion of responsible journalism. If the truth be that Mr Dorsey had failed to obtain confirmation of the story by Saudi sources, other than the Saudi source from whom he had obtained the story in the first place, none the less, in my opinion, the confirmation that Mr Simpson had obtained in Washington justified the publication of the story. The criterion of responsible journalism, given the importance of the story, would have been satisfied. I see no reason for the case to be referred back for a re-trial.

[144] I would for these reasons uphold the privilege defence, allow the appeal, set aside the damages award and dismiss the action. Having had the advantage of reading the respective opinions of my noble and learned friends on the qualified privilege point I am unable to discern any real differences of principle. If, however, there are any, I want to express my full agreement with the reasons given by my noble and learned friend Lord Hoffmann.

BARONESS HALE OF RICHMOND.

[145] My Lords, there are two issues before us and on both of them I agree with the opinions expressed by my noble and learned friend, Lord Hoffmann. There is only a little I wish to add on the issue of '*Reynolds* privilege' (*Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127) but rather more on the issue of damage.

THE *REYNOLDS* DEFENCE

[146] It should by now be entirely clear that the *Reynolds* defence is a 'different jurisprudential creature' (*Loutchansky v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 1805 at [35], [2002] 1 All ER 652 at [35], sub nom *Loutchansky v Times Newspapers Ltd (Nos 4 and 5)*, *Loutchansky v Times Newspapers Ltd (Nos 2, 3 and 5)* [2002] QB 783) from the law of privilege, although it is a natural development of that law. It springs from the general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information. It is not helpful to analyse the particular case in terms of a specific duty and a specific right to know. That can, as experience since *Reynolds* has shown, very easily lead to a narrow and rigid approach which defeats its object. In truth, it is a defence of publication in the public interest.

[147] This does not mean a free-for-all to publish without being damned. The public only have a right to be told if two conditions are fulfilled. First, there must [be] a real public interest in communicating and receiving the information. This is, as we all know, very different from saying that it is information which interests the public—the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it. It is also different from the test suggested by Mr Robertson QC, on behalf of the Wall Street Journal Europe, of whether the information is 'newsworthy'. That is too subjective a test, based on the target audience, inclinations and interests of the particular publication. There must be some real public interest in having this information in the public domain. But this is less than a test that the public 'need to know', which would be far too limited.

[148] If ever there was a story which met the test, it must be this one. In the immediate aftermath of 9/11, it was in the interests of the whole world that the sources of funds for such atrocities be identified and if possible stopped.

There was and should have been a lively public debate about this. Given the nationalities of the hijackers, this focussed particularly upon the efforts of the Saudi Arabian authorities. Anti-Saudi feeling was running high in some places. Information that the Saudis were actively co-operating, not only with the United Nations, but also with the United States was of great importance to that debate. This was, in effect, a pro-Saudi story, but one which, for internal reasons, the Saudi authorities were bound to deny. Without names, its impact would be much reduced.

[149] Secondly, the publisher must have taken the care that a responsible publisher would take to verify the information published. The actual steps taken will vary with the nature and sources of the information. But one would normally expect that the source or sources were ones which the publisher had good reason to think reliable, that the publisher himself believed the information to be true, and that he had done what he could to check it. We are frequently told that 'fact checking' has gone out of fashion with the media. But a publisher who is to avoid the risk of liability if the information cannot later be proved to be true would be well advised to do it. Part of this is, of course, taking reasonable steps to contact the people named for their comments. The requirements in 'reportage' cases, where the publisher is simply reporting what others have said, may be rather different, but if the publisher does not himself believe the information to be true, he would be well advised to make this clear. In any case, the tone in which the information is conveyed will be relevant to whether or not the publisher has behaved responsibly in passing it on.

[150] Once again, as my noble and learned friend Lord Hoffmann has demonstrated, the publication of this story passed this test. We have to judge the steps which are known to have been taken against the background of the style and tone of the publication in general and the article in particular. This is not a newspaper with an interest in publishing any sensational information however inaccurate (or even in some cases invented). It is, as the journalist quoted by my noble and learned friend said, 'gravely serious' (indeed some might find it seriously dull). We need more such serious journalism in this country and our defamation law should encourage rather than discourage it.

[151] In short, my Lords, if the public interest defence does not succeed on the known facts of this case, it is hard to see it ever succeeding.

DAMAGE

[152] The tort of defamation exists to protect, not the person or the pocket, but the reputation of the person defamed. Indeed, as Tony Weir points out in *A Casebook on Tort* (10th edn, 2004) p 519, it is so tender to a person's reputation that it allows him to claim substantial damages without having to show that the statement was false, or that it did him any harm, or that the defendant was at fault in making it. In the case of an individual, all this is so well established that we have ceased to think it odd (if we ever did) and it would certainly take the intervention of Parliament to change it. But the authority for the proposition that a company is in the same position as an individual is the Court of Appeal decision in *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, [1891–4] All ER Rep 548. This House is therefore free to overrule it, although of course it would only disturb an authority of such long-standing if there were good reason, in modern circumstances, to do so.

[153] Among those modern circumstances is the importance now attached in all developed democracies to freedom of expression, especially on matters of political

interest. The *South Hetton* case was decided before there was universal suffrage in this country, so before we were a proper democracy. Since then, we have acceded to several international instruments which guarantee freedom of speech. The most important is art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), because we have not only an international but also a domestic obligation to comply with it. Article 10(2) acknowledges that the protection of a person's reputation is a legitimate aim which may justify the restriction of freedom of speech. This includes the reputation of a commercial company. The competing interests in 'open debate about business practices' and 'protecting the commercial success and viability of companies' mean that the state enjoys 'a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation': see *Steel v UK* (2005) 41 EHRR 403 at 435 (para 94) (the McLibel case). Nevertheless, those means must be 'necessary in a democratic society': i e they must meet a pressing social need and be proportionate to the legitimate aim pursued. One of the reasons why the European Court of Human Rights found that the award of damages against the defendants in the McLibel case (at 436 (para 96)) was disproportionate was that 'in accordance with the principles of English law, they were not required to, and did not, establish that they had in fact suffered any financial loss as a result of the publication'.

[154] It seems, therefore, that while the retention of the rule that a company does not have to show that it has in fact been harmed in any way may be within our margin of appreciation, we should scrutinise its impact with some care to see whether it may have a disproportionately chilling effect upon freedom of speech. The earliest critical comment upon the rule in the United Kingdom to which we have been referred came again from Tony Weir, in a case note on *Bognor Regis UDC v Campion* [1972] 2 All ER 61, [1972] 2 QB 169: see 'Local Authority v Critical Ratepayer—A Suit in Defamation' [1972A] CLJ 238, pp 239–240 (but see also 'Libel and the Corporate Plaintiff' (1969) 69 Columbia Law Review 1496):

> 'There is still some justification, however, for the rule that the human plaintiff need not prove any harm. If the statement is defamatory, he will feel bad and others will think badly of him; the first need not be proved and the second cannot be. Indeed, this duality of harm can be presumed precisely because it is required: you get damages only if the defendant has been rude *about you to* someone else.'

But it was absurd to give substantial damages to a trading company:

> 'It was absurd because [the company] had no feelings which might have been hurt and no social relations which might have been impaired. The two kinds of presumptive harm could not be presumed because they could not have occurred . . . the reasons for which we absolve the human plaintiff from the usual requirement of proving loss cannot and do not apply to the inhuman plaintiff . . . To prefer the interest in maintaining the corporate image to the right of the citizen to say what he reasonably believes to be true is a grim perversion of values.'

[155] Lest it be thought that these are maverick academic views, it should be noted that amongst the recommendations of the Faulks Committee's *Report of the Committee on Defamation* (Cmnd 5909, 1975) p 92 (para 342) was the proposal that:

'(a) No action for defamation should lie at the suit of any trading corporation unless such corporation can establish either—(i) that it has suffered special damage, or (ii) that the words were likely to cause it pecuniary damage.

(b) Actions in defamation by non-trading corporations (including government bodies and local authorities) and trade unions should be subject to similar limitations.'

The Faulks Committee were influenced by Mr Weir's views, and also by the well-known words, albeit uttered in a different context, of Lord Reid in *Lewis v Daily Telegraph Ltd, Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 156, sub nom *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 at 262:

'A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel, but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured.'

The committee included the likelihood of future financial damage because of the difficulty of proving 'actual financial damage specifically flowing from a defamation' (p 90 (para 336)).

[156] This recommendation was not enacted, although others were. Nevertheless, this House felt able to go further than the committee had gone in relation to local authorities, when in *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011, [1993] AC 534, it overruled the *Bognor Regis* case and held that central and local government authorities could not sue in defamation at all. Lord Keith of Kinkel ([1993] 1 All ER 1011 at 1017, [1993] AC 534 at 547), giving the only reasoned opinion, accepted that the cases cited 'clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business'. He gave examples including deterring banks from lending, or the best qualified workers from joining, or a trade union's ability to keep its members, or a charity's ability to raise money. He then went on to distinguish governmental organisations on the grounds of democratic accountability.

[157] As none of the authorities cited by Lord Keith was binding upon this House, and the question of non-governmental corporate bodies was not before the House, it is open to us to take the matter further. It would require very little amendment to Lord Keith's formulation for us to reflect the recommendations of the Faulks Committee. Thus for the words 'which can be seen as having a tendency to damage it in the way of its business' we could substitute 'which can be shown to be likely to cause it financial loss'. Indeed, Mr James Price QC, on behalf of the claimants, was keen to stress that Lord Keith's formulation was already something of a barrier to companies which could not show such a tendency. We cannot know whether Lord Keith, had the matter been in issue, would have accepted the invitation to require that corporations produce at least some evidence to support the likelihood that their pockets would indeed be injured in some way.

[158] My Lords, in my view such a requirement would achieve a proper balance between the right of a company to protect its reputation and the right of the press and public to be critical of it. These days, the dividing line between governmental and non-governmental organisations is increasingly difficult to draw. The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government.

a [159] For these short reasons, I would have allowed the appeal against the award to the company in any event. But as a majority of your Lordships take a different view, and the appeals against each claimant are in any event to be allowed on the *Reynolds* point, there is no need to say more.

Appeal allowed.

Kate O'Hanlon Barrister.

Majorstake Ltd v Curtis

[2006] EWCA Civ 1171

COURT OF APPEAL, CIVIL DIVISION

MAY, NEUBERGER AND MOORE-BICK LJJ

19 JULY, 8 AUGUST 2006

Landlord and tenant – Lease – Right to acquire new lease – Landlord intending to redevelop – Redevelopment of any premises in which tenant's flat contained – Whether 'any premises in which the tenant's flat is contained' referring to existing recognisable unit – Leasehold Reform, Housing and Urban Development Act 1993, s 47.

The claimant was the freehold owner of a building which comprised two blocks of flats. The defendant was the lessee of one of the flats under an underlease whose term expired in 2008. The defendant gave notice to the claimant under the Leasehold Reform, Housing and Urban Development Act 1993 that he claimed the right under the 1993 Act to acquire a new lease. The claimant served a counter-notice stating that it intended to apply for an order under s 47[a] of the 1993 Act. Under that section the court could by order declare that the right to acquire a new lease was not exercisable by a tenant by reason of the landlord's intention to redevelop any premises in which the tenant's flat was contained. Subsection (2)(b)(ii) provided that the court was not to make such an order unless it was satisfied that for the purposes of redevelopment the landlord intended to carry out substantial works of construction on the whole or a substantial part of 'any premises in which the flat is contained'. It was the claimant's intention to combine the defendant's flat with a flat which was owned by a subsidiary of the claimant and situated immediately below the defendant's flat so as to form a single duplex apartment. The claimant issued proceedings in the county court seeking a declaration under s 47 of the 1993 Act. The judge dismissed the claim, holding that the expression 'any premises' in which a flat was contained in s 47 referred to a building as a whole or a self-contained part of it, namely the block in which the defendant's flat was situated. The claimant appealed. Before the Court of Appeal the defendant accepted that the expression could not be restricted to the building as a whole or a self-contained part of it, but submitted that it referred to an existing recognisable unit, such as a whole floor of a building.

Held – (May LJ dissenting) The expression 'any premises' in s 47(2)(b)(ii) of the 1993 Act was general and apt to refer to the whole or any part of a building. The expression 'any premises in which the [tenant's] flat is contained' was not intended to refer to some existing recognisable unit within the building; it was not possible to identify some irreducible minimum unit. There was no indication in the policy or the language of the 1993 Act that a part of a building which comprised two adjacent flats did not constitute premises in which each was contained, whether the flats were contiguous vertically or horizontally. Accordingly, the appeal would be allowed (see [18], [27]–[29], [33], [37], [59], [60], below).

a Section 47 is set out at [7], below

Notes

For application to defeat tenant's claim where landlord intends to redevelop, see 27(3) *Halsbury's Laws* (4th edn) (2006 reissue) para 1694.

For the Leasehold Reform, Housing and Urban Development Act 1993, s 47, see 23 *Halsbury's Statutes* (4th edn) (2004 reissue) 997.

Cases referred to in judgments

Cozens v Brutus [1972] 2 All ER 1297, [1973] AC 854, [1972] 3 WLR 521, HL.
Maunsell v Olins [1975] 1 All ER 16, [1975] AC 373, [1974] 3 WLR 835, HL.

Appeal

The claimant Majorstake Ltd, the freehold owner of Boydell Court, St John's Wood Park (the landlord), appealed from the decision of Judge Cowell in the Central London County Court dismissing its claim for a declaration that the right of the defendant, Monty Curtis, the lessee of Flat 77 of Block B of Boydell Court (the tenant) to acquire a new lease under the Leasehold Reform, Housing and Urban Development Act 1993 was not exercisable on the grounds that the landlord intended to redevelop premises in which the flat was contained. The facts are set out in the judgment of Moore-Bick LJ.

Jonathan Brock QC and *Emily Windsor* (instructed by *SJ Berwin LLP*) for the landlord.

Edward Denehan (instructed by *Freeman Box*) for the tenant.

Cur adv vult

8 August 2006. The following judgments were delivered.

MOORE-BICK LJ (giving the first judgment at the invitation of May LJ).

[1] This appeal raises a short point of statutory construction of some importance to landlords and tenants of residential flats. As with many issues of this kind, the question is easier to pose than to resolve.

[2] The appellant, Majorstake Ltd (the landlord), is the freehold owner of Boydell Court, St John's Wood Park which comprises two blocks of flats known as Block A and Block B. The respondent, Mr Curtis (the tenant), is the lessee of Flat 77 on the seventh floor of Block B under an underlease dated 22 July 1957 for a term of 51 years from 25 March 1957. The contractual term of the lease expires on 25 March 2008.

[3] One of the many purposes of the Leasehold Reform, Housing and Urban Development Act 1993 was to confer on tenants of flats held under long leases the right to obtain a new lease on payment of a premium determined in accordance with the terms of the 1993 Act, subject to certain provisions to safeguard the interests of landlords in redeveloping their property. The right to obtain a new lease is exercised by the service on the landlord of a notice under s 42 of the 1993 Act. On receipt of such a notice the landlord is required to give a counter-notice under s 45 stating that he admits (or does not admit, as the case may be) that the tenant has a right to acquire a new lease but (if it be the case) that he intends to make an application to the court for an order under s 47 declaring that the right to acquire a new lease shall not be exercisable by the tenant by reason of his intention to redevelop any premises in which the flat is contained.

[4] On 16 September 2003 the tenant gave notice to the landlord under s 42 that he claimed the right under the 1993 Act to acquire a new lease. It is not

disputed that he was a qualifying tenant within the meaning of the 1993 Act and was therefore entitled to do so. On 21 November 2003 the landlord served a notice under s 45 admitting the tenant's right to claim a new lease but stating that it intended to apply for an order under s 47 that that right should not be exercisable on the grounds that it intended to redevelop premises in which the flat was contained. It is accepted that the notice complied with the requirements of s 45(2)(c).

[5] On 20 January 2004 the landlord issued proceedings in the Central London County Court seeking a declaration that the tenant's right to acquire a new lease of Flat 77 Boydell Court was not exercisable by reason of the landlord's intention to redevelop premises in which the flat was contained. In his witness statement filed in support of the application one of the landlord's directors, Mr Elan Sasha, explained that it was the landlord's intention to redevelop Flat 77 by combining it with the next-door flat, Flat 79, to create a single large apartment containing four reception rooms, four bedrooms, kitchen and three bathrooms. The plan was to reduce each flat back to a shell by removing all internal walls and then to fit new windows, erect new internal partition walls, rewire, replumb, fit new bathrooms, lay new floors and redecorate. By the time the application came to be heard, however, the landlord's plans had changed. In a witness statement dated 1 December 2004 another director, Mr Sony Douer, explained that it was now the intention to combine Flat 77 with Flat 74, which is situated immediately below it and is owned by a subsidiary of the landlord, to form a single duplex apartment. That also involved reducing each flat back to a shell, installing a staircase between the two levels, renewing the windows, reordering the interior on both levels and replacing the services. It was accepted before the judge that the landlord had established its intention to redevelop Flat 77 as part of the plan described by Mr Douer, that it involved substantial works of construction in both flats and that it was necessary for the landlord to obtain possession of both flats to enable it to carry out the proposed works. The main issue between the parties, and the only issue that arises on this appeal, is whether that part of Block B which comprises Flats 77 and 74 constitutes 'any premises in which [Flat 77] is contained' within the meaning of s 47(2)(b).

[6] Section 47 therefore lies at the heart of this appeal. It forms part of Ch II of the 1993 Act which comprises those sections dealing with the right of certain tenants holding under long leases as defined by the 1993 Act to acquire new leases of their flats giving them an additional term of 90 years. Chapter I, to which it will be necessary to refer in a moment, is concerned with the right of collective enfranchisement by which, subject to certain conditions, tenants may obtain the transfer of the freehold of the building containing their flats to a nominated third party to be held on their behalf.

[7] Section 47 itself provides as follows:

> *'Application to defeat tenant's claim where landlord intends to redevelop.*—(1) Where the landlord has given the tenant a counter-notice under section 45 which complies with the requirement set out in subsection (2)(c) of that section, the court may, on the application of the landlord, by order declare that the right to acquire a new lease shall not be exercisable by the tenant by reason of the landlord's intention to redevelop any premises in which the tenant's flat is contained; and on such an order becoming final the tenant's notice shall cease to have effect.

> (2) The court shall not make an order under subsection (1) unless it is satisfied—(a) that the tenant's lease of his flat is due to terminate within the period of five years beginning with the relevant date; and (b) that for the purposes of redevelopment the landlord intends, once the lease has so terminated—(i) to demolish or reconstruct, or (ii) to carry out substantial works of construction on, the whole or a substantial part of any premises in which the flat is contained; and (c) that he could not reasonably do so without obtaining possession of the flat . . .'

The critical expression in each case is 'any premises in which the [tenant's] flat is contained'.

[8] The landlord's case before the judge, as before this court, was that the expression 'any premises' is perfectly general and is therefore apt to refer to the whole or any part of a building. (Indeed, before us Mr Brock QC initially submitted that it was apt to refer to two or more flats in widely separated parts of a building, but in the context of the expression as a whole which carries with it the idea of containment, I do not think that they can extend quite as far as that.) The tenant's case was that, having regard to the context in which it is found, the expression taken as a whole was intended to refer to the building as a whole or a self-contained part of it.

[9] The judge preferred the tenant's construction for three reasons. His first and main reason was that he believed it to be consistent with the use of the same expression elsewhere in the 1993 Act. He noted that under s 41(4) the tenant is entitled to obtain from persons with a superior interest in his flat information about a number of matters likely to affect his claim, including the service of a claim under s 13 to purchase the freehold of the building containing his flat pursuant to the collective enfranchisement provisions of Ch I. Section 41(4) provides as follows:

> 'Any notice given by a qualifying tenant under this section shall, in addition to any other requirement imposed in accordance with subsections (1) to (3), require the recipient to state—(a) whether he has received in respect of any premises containing the tenant's flat—(i) a notice under section 13 in the case of which the relevant claim under Chapter I is still current, or (ii) a copy of such a notice; and (b) if so, the date on which the notice under section 13 was given and the name and address of the nominee purchaser for the time being appointed for the purposes of section 15 in relation to that claim.'

[10] The judge noted that sub-s (4)(a) also contains the expression 'any premises containing the tenant's flat' and refers back to s 13. That led him back into Ch I and to s 3(1)(a) which provides that the provisions of that chapter apply to premises which consist of a self-contained building or part of a building. In the light of that he concluded that the expression 'any premises in which the [tenant's] flat is contained' in s 47 was to be construed in the same way and thus meant the building as a whole or any self-contained part of it, in this case Block B.

[11] The judge's second reason for preferring the tenant's case was his instinctive feeling that the landlord's proposals were simply a device to frustrate the tenant's lawful expectation. He pointed out that the landlord did not need possession of Flat 77 to carry out work to Flat 74 as such (although it could not, of course, carry out the particular work it had in mind without obtaining possession of Flat 77) and it appears that he thought that the landlord was taking advantage of the fact that it had control of Flat 74 to enable it to obtain possession

of Flat 77. He noted that the landlord was not seeking to redevelop a large part of the property, such as the whole of Block B, which he thought might properly be considered to represent the interest of the landlord which the statute was intended to protect, but was merely seeking to do work on two individual flats in relation to which he thought the legislation was intended to protect the tenant's interest. His third reason was that if Flats 77 and 74 could be regarded as premises in which Flat 77 was contained, he did not think that Flat 74 was a substantial part of those premises within the meaning of s 47(2)(b).

[12] I am afraid I do not find the judge's reasons persuasive. Although I agree that it is essential to construe s 47 in the context of the 1993 Act as a whole, it is also necessary to bear in mind that Ch I is dealing with a fundamentally different subject matter from that covered by Ch II. That does not necessarily mean that Ch I can be excluded from consideration altogether, but it does mean that it is necessary to read Ch I with that distinction clearly in mind.

[13] The word 'premises' is used in a variety of different senses in the 1993 Act. Sometimes it is used to refer to a single flat (as in the definition of a flat in s 101(1)), sometimes to a part of a building in which a flat is contained and sometimes to the building as a whole. In the light of that it was common ground that it is impossible to attribute any single clear meaning to the word and that it is necessary to examine the context in which it occurs in each case to understand the particular sense in which it is used. In my view the judge failed to take sufficient account of the fact that, although the same phrase is used in Chs I and II, the two chapters are dealing with fundamentally different matters and that the only purpose of s 41(4) is to enable the tenant to obtain information about any claim for collective enfranchisement that may have been made in respect of the building as a whole. He needs that information, both because he may wish to take advantage of any such claim himself and because a pending collective enfranchisement claim under the provisions of Ch I operates to suspend the tenant's right to obtain a new lease under the provisions of Ch II. Since a collective enfranchisement claim can only relate to a self-contained building or part of a building, the expression 'premises containing the tenant's flat' in s 41(4)(a) must inevitably refer to a self-contained building or part of a building, but there is no reason why it should be construed in the same way in s 45 or s 47 which are concerned with the acquisition by the tenant of a new lease in an individual flat.

[14] The judge's second reason, as he himself recognised, was little more than an instinctive reaction to the landlord's case. A finely-tuned instinct may often be a valuable guide in resolving legal problems, but when dealing with legislation of some technical complexity such as that with which this case is concerned, it is no substitute for careful analysis.

[15] His third reason was really no more than an extension of his first, since it assumes that the purpose of ss 45 and 47 is to preserve the landlord's right to redevelop the building as a whole, or at any rate a substantial part of it, rather than to allow him to redevelop different parts of it on a piecemeal basis. However, that is the very question at issue in this case. Moreover, the suggestion that it would not be right to say that Flat 74 is a substantial part of the premises misses the point. The premises for the purposes of the argument are Flats 74 and 77 viewed together. The landlord clearly did intend to carry out works of construction on substantially the whole of those premises.

[16] As I have already observed, the word 'premises' is used in different senses in different parts of the 1993 Act and its meaning in any particular instance

depends to a large extent on the context in which it is found. The expression we have to construe is 'any premises in which the [tenant's] flat is contained' in the context of s 47 and it is important to read it as a whole when seeking to identify its correct meaning. On behalf of the landlord Mr Brock emphasised the use of the word 'any' and submitted that the expression as a whole naturally refers to the building as a whole or any part of it which includes the tenant's flat. This became known as the 'red line' argument since it involves the proposition that, provided he can satisfy the court that he has a genuine and realistic intention of doing so, the landlord can redevelop any part of the building containing the tenant's flat which is capable of being identified by a continuous line drawn on a three-dimensional plan of the building. Mr Denehan for the tenant accepted before us that the expression could not be restricted to the building as a whole or even a self-contained part of it, but he submitted that on its ordinary and natural meaning it referred to an existing recognisable unit, such as a whole floor of the building, which contains the flat in question.

[17] Chapter II of the 1993 Act seeks to strike a balance between the interests of tenants holding under existing long leases to acquire new leases and thereby obtain additional security of tenure and the interests of landlords in developing and renovating their property. In striking this balance Parliament has hedged about the landlord's right to obtain possession of an individual flat with the various requirements set out in s 47(2). These include a requirement that the existing lease be due to terminate within five years of the date of the tenant's notice, a requirement that the landlord intends to demolish or reconstruct or carry out substantial works of construction on the whole or a substantial part of the premises in question and a requirement that the landlord be unable to undertake that work without obtaining possession of the tenant's flat. Two things follow from these. The first is that the tenant is not at risk of losing his right to acquire a new lease until his original lease has almost come to an end in any event. The second is that the landlord must be able to satisfy the court that he has a genuine and realistic intention of carrying out redevelopment work of a substantial kind for which he needs to obtain possession of the tenant's flat. Section 47(2) appears to have been closely modelled on s 30(1)(f) of the Landlord and Tenant Act 1954 and the court can therefore be expected to apply broadly the same principles when considering an application under s 47 as it does when considering opposition by a landlord to the grant of a new tenancy under s 30(1)(f). The statute itself reflects Parliament's decision as to how the balance between the interests of landlords and tenants is to be held.

[18] Once it is accepted, as it was on both sides, that the premises to which s 47(2)(b) refers may be something less than the whole building or a self-contained part of it, I find it difficult to limit its meaning by reference to some notional unit within the building. If the landlord wishes to redevelop two adjacent flats to create a single larger unit, as the landlord in this case originally had in mind in the case of Flats 77 and 79, I think he can properly say that the balance of interests reflected in ss 42–47 favours redevelopment rather than the grant of a new tenancy. That would certainly be the case if he intended to redevelop the whole building and I can see no reason why it should be otherwise just because the redevelopment will extend to only part of it. As far as the individual tenant is concerned, the effect, of course, is the same. The expression 'any premises in which the flat is contained' is very broad. If Parliament had intended the tenant's right to acquire a new lease to be defeated only in cases where the landlord intended to redevelop the building as a whole, or a

self-contained part of it, that could easily have been achieved by a provision similar to that found in s 3(1)(a). Similarly, if Parliament had intended that the premises in question should represent an existing recognisable section of the building, it would have been possible to define 'premises' for the purposes of s 47 in appropriate terms. In s 101(1), for example, a flat is defined as a separate *set* of premises, whether or not on the same floor. The concept of a set of premises is one which could have been employed to identify an existing recognisable part of the building.

[19] In my view the landlord's argument gains some additional force from the use of the words '*any* premises' rather than '*the* premises'. Sections 40 and 41 recognise that there may be a number of persons with superior interests in the tenant's flat and that the premises in which their respective interests subsist may not all be the same. Moreover, since any new lease acquired under these provisions will be for an additional term of 90 years, the relevant landlord for the purposes of Ch II must hold either the freehold or an interest in the flat for a term of sufficient length to enable him to grant the tenant a new lease of that duration. In order to accommodate these circumstances s 40 provides that the landlord for the purposes of Ch II is the person who holds the first superior interest capable of granting a term of 90 years. If in ss 45(2)(c) and 47 Parliament had used the words '*the* premises', it might have been possible to argue that it intended to refer to the whole of the premises in which the relevant landlord's interest subsists, whether that was the whole building or some part of it. The question would then be whether those premises 'contained' the flat (they would not do so if they did not extend beyond the flat itself) and whether the landlord intended to redevelop the whole or a substantial part of them. In many cases a landlord whose interest subsists in only part of the building would not be capable of carrying out work of sufficient substance to fall within s 47(2)(b).

[20] The concept of containment underpinned Mr Denehan's submission that the expression 'any premises in which the [tenant's] flat is contained' is intended to refer to some existing recognisable unit within the building such as a whole floor or part of a floor which is physically separated in some way (for example by the stairwell or lift shaft) from the remainder. The concept of containment is undoubtedly an essential element. It is what prevents the landlord from redeveloping the flat on its own since the premises in which the flat is contained must by definition be larger than the flat itself. (It also, in my view, prevents him from treating two separated parts of the building as the relevant premises for this purpose since in this context the word 'premises' connotes one undivided part of the building as a whole.) The expression 'premises in which the flat is contained' is clearly capable of referring to a whole floor of a building, but the difficulty with his argument is that it is just as capable of referring to part of a floor which includes the flat in question, even though it would not otherwise be recognised as a defined unit in any ordinary sense.

[21] Another difficulty I have with Mr Denehan's submission is that it is liable to produce arbitrary consequences. For example, a landlord who intends to combine two or more adjacent flats in the manner originally proposed by the landlord in the present case would be in a position to do so if together they represented the whole floor on one side of the staircase or lift shaft, but not if they represented only part (albeit the larger part) of that section of the floor. Similarly, a landlord who wished to combine flats on two adjacent floors, as the landlord in the present case now intends, would be able to do so if the redevelopment work involved a substantial part of the floor on which the

tenant's flat was situated, but not if it involved only the tenant's flat and perhaps a few others on the same floor. In the absence of any clear indication in the language of s 47(2)(b) that this is what Parliament intended I find it difficult to accept that his construction is correct.

[22] The demise in the present case extends to half the depth of the floor and ceiling joists between Flat 77 and the flats above and below it as well as the internal and external walls between those levels. However, it was pointed out in the course of argument that in some cases it might not extend beyond the internal plaster coating of the walls and ceiling of the flat, leaving the brick and timber structure in the possession of the landlord. In those circumstances could the landlord maintain that the solid structure surrounding the flat represented 'premises in which the flat is contained' within the meaning of s 47(2)(b)? If so, it would provide a strong argument against the landlord's construction since it would effectively enable him in those circumstances to obtain possession of a single flat for the purposes of redevelopment.

[23] In my judgment such an argument seeks to press the linguistic analysis of s 47(2)(b) too far. Although it could be said in such a case that the flat demised was 'contained in' the premises represented by the solid structure, it was clearly not the intention of Parliament in my view to draw a distinction of that kind. The definition of a flat as 'a separate set of premises' which is 'constructed or adapted for use for the purposes of a dwelling' (see s 101(1)(b)) does not easily lend itself to a distinction of that kind and in my view to treat the solid structure as separate from the flat itself would be to frustrate the will of Parliament rather than to give effect to it.

[24] The so-called 'box room' argument presents greater difficulty. Like the previous argument it depends on whether for the purposes of s 47(2)(b) the flat can properly be regarded as being 'contained in' any premises which comprise the flat itself and some other insignificant part of the building such as an adjacent box room accessible from the common parts and currently in the landlord's possession. Again, it is said that, if it can, it would enable the landlord to obtain possession of an individual flat for the purposes of refurbishment and would thus suggest that the construction being advanced on behalf of the landlord in this case cannot be correct.

[25] It seems to me that, if the landlord's argument is accepted, it must also be accepted that the flat and the box room together do constitute premises in which the flat is contained and that the landlord would be able to defeat the tenant's right to acquire a new tenancy if he could satisfy the court that he intended to carry out substantial works of construction on the whole or a substantial part of those premises taken as a whole. However, although I doubt whether Parliament had a situation of this kind in mind, I do not think it conflicts with the purposes of the statute in the way that the previous argument does. Moreover it should be noted that the argument gains much of its force from the use of an insignificant additional area represented by a box room. It would not appear as attractive if the landlord's intention were to incorporate into the existing flat an adjacent area of much more significant proportions, although it is difficult to see where the difference of principle might lie. Moreover, it is unlikely that the expression 'substantial works of construction' in s 47(2)(b) will be construed any more liberally than the corresponding expression 'substantial work of construction' in s 30(1)(f) of the Landlord and Tenant Act 1954 and therefore, taking the example of the box room, if the landlord intends to carry out major work of that kind on a substantial part of the premises the existing flat will

inevitably be the primary focus of attention. I do not think that it would be contrary to the purposes of the legislation to allow a landlord to obtain possession in order to carry out a redevelopment of that kind. I strongly suspect, however, that opportunities to take advantage of the legislation in this way will in practice be few and far between.

[26] Mr Denehan submitted that each case would depend on its own facts and to some extent that must be true, but I do not think that this is one of those cases in which the court is concerned with the meaning of an ordinary word or expression of the kind that was considered in *Cozens v Brutus* [1972] 2 All ER 1297, [1973] AC 854. Both landlords and tenants need to be able to organise their affairs on the basis of a clear understanding of the effect of these provisions and for that purpose it is necessary to decide what Parliament meant by the expression under consideration in this case.

[27] In the end I am unable to accept Mr Denehan's submission because I do not think that it is possible to identify some irreducible minimum unit that constitutes 'premises in which the [tenant's] flat is contained' for the purposes of ss 45 and 47 of the 1993 Act. The creation of a single maisonette out of two vertically adjacent flats does not seem to me to run counter to the purposes of the statute and that part of the building which comprises the two flats can properly be described as premises containing Flat 77 just as much as can the seventh floor of the building on which it is situated. In the end I am unable to find either in the policy or the language of the Act any indication that a part of the building which comprises two adjacent flats does not constitute premises in which each is contained, whether the two flats be vertically or horizontally contiguous.

[28] In these circumstances I have come to the conclusion that the landlord's construction is correct and that the appeal should be allowed.

NEUBERGER LJ.

INTRODUCTORY

[29] The relevant facts and the statutory background to this appeal are set out in the judgment of Moore-Bick LJ, and I gratefully adopt what he says. I agree with his conclusion and with his reasoning, but, because the point at issue is not easy, of some potential general significance, and has resulted in a divergence of judicial views, I shall give my reasons in my own words.

[30] The issue in this appeal turns on the meaning of the expression 'any premises in which the [tenant's] flat is contained' (the expression) in ss 45(2)(c), 47(2)(a) and 47(2)(b) of the Leasehold Reform, Housing and Urban Development Act 1993. Any section referred to in this judgment is in the 1993 Act unless the contrary is stated.

[31] Does the expression refer to any unit of property provided that (a) it includes the whole of the flat and (b) it also extends to other property, as the appellant landlord contends? Or is it restricted to an existing recognisable unit of property which cannot be characterised as artificially assembled for the purposes of enabling the landlord to rely on s 47, as the respondent tenant argues? Or is it limited to the premises defined in s 3, ie the block of flats in which the flat concerned is situated, or a vertically severable part of that block, as the judge held?

[32] The third of these possibilities (which Mr Denehan, on behalf of the respondent, realistically did not pursue) must, in my view, be rejected. Considering the wording of ss 45(2) and 47(2), as a matter of ordinary language,

that construction involves an artificially restricted interpretation of the expression. It is also not entirely easy to reconcile with the inclusion of the word 'any' in the expression. Additionally, it is not, despite the judge's view to the contrary, supported by the provisions of s 41(4)(a). I accept that those provisions contain words very similar to the expression, and that the 'premises' there referred to would normally be limited to property falling within s 3. However, that is because the ambit of the relevant words is expressly limited by the reference to s 13 in para (i) of s 41(4)(a), which takes one to s 3. Further, adopting the s 3 definition for the purposes of ss 45 and 47 produces anomalies: it would, for instance, exclude a building with one flat (e g the familiar shop with flat above) from the ambit of the expression.

[33] So the choice is between the very broad meaning propounded by the appellant, and the somewhat subjective meaning favoured by the respondent. I have come to the conclusion that, while it is not without its difficulties and problems, the appellant's interpretation is to be preferred.

THE LANGUAGE AND CONSEQUENCES OF THE RIVAL CONSTRUCTIONS

The appellant's construction

[34] The appellant's construction seems to me to accord (subject to one possible point) with the natural meaning of the expression, and to give rise to a simple test which is easy to apply, albeit possibly rather generous to landlords. There should rarely, if ever, be any difficulty in deciding whether premises include the whole of a flat, and some other property.

[35] However, the appellant's construction may appear, at least to some people, not to involve an entirely natural use of language. A combination of two flats, one above the other, in a large block such as Boydell Court, can fairly be said to constitute 'premises' in which each flat is 'contained' particularly in the eyes of a conveyancer, but some might regard it as a slightly artificial use of ordinary language.

[36] At least to my mind, there does not appear to be any artificiality in the appellant's construction; if there is, it is certainly not particularly striking. The word 'premises' particularly when preceded by the word 'any', has a naturally very wide meaning. As for 'contained', the appellant's case does not, in my judgment, attribute an artificial meaning to it. In particular, the notion that the appellant's case is weakened by the use of the word 'contained', rather than 'included', in the expression does not seem to me to undermine, to any extent, the appellant's case. On the contrary; the two words appear, at least to me, to be virtually synonymous. Any attack on this basis is also weakened by the fairly poor drafting of the 1993 Act, and by the fact that it can be said to be a conveyancing statute, so a reading which would seem natural to conveyancers is relatively easy to accept.

[37] The appellant's construction is, however, not quite as simple as it seems. If a landlord owns two flats which are not contiguous (e g two flats on unadjacent floors), the combination of the two flats could be within the wide meaning of 'premises', particularly to a conveyancer. (A transfer or lease of two such flats might well describe them together as 'premises'.) Yet it seems to me that Mr Brock QC, who appeared for the appellant with Miss Windsor, was probably right ultimately to concede that two flats would have to be contiguous before they could fall within the expression. I do not believe that this weakens the appellant's case, because the word 'contained' in the expression can fairly be said

to be capable of carrying with it the notion of the 'premises' being a single piece of property which is greater than, and includes, the flat concerned.

[38] There are, it is fair to say, arguably unattractive consequences of the appellant's construction. If the expression is given the meaning for which the appellant contends, it would enable a landlord to deprive a tenant of his right under Ch II of Pt I of the 1993 Act, by establishing an intention to redevelop the tenant's flat plus, say, an adjoining box room. I think that it must follow from the appellant's construction that a landlord could do this. Unattractive though this may appear to some people, it does not deter me from adopting the appellant's construction.

[39] The purpose of s 47, as I see it, is that Ch II should not be invoked by a tenant of a flat to defeat a fairly imminent prospect of redevelopment, in the same way as s 30(1)(f) of the Landlord and Tenant Act 1954, from which the language of s 47(2)(b) is plainly lifted. Where the relevant flat is the sole subject of a projected redevelopment, there is no need for s 47: the tenant can redevelop the flat himself (subject to the terms of the lease permitting, but if the landlord wants the redevelopment, and it is inherent in s 47 that he does, then he can relax any covenant which would preclude it). However, once the proposed redevelopment extends to the flat together with other property, even if the other property is not very extensive, the tenant could not carry it out: only the landlord could do so, but he would need possession. The fact that this means that a landlord can sometimes formulate redevelopment proposals partly (or even solely) for the purpose of defeating the exercise of a right by a tenant under Ch II is unattractive. However, it has always been a relatively well-known feature of s 30(1)(f) of the 1954 Act, and it has not been abrogated by the legislature despite the 1954 Act having been amended from time to time over the past 40 years.

[40] A more unattractive possible result of the appellant's construction which was canvassed in argument is that, if a flat demised to the tenant only extended to the inside of the plaster of the outer walls, premises which included only the flat and the outer walls of the flat would fall within the expression. Strictly speaking, it is unnecessary to decide whether this would be right, but, as one of my reasons for rejecting the respondent's construction is that it is unclear and uncertain in its effect, the point ought to be addressed.

[41] I am of the view that the point is not right, and does not follow from the appellant's construction. If, as is common ground, the flat alone is not within the expression, then it appears to me that something more than its brick or stone envelope must be added before one is in the ambit of the expression. Tempting though it is, I do not think that this conclusion can be justified, as Mr Brock suggested, by recourse to de minimis. I consider, however, that the conclusion can be justified on the basis that the 'premises in which the [tenant's] flat is contained' must contain some additional space, and not just some wall, as well as the flat itself. In other words, for property to be within the expression, it must contain something which can fairly be called 'premises' in addition to the 'flat' itself.

[42] (Another possible answer to the two conundrums discussed in the preceding paragraphs is that the common assumption before us that the expression cannot include the flat on its own is wrong. That assumption seems to be correct as a matter of ordinary English, but it does not appear to me to be a gross violation of language to hold that the flat on its own is included in the expression. Some support for such a reading might be said to be found in s 11(9), which is mentioned below. I doubt such a reading of the expression is

correct, but, as it would involve trespassing into an area which was not argued, and going behind the agreed basis upon which the appeal and the case below were argued, it is inappropriate to say any more about it.)

The respondent's construction

[43] I find the respondent's construction less satisfactory, both linguistically and in practical terms, than that of the appellant. I accept that such a construction could be possible if it was required by the context. However, it does seem to me to involve cutting down the naturally wide meaning of a statutory expression in the absence of any express words of limitation, in circumstances where there is no need to do so, and where there is no indication in the statute as to how it is to be done. Further, it also involves cutting down the meaning of the expression in a way which, in my opinion, could often lead to subjective, almost arbitrary, assessments, and therefore to uncertainty.

[44] It does not strike me as a particularly natural or consistent use of language to conclude that two flats (excluding the common corridor, lift, and staircase) on a floor of a block with two flats per floor could be within the expression, when, in the same block, two flats, one above the other, could not. I also wonder whether, on the respondent's case, two flats, one above the other, in a converted house with one flat per floor, would be within the expression. Further, I presume that the question whether two horizontally adjacent flats in a block with more than two flats per floor could be within the expression, as interpreted by the respondent, would depend on the lay-out, or even the construction, of the block.

[45] In most cases at any rate, any part of a block of flats, which is greater than a flat and less than the block, and which the landlord wishes to redevelop, could be characterised as not being an existing recognisable unit. It could also be seen as being artificially assembled for the purposes of redevelopment. The concept of an existing recognisable unit would not merely be a judicial addition to, or implication into, the 1993 Act; it would also, as just explained, give rise to uncertainties in its application, being somewhat vague and rather subjective. Further, given that the premises within the expression are envisaged as being property which the landlord wishes to redevelop, I am not clear how the concept of artificiality assists.

OTHER RELEVANT PROVISIONS OF THE 1993 ACT

[46] I turn to see whether any assistance is to be found elsewhere in the 1993 Act. As already mentioned, the word 'premises' is generally a word of very wide meaning, especially if it is preceded by the word 'any'. Further, every time the word 'premises' is used in the 1993 Act, it appears to me that the use is consistent with that wide meaning. Of course, in most cases, the wide meaning is cut down by express words of limitation, but that does not mean that the word itself does not have a wide meaning. On the contrary. The term 'a man of property' only applies to a male with assets, but that does not alter the fact that the word 'man' in that term encompasses, in its normal way, all males.

[47] The judge thought that s 3 in Ch I of Pt I of the 1993 Act cast doubt on the appellant's case, particularly as it is referred to (via s 13) in s 41(4)(a) in Ch II. I do not agree. It is true that ss 3 and 41 include similar expressions to that in ss 45(2) and 47(2), namely 'flats contained in the premises' and 'any premises containing the tenant's flat' respectively. However, neither the provisions of s 3 nor those of s 41 suggest 'premises' has a narrow meaning when used in the 1993 Act, even where the word is being used to apply to a unit of property containing a flat.

On the contrary; those sections are quite consistent with 'premises' being a word with a wide meaning, which is then narrowed by excluding any 'premises' which do not satisfy all the three conditions in s 3(1) and that in s 3(2).

[48] Particularly in those circumstances, it is hard to see any justification for presuming that the word was intended to be similarly confined in different sections of the 1993 Act, which contain no express narrowing conditions as in s 3, and no cross-reference (like s 41(4)(a), through the mention of s 13) to s 3. On the contrary: I consider that s 3 rather supports the appellant's interpretation, in that it shows that, when the draftsman wished to narrow the meaning of the word 'premises' for a particular statutory purpose, he did so by means of clear express words.

[49] (It is arguable that the judge's reliance on s 41(4)(a) was misconceived in any event. That is because it may well be that s 41(4)(a) would apply to a s 13 notice which sought to enfranchise property (including the flat in question) even if the property did not comply with the requirements of s 3: I think that such a notice would still be a s 13 notice for the purposes of s 41(4)(a).)

[50] I see the force of the respondent's point that one should not focus too much on the word 'premises', but on the expression as a whole, perhaps particularly the word 'contained'. Even on that basis, it is difficult, at least in my opinion, to see how the word 'premises' in the expression can legitimately and practically be limited in its ambit, save, perhaps, to the whole of the building in which the flat is situated. However, on that basis, quite apart from the fact that it is difficult to see the function of the word 'any', there is still the point that one is not only implying words into the expression, but implying words very similar in terms and concept to words which the draftsman has expressed in s 3.

[51] That point is reinforced when one considers the definition of 'flat' in s 101(1); it is defined as 'a separate set of premises . . . which forms part of a building'. Two points arise here. First, the draftsman had it in mind that a flat mentioned in the 1993 Act would be in a 'building'; yet he did not require the redevelopment in s 47(2) to be of the whole or a substantial part of the building containing the flat. That seems to me to render it less appropriate (or more inappropriate) than it might otherwise have been to limit the 'premises' in the expression to the building or a 'natural' part of the building. Secondly, in s 101 the draftsman also had in mind the notion of a 'set of premises' which he did not seek to introduce into the expression. Yet the respondent's interpretation of 'premises' in the expression gets close to invoking the notion of a 'set of premises'.

[52] The contention that the expression could apply to any piece of property provided that it includes the whole of the relevant flat also derives a little support, in my opinion, from s 11. This section is concerned with the right of a tenant of a flat to make inquiries of his landlord for the purposes of Ch I. Section 11(1) entitles the tenant to be told of anyone who has an interest in 'the relevant premises', which are defined in s 11(9) as being 'the building in which the flat is contained' or, where the ownership of the building is split, 'that part of that building'. So, however the ownership of the building is split, and however 'artificial' the part which includes the flat, that part is 'relevant premises' 'in which the flat is contained'.

THE DECISION IN *MAUNSELL v OLINS* [1975] 1 ALL ER 16, [1975] AC 373

[53] The problem thrown up by this appeal must, of course, be resolved by reference to the particular wording of the expression in its statutory context.

Accordingly, it may be unhelpful, even dangerous, to look at decisions on other statutory provisions. None the less, I find it instructive to consider the reasoning of the House of Lords in *Maunsell v Olins* [1975] All ER 16, [1975] AC 373, which was concerned with the meaning of 'premises' in s 18(5) of the Rent Act 1968. That section afforded in certain circumstances protection to a sub-tenant of a 'dwelling-house . . . form[ing] part of premises which have been let as a whole on a superior letting'. The House was divided on the issue of whether 'premises' in that context applied to a farm with buildings (including the 'dwelling-house', which in the Rent Act context, of course, can extend to a flat or even a room).

[54] Lord Wilberforce, giving the main speech for the majority (who considered that a farm was not 'premises' for this purpose), rejected ([1975] 1 All ER 16 at 24, [1975] AC 373 at 389) the contention that the word 'premises' should be '[given] a universal meaning' in the light of the legislative and case law history of s 18(5) of the 1968 Act. Lord Reid ([1975] 1 All ER 16 at 18, [1975] AC 373 at 382–383) accepted that the word should be 'given its ordinary meaning unless there is sufficient reason to give it in the particular case a secondary or limited meaning'; he then went on to hold, for similar reasons to those of Lord Wilberforce, that there was sufficient reason to give the word what he accepted was a 'limited meaning' in that case. Viscount Dilhorne thought that 'premises' naturally meant buildings rather than farmland with buildings (see [1975] 1 All ER 16 at 19, [1975] AC 373 at 384), a view with which Lord Wilberforce ([1975] 1 All ER 16 at 21–22, [1975] AC 373 at 386) had some sympathy.

[55] In a powerful dissenting speech, written with Lord Diplock who agreed with it, Lord Simon of Glaisdale invoked ([1975] 1 All ER 16 at 25, [1975] AC 373 at 390–391) the 'golden rule' of statutory construction, namely that in technical legislation, a word is normally to be given its appropriately technical meaning (if it is has one), or (if it does not have one) its ordinary meaning. There was no good reason, in their view, for departing from that rule in the case before them, so that 'premises' in their opinion meant the property comprised in the headlease, whether it was open land, buildings, parts of buildings or a combination.

[56] It appears to me that the differing views in *Maunsell v Olins* not only show the differences of judicial opinion that can be produced by the use of the word 'premises' (which Lord Reid called a 'difficult word': [1975] 1 All ER 16 at 18, [1975] AC 373 at 382) in a statute. They also tend to support the conclusion I have reached in this case. The adoption of a naturally wide meaning of 'premises' is (subject to one point) supported by the minority. It is also supported by Lord Reid (at least in the absence of good reason to depart from it). Given that Viscount Dilhorne and Lord Wilberforce thought it naturally applied to buildings, their reasoning and conclusions were, to put it at its lowest, not inconsistent with the appellant's case here.

[57] A point I ought to mention is that Lord Simon held that the technical meaning of 'premises' was the property (of whatever nature) comprised in the headlease. That was because s 18(5) of the 1968 Act was in terms concerned with the whole of the property demised to the superior landlord. In this case, rightly in my view, neither party raised the possibility of the expression meaning the property comprised in the interest of the landlord (although it was canvassed briefly by Moore-Bick LJ in argument). The use of the word 'any' and the absence of any reference to the property comprised in the landlord's interest in ss 45 and 47 serve to demonstrate how this case differs from *Maunsell v Olins* in this connection.

[58] While it can be said with force that those distinctions assist the appellant, such differences serve to emphasise the dangers of construing a word in a statute in reliance on judicial decisions on the meaning of the same word in a different statute. None the less, at least the general statements of principle and the opinions as to prima facie meaning of 'premises' in the speeches of Lord Reid and of Lord Simon (with which Lord Diplock agreed) are, to my mind, of some, albeit limited, help in this difficult case.

CONCLUSION

[59] In the end, canons of construction and judicial decisions (even of the House of Lords) on the meaning of similar words in other statutes cannot conclusively determine the outcome of this appeal. We have to decide the meaning to be ascribed to the composite expression 'any premises in which the [tenant's] flat is contained' in ss 45 and 47, in the light of its linguistic and purposive context. For the reasons I have given, which are substantially the same as those of Moore-Bick LJ, with whose judgment I entirely agree, it seems to me that the appellant's construction is to be preferred to that of the respondent or to that adopted by the judge.

[60] In these circumstances, for my part, I would allow the appeal.

MAY LJ.

[61] I gratefully adopt, without repeating, Moore-Bick LJ's account of the facts and circumstances of this appeal. I agree with much of his analysis and that of Neuberger LJ in his judgment. I regret, however, that I do not agree with all of it, in particular with regard to the facts of the present case.

[62] We are concerned with '[an] intention to redevelop any premises in which the tenant's flat is contained'—see s 47(1) of the Leasehold Reform, Housing and Urban Development Act 1993. We are therefore concerned with the concept of *premises* which *contain* a flat in the context of an intention to *redevelop* those premises. The three elements which contribute to this concept all reappear in s 47(2). The inquiry has to look at the flat and premises which might contain it as they are at the time of the landlord's application.

[63] The word 'premises' is used in a number of different contexts in this statute, and no help is to be found from other places for its meaning and extent in s 47. I agree with Moore-Bick LJ for the reasons which he gives that the judge was wrong to derive help from Ch I of the 1993 Act. I also note that the expression in s 47 is '*any* premises'.

[64] I agree that, depending on the facts, 'any premises in which the tenant's flat is contained' may apply to premises consisting of less than a whole building or block. I am prepared to suppose that the full seventh floor of this block of flats would qualify.

[65] However, where do you stop? The appellant landlords' case in effect means that 'premises in which the tenant's flat is contained' may comprise the flat together with any premises contiguous with it around which the landlord chooses to delineate a three-dimensional parcel. Thus the flat plus an adjacent box room, or, if the demise of the flat includes the plaster but not the underlying walls, the flat plus the walls would each comprise premises in which the tenant's flat is contained. I do not think so. In the context of redevelopment, these artificial units are scarcely premises, but they are clearly, in my view, not premises in which the flat is contained. The premises have to contain the flat and have to be an existing recognisable unit which may sensibly be said to do that,

not some artificial unit, put together simply to achieve the statutory requirement, which would not otherwise be recognised as an existing containing unit. I do not regard this as reading words into the statute. It is rather construing words which express the concept of premises which may properly be said to contain a flat in the context of an intention to redevelop those premises. The statutory expression is not 'any premises in which the tenant's flat is *included*'.

[66] I understand that each floor of this block of flats has seven or eight flats. The seventh floor would, I think, be premises in which Flat 77 is contained. Whether part of the seventh floor, including Flat 77, would also be premises in which Flat 77 is contained would be debateable. But, in my judgment, it overstrains the statutory language to say that Flat 77 on floor seven and Flat 74 on floor six are together and alone premises in which Flat 77 is contained. Together they are not a recognisable existing unit which contains Flat 77. This was Mr Denehan's essential submission, which I would accept.

[67] I accept that my construction of s 47 of the 1993 Act leaves rough edges at the factual margins. Two adjacent flats on a floor comprising eight flats with no identifiable physical separation such as a lift lobby would be an example. I would be inclined to say that two such flats did not come within s 47 because they were not, in the context of redevelopment, together a recognisable existing unit. But imprecise statutory language will often result in problems of this kind; and equivalent problems arise, I think, with the appellant's construction, as is illustrated by the difficulties identified, and to my mind not satisfactorily resolved, at [22]–[25], above of Moore-Bick LJ's judgment and [35]–[42], above of Neuberger LJ's judgment.

[68] For these reasons, I would dismiss this appeal.

Appeal allowed.

Gareth Williams Barrister.

R (on the application of the Crown Prosecution Service) v Bow Street Magistrates' Court (James and others, interested parties)

[2006] EWHC 1763 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

MAY LJ AND FORBES J

4, 18 JULY 2006

Statute – Construction – Anomalies – Correction of obvious drafting error – Statute abolishing sections containing offence in previous statute before implementing sections in new statute recreating repealed offences – Whether permissible for court to use interpretive powers to achieve clear intention of legislation – Forgery and Counterfeiting Act 1981, s 5(5)(f), (fa) – Identity Cards Act 2006, s 44(2), (3).

On 5 April 2006, the first five interested parties were charged with offences contrary to s 5(2)[a] of the Forgery and Counterfeiting Act 1981, which provided that it was an offence for a person to have under his control an instrument which he knew or believed to be false. By s 5(5)(f) and (fa) those instruments included passports and immigration documents. At a contested committal hearing in the magistrates' court the district judge concluded that s 44(2)[b] of the Identity Cards Act 2006 operated to repeal s 5(5)(f) and (fa) as from 30 March 2006, and decided to discharge the first five interested parties. Section 44(2) stated that 'The enactments in Schedule 2 are repealed to the extent shown in the second column of that Schedule' and s 44(3) provided that 'This Act, (apart from this section and sections 36 and 38) shall come into force on such day as the Secretary of State may by order appoint . . .' Section 5(5)(f) and (fa) were included in the second column of Sch 2. The Director of Public Prosecutions applied for judicial review of that decision. He argued, inter alia, that since the draftsman of s 44(3) of the 2006 Act had not used language apt to achieve the clear intention of Parliament namely to effect a smooth transition by replacing s 5(5)(f) and (fa) with a series of similar offences, which were contained in ss 25[c] and 26[d] of the

a Section 5, so far as material, is set out at [12], below

b Section 44, so far as material, is set out at [14], below

c Section 25, so far as material, provides: '(1) It is an offence for a person with the requisite intention to have in his possession or under his control—(a) an identity document that is false and that he knows or believes to be false; (b) an identity document that was improperly obtained and that he knows or believes to have been improperly obtained; or (c) an identity document that relates to someone else. (2) The requisite intention for the purposes of subsection (1) is—(a) the intention of using the document for establishing registrable facts about himself; or (b) the intention of allowing or inducing another to use it for establishing, ascertaining or verifying registrable facts about himself or about any other person (with the exception, in the case of a document within paragraph (c) of that subsection, of the individual to whom it relates) . . . (5) It is an offence for a person to have in his possession or under his control, without reasonable excuse—(a) an identity document that is false; (b) an identity document that was improperly obtained; (c) an identity document that relates to someone else . . . (6) A person guilty of an offence under subsection (1) . . . shall be liable, on conviction on indictment, to imprisonment for a term not exceeding ten years or to a fine, or to both . . . (10) In this section "identity document" has the meaning given by section 26.'

2006 Act, it was permissible for the court to use its interpretative powers to read words into s 44(3) in order to give effect to that intention.

Held – Parliament clearly intended that the repeal of the relevant provisions of s 5 of the 1981 Act should be consequential upon the coming into force of the new provisions contained in ss 25 and 26 of the 2006 Act and s 44(3) was intended by Parliament to achieve that purpose. It was only a result of error or inadvertence on the part of the draftsman and Parliament that the terms of s 44(3) failed to give effect to that intended purpose because s 44(2) was not excluded from the list of excepted provisions specified in brackets in s 44(3) and the exclusion of Sch 2 from the bracketed list of exceptions was insufficient to achieve the intended purpose, particularly having regard to the terms of s 44(2) itself. It followed that the expression 'apart from this section and sections 36 and 38' in s 44(3) was to be read as meaning 'apart from this section, other than subsection (2) hereof, and sections 36 and 38'. There was also no reason not to exercise the court's discretion against the grant of relief as construing s 44(3) in that way did not inflict any hardship or greater detriment on any of the first five interested parties or any other person. The proper construction of s 44(3) merely continued the existing law until its replacement by the new provisions and no increase in penalty was involved at any stage. Accordingly, the application for judicial review would be allowed (see [40]–[44], [46]–[49], below).

Inco Europe Ltd v First Choice Distribution [2000] 2 All ER 109 applied.

Notes

For rectifying construction of statutory provisions, see 44(1) *Halsbury's Laws* (4th edn reissue) para 1472.

For the Forgery and Counterfeiting Act 1981, s 5, see 12(1) *Halsbury's Statutes* (4th edn) (2005 reissue) 762.

For the Identity Cards Act 2006, s 44, see 37 *Halsbury's Statutes* (4th edn) (2006 reissue) 870.

Cases referred to in judgments

Inco Europe Ltd v First Choice Distribution (a firm) [2000] 2 All ER 109, [2000] 1 WLR 586, HL.

Western Bank Ltd v Schindler [1976] 2 All ER 393, [1977] Ch 1, [1976] 3 WLR 341, CA.

Application for judicial review

The Director of Public Prosecutions applied for judicial review of the decision of District Judge Purdy, sitting at Bow Street Magistrates' Court on 26 May 2006, whereby he discharged the first five interested parties, (1) Samuel James, (2) Babtunde Smith, (3) Victoria James, (4) Pauline Osofudunrin, and (5) Hannah Sutton, of offences contrary to s 5 of the Forgery and Counterfeiting

d Section 26, so far as material, provides: '(1) In section 25 "identity document" means any document that is, or purports to be—(a) an ID card . . . (c) an immigration document . . . (e) a passport issued by or on behalf of the authorities of a country or territory outside the United Kingdom or by or on behalf of an international organisation; (f) a document that can be used (in some or all circumstances) instead of a passport . . . (2) In subsection (1) "immigration document" means . . . (b) a document which is given in exercise of immigration functions and records information about leave granted to a person to enter or to remain in the United Kingdom; or (c) a registration card (within the meaning of section 26A of the Immigration Act 1971) . . .'

Act 1981, in committal proceedings held pursuant to s 6(1) of the Magistrates Courts Act 1980. The Secretary of State for the Home Department appeared as the sixth interested party. The facts are set out in the judgment of Forbes J.

Nigel Pleming QC (instructed by the *Crown Prosecution Service*) for the Crown Prosecution Service and the Secretary of State for the Home Department, the sixth interested party.

Andrew Campbell-Tiech QC and *Jack Talbot* (instructed by *Dobson Hillman*, Orpington) for the first interested party.

Emma Akuwudike (instructed by *Mayfair Chamberlain & Co*) for the third interested party.

Yasmin Qureshi (instructed by *Julius Ceasar Solicitors*) for the fourth interested party.

Hugh Blake-James (instructed by *Julius Ceasar Solicitors*) for the fifth interested party.

Cur adv vult

18 July 2006. The following judgments were delivered.

FORBES J (giving the first judgment at the invitation of May LJ).

INTRODUCTION

[1] This is an application for judicial review of the decision of District Judge Purdy, sitting at Bow Street Magistrates' Court on 26 May 2006, whereby he discharged the first five interested parties (Babatunde Smith, Samuel James, Victoria James, Pauline Osofudunrin and Hannah Sutton) of offences contrary to s 5 of the Forgery and Counterfeiting Act 1981, pursuant to s 6(1) of the Magistrates' Courts Act 1980.

THE FACTS

[2] There is no dispute as to the relevant factual background, which is as follows.

[3] On 4 April 2006, police officers acting under the authority of search warrants issued by the Horseferry Road Magistrates' Court went to a block of flats in Thamesmead. There the officers commenced to search flat 79 shortly after 6.50 am. Present inside the flat when the police arrived were two of the interested parties, Samuel James and Babatunde Smith.

[4] From inside a training shoe found in a bedroom occupied by Samuel James the police recovered a car key that was eventually found to fit a Ford Fiesta motor car. The Fiesta itself was located in a car park at the block of flats. It was covered in dust and appeared to have been stationary for a long time.

[5] The boot of the Fiesta was searched and two forged British passports were found, amongst other items of property. One of the passports, purportedly issued to an Abbey Jackson, bore a photograph of Babatunde Smith. The other passport, purportedly issued to an Elias Williams, bore a photograph of Samuel James.

[6] Both men were arrested and taken to the police station.

[7] In the meantime, shortly after 9 am, the police had commenced a search of flat 213. Present inside the flat when the police arrived were the remaining three of the first five interested parties, Victoria James, Pauline Osofudunrin and Hannah Sutton.

[8] Inside a chest of drawers in the main bedroom, the police found a forged Nigerian passport in the name of Pauline Osofudunrin and bearing her photograph. On the top shelf of a fridge, the police found a forged Nigerian passport in the name of Victoria James that bore her photograph. In a cupboard in the hallway the police found a forged Nigerian passport in the name of Hannah Sutton and containing her photograph.

[9] On 5 April 2006 each of the first five interested parties was separately charged with an offence of possessing a false passport on 4 April 2006, contrary to s 5(2) of the 1981 Act.

[10] At subsequent preliminary court appearances, the magistrates declined jurisdiction in relation to each offence. Accordingly, on 12 May 2006, the case was set down for a contested committal hearing at Bow Street Magistrates' Court on 17 May 2006, for argument before District Judge Purdy as to whether the offence contrary to s 5(2) of the 1981 Act in relation to passports had been repealed on 30 March 2006 by s 44(2) of the Identity Cards Act 2006 (as to which see below).

[11] Prior to commencement of the contested committal hearing, each of the first five interested parties was additionally and separately charged with the following two offences: (i) making a false passport on or before 4 April 2006, contrary to s 1 of the 1981 Act and (ii) possessing a false passport before 31 March 2006, contrary to s 5(1) of the 1981 Act.

THE RELEVANT STATUTORY PROVISIONS

[12] So far as is material, s 5 of the 1981 Act is in the following terms:

> '*Offences relating to money orders, share certificates, passports, etc.*—(1) It is an offence for a person to have in his custody or under his control an instrument to which this section applies which is, and which he knows or believes to be, false, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.
>
> (2) It is an offence for a person to have in his custody or under his control, without lawful authority or excuse, an instrument to which this section applies which is, and which he knows or believes to be, false . . .
>
> (5) The instruments to which this section applies are . . . (f) passports and documents which can be used instead of passports; (fa) immigration documents . . .'

[13] As indicated by its introductory heading, the offences created by s 5 of the 1981 Act are concerned with documents such as money orders, share certificates and passports etc. Sections 25 and 26 of the 2006 Act provide for a series of similar offences in relation to false identity documents. Although ss 25 and 26 are not in identical terms to the antecedent provisions of the 1981 Act, it is common ground that, in all relevant respects, the penalties for the equivalent offences under the two statutes are the same. It is also common ground that Parliament cannot have intended that both sets of provisions should subsist simultaneously.

[14] The 2006 Act received Royal Assent on 30 March 2006. So far as is material, s 44 of the 2006 Act provides as follows:

> '*Short title, repeals, commencement, transitory provision and extent.*—(1) This Act may be cited as the Identity Cards Act 2006.
>
> (2) The enactments in Schedule 2 are repealed to the extent shown in the second column of that Schedule.

(3) This Act (apart from this section and sections 36 and 38) shall come into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes . . .'

[15] Schedule 2 of the 2006 Act is entitled 'Repeals' and in its second column it lists those sections of other enactments that are repealed. Schedule 2 includes s 5(5)(f) and (fa) and s 5(9)–(11) of the 1981 Act in its second column.

[16] It was and is common ground that s 44 of the 2006 Act was brought into force in its entirety on the date of Royal Assent, ie 30 March 2006. It is accepted that this follows from the terms of s 44(3) of the 2006 Act (in particular, from the inclusion of s 44 in the excepted provisions specified in brackets: see above) and s 4 of the Interpretation Act 1978, which is in the following terms:

'An Act or provision of an Act comes into force—(a) where provision is made for it to come into force on a particular day, at the beginning of that day; (b) where no provision is made for its coming into force, at the beginning of the day on which the Act receives the Royal Assent.'

[17] It is to be noted that, as drafted, there is nothing in the wording of s 44(3) of the 2006 Act that appears to suggest that s 44(2) does not form part of s 44 for the purposes expressed in s 44(3). As already indicated, s 44(2) provides that the enactments in Sch 2 'are repealed' to the extent shown in the second column of that Schedule and the second column itself is headed 'Extent of Repeal'. It is also to be noted that Sch 2 is not expressly mentioned in s 44(3) of the 2006 Act. In particular, Sch 2 is not included in the excepted provisions that are set out in brackets in s 44(3).

THE RULING BY THE DISTRICT JUDGE

[18] Following submissions at the committal hearing on 17 May 2006, District Judge Purdy adjourned the case and subsequently handed down a written judgment relating to his ruling on 26 May 2006.

[19] The district judge concluded that s 44(2) of the 2006 Act operated to repeal s 5(5)(f) and (fa) of the 1981 Act as of 30 March 2006 (ie the date upon which it was common ground s 44 had come into force). At para 7 of his judgment, the district judge stated his conclusions in the following terms:

'In my judgment all of s 44 of the 2006 Act came into force upon royal assent on 30 March 2006. Section 44(2) is part of that section. The provisions of s 44(2) bring into law Sch 2, without need for qualification or further action of any kind, which simply and clearly repeals, inter alia, s 5(5)(f) of the 1981 Act. This is the clear intent of Parliament. I simply cannot read the legislation in any other way without an Alice in Wonderland exercise in totally misreading clear statutory provisions to give the meaning the Crown contends. There is nothing unclear about the repeal nor the reasoning behind it. The concern, rightly, is the fact ss 25 and 26 have not been brought into force to run from 30 March 2006. That is the responsibility of the Secretary of State. I must give effect to the primary legislation. Accordingly I hold that s 44(2) of the 2006 Act has operated to repeal s 5(5)(f) of the 1981 Act as of 30 March 2006. Therefore the charge pursuant to s 5(5)(f) of the [1981 Act] alleging an offence on 4 April 2006 is one not known to the criminal law at that date. I make clear, aided if need be by s 16 of the [1978 Act], that all alleged offences prior to that date can be prosecuted under the full provisions of [the 1981 Act] and that is so for existing cases

already charged and any offences coming to light now but committed before 30 March 2006. That charge in each defendant's case is thus discharged.'

[20] So it was that the district judge ruled that the charges alleging the commission of an offence in relation to a passport on 4 April 2006, contrary to s 5(2) of the 1981 Act, was in each case an allegation of an offence not known to the criminal law. He therefore discharged each of the five defendants on each such charge. However, he went on to decide that there was a case to answer in relation to each of the additional charges and therefore committed all five defendants to the Crown Court for trial pursuant to s 6(1) of the 1980 Act.

THE PARTIES' SUBMISSIONS

[21] On behalf of the claimant, Mr Pleming QC made it clear that it was the claimant's primary case that s 44(2) of the 2006 Act had come into force on 30 March 2006 but that Sch 2 of that Act had not. Mr Pleming submitted that by virtue of s 44(3) of the 2006 Act, Sch 2 was to come into force on a date to be appointed by the Secretary of State (the sixth interested party), because it was not one of the excepted provisions listed in brackets in the subsection. He argued that it was clearly Parliament's intention that the Secretary of State would also bring ss 25 and 26 of the 2006 Act into force on the same date as Sch 2. He pointed out that this was precisely what did happen on 31 May 2006, when the responsible Minister promulgated the Identity Cards Act 2006 (Commencement No 1) Order 2006, SI 2006/1439, which brought into force both ss 25 and 26 and Sch 2 of the 2006 Act with effect from 7 June 2006.

[22] Mr Pleming relied on four main submissions in support of the claimant's primary case.

[23] First Mr Pleming submitted that a schedule to an Act of Parliament should be seen as part of the relevant Act to which it is attached, but separate from the body of the Act which contains the sections of the Act. Mr Pleming submitted that a schedule is attached to the body of the Act by appropriate words in a section that contains 'inducing words' and is known as an 'inducing section'. He suggested that a schedule may also be properly regarded as an extension of the section that induces it (see 44(1) *Halsbury's Laws* (4th edn reissue) paras 1257, 1260).

[24] However, Mr Pleming contended that it does not follow from the foregoing principles that a schedule is to be regarded as part of the inducing section itself; the schedule should not be treated as being incorporated into the section merely by the reference to it in the inducing section. Mr Pleming argued that the schedule retains a separate identity, although it is part of the Act in question; it is attached to the body of the Act; but it contains separate provisions from those contained in the body of the Act.

[25] In short, Mr Pleming's first submission was that the mere coming into force of the 'inducing words' of s 44(2) without more was insufficient to activate Sch 2 of the 2006 Act and the repeal of the provisions listed in that schedule.

[26] Second, Mr Pleming submitted that repeal schedules have, by parliamentary convention, a particular purpose. Mr Pleming maintained that, in cases where (as here) the positive provisions of the new Act are designed to supersede the complementary provisions of an earlier Act, it is standard parliamentary practice to list the provisions to be replaced in a repeal schedule and to introduce that schedule by a section in the Act saying that the enactments mentioned in the schedule are repealed to the extent specified in the schedule. He submitted, uncontroversially, that the repeals are not effectuated unless and

until the schedule has been brought into force by the terms of the Act. However, it was Mr Pleming's submission that the coming into force of an inducing section does no more than activate a 'signpost' to its matching schedule and it does not effectuate anything more than that.

[27] Mr Pleming submitted that the present case exemplifies a particular type of consequential repeal that is closely analogous to (and, to all intents, the same as) an 'implied repeal'; ie where the new statutory provision is inconsistent with or repugnant to the continued existence of the old, with the result that the new provision impliedly repeals the old (see 44(1) *Halsbury's Laws* (4th edn reissue) para 1299). Mr Pleming suggested that, in such a case, there is no need for the repealing effect of the new provision to be spelt out by Parliament in the body of the Act, because in practical terms the substantive law remains the same, in contrast with the position relating to a substantive repeal; ie the repeal of a provision that is not obsolete or spent and which is not replaced by the positive provisions of the new Act.

[28] Mr Pleming submitted that in the case of a substantive repeal it is Parliamentary practice that the repeal must always be made or 'paved for' in the main body of the Act and not 'hidden' in a repeal schedule. This practice ensures that the repeal provision is fully considered and debated whilst the Bill is passing through Parliament. Mr Pleming therefore contended that, if it had been Parliament's intention to repeal s 5 of the 1981 Act before bringing into force ss 25 and 26 of the 2006 Act, it would have done so by appropriate provision in the main body of the new Act, because it would have been a substantive repeal. He stressed that there was no such provision in the main body of the 2006 Act and submitted that it was therefore clear that this was a consequential repeal and that Parliament had thus intended that s 44(2) should be regarded and construed as no more than 'a signpost' to the relevant repeal schedule, namely Sch 2.

[29] Mr Pleming suggested that those considering and debating the Identity Cards Bill would have known that the repeal schedule contained nothing that warranted specific consideration, because the only real purpose of the schedule was to tidy up the statute book in the light of the coming into force of the new provisions, which would (of course) have been subjected to full parliamentary scrutiny.

[30] In short, Mr Pleming's second submission was that it is clear from the form and terms of the 2006 Act that the repeals effectuated by it are repeals consequential upon the bringing into force of the relevant new provisions. To that end, the repeal Sch 2 needs to be brought into force simultaneously with the new superseding provisions and s 44(2) and (3) should be so construed. Accordingly, s 44(2) is no more than a 'signposting section' and is insufficient to effectuate the repeal schedule. The repeal schedule still requires to be brought separately into force and that is why there is no specific reference to it in the excepted provisions specified in brackets in s 44(3). Mr Pleming therefore submitted that the correct construction of s 44(3) is as follows: s 44(2) comes into force on Royal Assent, but Sch 2 (which is not part of s 44) comes into force on a day appointed by the Secretary of State.

[31] Third, Mr Pleming submitted that the parliamentary practice referred to above is supported by a number of broadly analogous statutory examples. However, he readily accepted that these analogies are not so close to the present case that they may be said to supply a direct answer to it. As it seems to me, there is little assistance to be derived from these examples and I do not feel that it is necessary to make any further reference to them.

[32] Mr Pleming's fourth submission was that his suggested construction of s 44(2) and (3) of the 2006 Act achieves harmony with s 17(1) of the 1978 Act, which is in the following terms: 'Where an Act repeals a previous enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into force.'

[33] On behalf of the first five interested parties it was submitted that a schedule is part of the Act to which it is attached and that it comes into force when the section giving it effect comes into force. As it seems to me, that simple and succinct submission is self-evidently correct and none of the submissions put forward by Mr Pleming in support of the claimant's primary case have persuaded me that it is in any sense wrong or misleading.

[34] It was further submitted that there is no necessity as a matter of law for separate express provision to be made for the coming into force of a repeal schedule; on the contrary, where the express terms of a section or subsection in the Act are sufficient to effectuate such a schedule, then it is an absolute necessity to qualify the commencement of the section or subsection in suitable terms that ensure the repeal takes effect at the appropriate time (see p 3 of the paper 'Identity Cards Act 2006—Commencement' by James Richardson, dated 20 May 2006). As Mr Richardson observes and illustrates in that paper, there are many examples of this in practice. Again, I would agree with that submission.

[35] On behalf of the first five interested parties it was submitted that, in effect, the district judge's detailed reasoning for the conclusion that he reached dealt satisfactorily with all Mr Pleming's submissions in support of the claimant's primary case and each of the first five interested parties adopted the district judge's reasoning accordingly. It is therefore helpful to quote the following further passages from his written judgment:

> '4. On reading the 2006 Act it is plain ss 25 and 26 are intended to replace s 5(5)(f) of the 1981 Act. Parliament clearly envisaged a commendable tidying up of criminal provisions and hence the specific repeal of s 5(5)(f) on passports. Thus as an exercise in seeking the intent, aim or purpose of the legislature I have no doubt a smooth transition effectively replacing s 5(5)(f) of the 1981 Act with ss 25 and 26 of the 2006 Act was/is the parliamentary objective. Any statutory interpretation seeking to submit no intention to repeal this specific provision simply cannot pass muster, the express intention is clear . . .
>
> The Crown concede that s 44 of the 2006 Act came into force on 30 March 2006 but contend *only the section not Sch 2* and thus not the repeal of s 5(5)(f) of the 1981 Act. In short the Crown submit Sch 2, in any part, can only come into force, if ever it does, by operation of the transitionary provisions provided for in s 44(3). Therefore, in the Crown's contention, only s 44 is in force save for ss 36 and 38 after two months as expressly provided for in s 44(5), but nothing more.
>
> 5. The difficulty, in my judgment, with the Crown's position are the words of s 44(3) in particular the words in brackets. If the words in brackets did not exist the entire statute would depend upon further commencement provisions at the behest of the Secretary of State. However, the words in brackets are not limited to s 44(3) but read "apart from this Section" which is the entirety of s 44—not simply sub-s 44(3)—which includes the apparently unambiguous wording of s 44(2) "the enactments in Schedule 2 are repealed to the extent shown in the second column of that schedule" ie s 5(5)(f) of the

1981 Act . . . the Crown's view . . . does not, in my judgment, stand with any reading of the words actually enacted. The clearly enacted words bind me. They alone comprise the relevant law, the more so given the penal nature of the legislation.

6. By way of illustration with other statutory provisions Mr Shaw relied on numerous statutes . . . My researches of those provisions . . . do not seem to me to support the Crown at all . . . No template format for commencement provisions is adopted by parliamentary draftsmen, styles vary. Nevertheless, nowhere have I found any authority for the proposition that a schedule necessarily requires action by the Secretary of State to be brought into force. If primary legislation has a schedule(s), which is part of the statute by its very nature, I know of no requirement preventing a schedule coming into force without secondary legislation of any kind . . . However, once Parliament has enacted clear provisions they are the law of the land unless or until repealed or amended by Parliament . . .'

[36] In my view, the district judge's reasoning was impeccable as far as it went and, if s 44(2) and (3) are read in isolation from their context, the argument that his reasoning encapsulates is apparently unanswerable: ie the whole of s 44 came into force on 30 March 2006, s 44(2) therefore came into force on 30 March 2006 and the words of s 44(2) are clear and sufficient to effectuate the repeal of the statutory provisions listed in Sch 2.

[37] As it seems to me, Mr Pleming's primary case must fail because it proceeds on the basis that although s 44(2) did come into force on 30 March 2006, Sch 2 did not. Essential to the success of that case is the suggestion that the wording of s 44(2) is insufficient to effectuate the repeals listed in Sch 2 and that s 44(2) is no more than a 'signpost'. For my part, I cannot accept that this is correct because the words of s 44(2) are perfectly clear and are plainly capable of expressly effectuating the repeal of the statutory provisions listed in Sch 2. In short, it is clear from its express wording that s 44(2) is not merely a 'signpost' to a schedule that is yet to be brought into force. In my view, the absence of Sch 2 from the excepted provisions specified in brackets in s 44(3) does not prevent s 44(2) from being construed to mean precisely what it says and I would reject Mr Pleming's submissions to the contrary effect.

[38] However, that is not the end of the matter. Mr Pleming's 'fallback' position, in the event that the claimant's primary case failed, was that, since the draftsman of s 44(3) of the 2006 Act had not used language apt to achieve the clear intention of the legislature (ie to effect a smooth transition in replacing s 5(5)(f) and (fa) of the 1981 Act with the new provisions contained in ss 25 and 26 of the 2006 Act), it is permissible for the court to use its interpretative powers to read words into s 44(3) of the 2006 Act in order to give effect to that intention (see *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109, [2000] 1 WLR 586).

[39] In the *Inco Europe* case the court was concerned (inter alia) with the question whether s 107 of and para 37(2) of Sch 3 to the Arbitration Act 1996 had amended s 18(1)(g) of the Supreme Court Act 1981 so as to deprive the Court of Appeal of its jurisdiction to entertain an appeal against the grant or refusal of a stay in favour of arbitration. The House of Lords held that it was plain from the legislative history and from the fact that s 107 of the 1996 Act was concerned with 'consequential' amendments; that the sole object of the amendment made to s 18(1) of the 1981 Act had been to substitute a new sub-sub-s (g), serving the same purpose as the original paragraph had done in relation to the Arbitration

Act 1979; and that, since the draftsman in para 37(2) of Sch 3 to the 1996 Act had not used language apt to achieve the intention of the legislature, it was permissible to read words into the amended sub-sub-s (g) to give effect to that intention.

[40] In the course of his speech in the *Inco Europe* case, Lord Nicholls of Birkenhead stated the relevant principles in the following terms ([2000] 2 All ER 109 at 114–115, [2000] 1 WLR 586 at 592–593):

> 'I am left in no doubt that, for once, the draftsman slipped up. The sole object of para 37(2) in Sch 3 was to amend s 18(1)(g) by substituting a new para (g) that would serve the same purpose regarding the 1996 Act as the original para (g) had served regarding the 1979 Act. The language used was not apt to achieve this result. Given that the intended object of para 37(2) is so plain, the paragraph should be read in a manner which gives effect to the parliamentary intention. Thus the new s 18(1)(g), substituted by para 37(2), should be read as confined to decisions of the High Court under sections of Pt I which make provision regarding an appeal from such decisions. In other words, "from any decision of the High Court under that Part" is to be read as meaning "from any decision of the High Court under a section in that Part which provides for an appeal from such decision".
>
> I freely acknowledge that this interpretation of s 18(1)(g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross' admirable opuscule, *Statutory Interpretation* (3rd edn, 1995) pp 93–105. He comments (p 103):
>
> > "In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation . . .
>
> Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what

it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd v Schindler* [1976] 2 All ER 393 at 404, [1977] Ch 1 at 18 Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature.'

[41] I am abundantly sure (as was the district judge) that the intended purpose of s 44(3) of the 2006 Act was to effect a smooth transition in replacing the relevant provisions of s 5 of the 1981 Act with the new provisions contained in ss 25 and 26 of the 2006 Act. I agree with Mr Pleming that, to that end, Parliament clearly intended that the repeal of the relevant provisions of s 5 of the 1981 Act should be consequential upon the coming into force of the new provisions contained in ss 25 and 26 of the 2006 Act. Section 44(3) was intended by Parliament to achieve that purpose.

[42] I am also satisfied that, as a result of an error and inadvertence on the part of the draftsman and Parliament, the terms of s 44(3) of the 2006 Act failed to give effect to that intended purpose because s 44(2) was not excluded from the list of excepted provisions specified in brackets in s 44(3) and the exclusion of Sch 2 from the bracketed list of exceptions was insufficient to achieve the intended purpose, particularly having regard to the terms of s 44(2) itself. In my view, this is a plain case of a drafting mistake.

[43] For those reasons I am satisfied that the first two conditions identified by Lord Nicholls in *Inco Europe* are clearly satisfied in this case.

[44] So far as concerns Lord Nicholls's third condition, I am satisfied that the substance of the provision that Parliament would have made, had the error in the Bill been noticed, would have been to exclude s 44(2) from the excepted provisions specified in s 44(3). In other words the expression '(apart from this section and sections 36 and 38)' in s 44(3) is to be read as meaning '(apart from this section, other than subsection (2) hereof, and sections 36 and 38)'. Subject to what follows, I am therefore satisfied that Lord Nicholls's three conditions are satisfied in this case and that it would be open to this court to exercise its interpretative function in this way perfectly properly in order to correct the drafting error in s 44(3) of the 2006 Act and achieve the purpose clearly intended by Parliament.

[45] On behalf of the first five interested parties it was submitted that the court should exercise its discretion against the grant of relief in the circumstances of this case and that, in any event, since the 2006 Act is a penal statute, the subject matter calls for a strict interpretation that would prevent s 44(3) from being construed in the manner suggested in the previous paragraph.

[46] As to the first point, it seems to me that there is no reason to exercise the court's discretion against the grant of relief in these proceedings if it is right to construe s 44(3) as suggested at [44], above.

[47] So far as concerns the second point, Mr Pleming rightly accepted that the 2006 Act is penal in nature. However, he submitted that, in the circumstances of this case, that fact does not present any obstacle to s 44(3) being construed in the way suggested above because that construction does not inflict any hardship or greater detriment on any of the first five interested parties or any other person.

Mr Pleming pointed out that the proper construction of s 44(3) merely continues the existing law until its replacement by the new provisions and that no increase in penalty is involved at any stage. Mr Pleming referred to and relied on the following passage in 44(1) *Halsbury's Laws* (4th edn reissue) para 1240:

> '. . . the true test is now considered to be whether a particular construction inflicts a detriment, or greater detriment, on persons affected. A law that inflicts hardship or deprivation of any kind on a person is in essence penal. There are degrees of penalisation, but the concept of detriment inflicted through the state's coercive power pervades them all. The substance, not the form, of the penalty is what matters. The law is concerned that a person should not be put in peril of any kind upon an ambiguity; hence the principle against doubtful penalisation.'

[48] I consider that Mr Pleming's submissions on this aspect of the matter are correct. In my view, the construction of s 44(3) of the 2006 Act that I have set out at [44], above, does not inflict any detriment or greater detriment upon any of the first five interested parties or any other person for the reasons advanced by Mr Pleming with which I agree. Accordingly, I am satisfied that s 44(3) can and should be construed as indicated at [44], above, and for those reasons I would allow this application.

MAY LJ.

[49] I agree.

Application allowed.

Dilys Tausz Barrister.

Percy v Board of National Mission of the Church of Scotland

[2005] UKHL 73

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD SCOTT OF FOSCOTE AND BARONESS HALE OF RICHMOND

24–26 OCTOBER, 15 DECEMBER 2005

Employment – Contract of Service – Contract personally to execute work and labour – Church minister - Complaint of sex discrimination against church – Whether minister's relationship with church constituting 'employment' – Whether complaint constituting 'matters spiritual' falling within exclusive jurisdiction of church courts – Church of Scotland Act 1921, s 3, Schedule, art IV – Sex Discrimination Act 1975, s 82(1).

P, a single woman and ordained minister in the Church of Scotland, was appointed to the position of associate minister in a Church of Scotland parish under an agreement which required the performance of specific duties in return for a salary and other specified benefits, including the supply of a manse and payment of travelling expenses. An allegation of misconduct was made against her, and she was suspended from her duties while an inquiry committee was set up to investigate the allegation. The committee found that there was a case to answer and preparations were made for holding a trial by libel. P resigned as a minister before the trial could commence, bringing to an end her appointment as associate minister. She initiated proceedings in an industrial tribunal, alleging unlawful sex discrimination on the ground that the church had not taken similar action against male ministers in similar circumstances. The tribunal dismissed the application for want of jurisdiction, holding that the complaint was a spiritual matter falling within the exclusive jurisdiction of the courts of the Church of Scotland under s 3[a] of the Church of Scotland Act 1921. The tribunal also held that, although there was a contract in existence, having regard to the essentially religious nature of P's duties it was not a contract of employment, defined in s 82(1)[b] of the Sex Discrimination Act 1975 as 'a contract of service . . . or a contract personally to execute any work or labour'. P's appeal to the Employment Appeal Tribunal and subsequent appeal to the First Division of the Court of Session were dismissed. On appeal the House of Lords considered (i) whether P's relationship with the church constituted 'employment' as defined in s 82(1) of the 1975 Act, and (ii) whether P's discrimination claim constituted a spiritual matter within s 3 of the 1921 Act.

Held – (Lord Hoffmann dissenting) (1) The offer and acceptance of a church post for a specific period, with specific provision for the appointee's duties and remuneration, fell into the category of arrangements which on their face were expected to give rise to legally binding obligations. P's rights and duties

a Section 3, so far as material, provides: 'Subject to the recognition of . . . matters spiritual, nothing in this Act . . . shall affect . . . the jurisdiction of the civil courts . . .'

b Section 82, so far as material, is set out at [13], below

were defined by the contract, the performance of which required the execution of work and labour, in return for the right to enforce the undertaking to provide a salary and other benefits. That was sufficient to bring the contract within the scope of protection that the 1975 Act gave to those whose work was in the field of employment (see [33], [36], [112], [114], [115], [137], [148], below).

(2) The provision of a remedy for unlawful discrimination was a civil matter, not a spiritual one, and the exercise of the exclusive jurisdiction of the church in spiritual matters did not extend to a claim by persons 'employed' by the church within the meaning of s 82(1) of the 1975 Act that they had been unlawfully discriminated against. Accordingly, the appeal would be allowed and the case remitted for consideration by the employment tribunal (see [40]–[42], [133], [134], [136], [138], [139], [154], below).

Notes

For the wider statutory definition of 'employee', see 16(1A) *Halsbury's Laws* (4th edn reissue) para 5.

For the Sex Discrimination Act 1975, s 82, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 141.

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Appeal

Helen Percy appealed from the decision of the First Division of the Court of Session (Lord Rodger, Lord Cameron of Lochbroom and Lord Caplan) given on 20 March 2001 (2001 SC 757), dismissing her appeal from the decision of the Employment Appeal Tribunal (Lord Johnston, GR Carter and AE Robertson) on 22 March 1999, dismissing her appeal from the decision of an industrial tribunal at Dundee (chair: NM Hosie) on 21 September 1998, dismissing her application seeking compensation for unlawful sex discrimination under the Sex Discrimination Act 1975 against the Church of Scotland Board of National Mission. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

Susan O'Brien QC and *Brian Napier QC* (instructed by *Drummond Miller WS*) for Ms Percy.
Laura Dunlop QC and *Simon Collins* (instructed by *Bircham Dyson Bell* as agents for the *Church of Scotland Law Dept*) for the Board of National Mission.

Their Lordships took time for consideration.

15 December 2005. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, these proceedings concern a sex discrimination claim brought against the Church of Scotland by a former minister of the church,

Ms Helen Percy. The question is whether, as a matter of law, such a claim lies on the facts of this case. This raises two main issues. The first is whether Ms Percy's relationship with the church constitutes 'employment' as defined in s 82(1) of the Sex Discrimination Act 1975. The second issue is whether Ms Percy's discrimination claim constitutes a spiritual matter within s 3 of the Church of Scotland Act 1921 and, as such, it is within the exclusive cognisance of the Church of Scotland and its own courts.

[2] Ms Percy, a single woman, was ordained a minister of the Church of Scotland on 12 December 1991. In June 1994 she was appointed to the position of associate minister in a Church of Scotland parish in Angus. In June 1997 an allegation of misconduct was made against her. She was said to have had an affair with a married elder in the parish. The presbytery of Angus set up a committee of inquiry to investigate the allegation. Ms Percy was suspended from her duties. The committee found there was a case to answer, and the presbytery began making preparations for holding a trial by libel, that is, trying a formal disciplinary charge against Ms Percy. At a mediation meeting arranged by the church Ms Percy was counselled to resign and demit status as a minister. In December 1997 she demitted status, that is, she resigned as an ordained minister of the church. The presbytery accepted this. Necessarily that brought to an end her appointment as associate minister.

THE PROCEEDINGS

[3] Ms Percy initiated these proceedings in an employment tribunal, then known as an industrial tribunal, in February 1998. She named as respondent the Church of Scotland. She alleged unfair dismissal and unlawful sex discrimination. The essence of her discrimination claim was that in similar circumstances the church had not taken similar action against male ministers known to have had extra-marital sexual relationships. Notice of appearance was given by the 'Church of Scotland Board of National Mission'.

[4] In December 1998 the employment tribunal dismissed Ms Percy's application for want of jurisdiction. Both complaints comprised 'matters spiritual' and fell within the exclusive jurisdiction of the courts of the Church of Scotland as provided by the Church of Scotland Act 1921. The employment tribunal added that, although there was a contract in existence, having regard to the essentially religious nature of Ms Percy's duties it was not a contract of employment as defined in the unfair dismissal legislation or as defined in s 82(1) of the Sex Discrimination Act 1975.

[5] Ms Percy appealed against that decision so far as it related to her claim for sex discrimination. The Employment Appeal Tribunal, presided over by Lord Johnston, dismissed the appeal in March 1999. The appeal tribunal held that the case concerned the disciplining of a minister with regard to her living and that was a matter spiritual governed by art IV in the Schedule to the 1921 Act. On matters spiritual Parliament has allowed the Church of Scotland an exclusive jurisdiction. The appeal tribunal added that 'with some hesitation' it had concluded that the arrangement between Ms Percy and the National Board of Mission was not a contract for work and labour within s 82(1) of the 1975 Act.

[6] Ms Percy appealed again. In March 2001 the First Division of the Court of Session, comprising the Lord President, Lord Cameron of Lochbroom and Lord Caplan, dismissed the appeal (see 2001 SC 757). The leading judgment was given by the Lord President, Lord Rodger of Earlsferry. He considered first whether Ms Percy was employed by the Board of National Mission in terms of

a 'contract personally to execute any work or labour'. After reviewing the authorities the Lord President enunciated a principle that where an appointment was made to a recognised form of ministry within the Church of Scotland, and where the duties of that ministry were essentially spiritual, it was to be presumed there was no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law. The presumption was rebuttable. b In the present case the Lord President was not persuaded the parties intended to create relations enforceable in the civil courts.

CONTRACTS OF SERVICE AND THE CLERGY

[7] The existence of a contract of service between a minister of religion and his church is a question courts have considered on several occasions. In *Re National* c *Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563 at 568–569, Parker J held that a curate in the Church of England was not employed under a 'contract of service' within Pt I(a) of the First Schedule to the National Insurance Act 1911: 'the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose rights d and duties are defined by contract at all.' Thus Parker J contrasted the position of an office holder and a person whose functions are defined by contract.

[8] In *Scottish Insurance Comrs v Church of Scotland* 1914 SC 16 the Court of Session reached the same conclusion regarding assistants to ministers, not to be confused with associate ministers, of the Church of Scotland. Applying the 'control' test used in identifying a contract of employment, an assistant to a e minister was not subject to the control and direction of any particular master. An assistant holds an ecclesiastical office and performs his duties subject to the laws of the church (see Lord Kinnear at 23). Lord Kinnear added that in any event there was difficulty in identifying exactly who was the assistant's employer. Lord Johnstone noted that employment must be under a contract of service. f A contract of service assumes an employer and a servant. It assumes the power of appointment and dismissal in the employer, the right of control over the servant in the employer, and the duty of service to the employer in the servant. There was no one who occupied that position. The contract in which the assistant was engaged was more a contract for services than a contract of service (see 26–27).

g [9] The Court of Appeal decision in *President of the Methodist Conference v Parfitt* [1983] 3 All ER 747, [1984] QB 368 concerned an unfair dismissal claim brought by a Methodist minister. The issue was whether the parties had entered into a contract of service. The court held that having regard to all the circumstances it was impossible to conclude that any contract, let alone a contract of service, came h into being between a newly ordained minister and the Methodist Church when the minister was received into full connection.

[10] The same question arose for decision by your Lordships' House in *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705, [1986] ICR 280. The case concerned an unfair dismissal claim by a minister of the Presbyterian Church of Wales who had been inducted pastor of a united pastorate in Wales. j Lord Templeman delivered the leading speech. He held that the claimant could not point to any contract between himself and the church. The book of rules did not contain terms of employment capable of being offered and accepted in the course of a religious ceremony.

[11] The same issue arose again in *Diocese of Southwark v Coker* [1998] ICR 140, this time in the context of an unfair dismissal claim by an assistant curate of the

Church of England. Again the claimant failed. Mummery LJ analysed the reason underlying the absence of a contract between a church and a minister of religion in these cases as lack of intention to create a contractual relationship. He said that special features surrounding the appointment and removal of a Church of England priest as an assistant curate, and surrounding the source and scope of his duties, preclude the creation of a contract 'unless a clear intention to the contrary is expressed' (see 147). Mummery LJ noted that under the employment protection legislation the relevant right of an employee is not to be dismissed by his employer. He then considered and rejected one by one the possible candidates for the role of employer in that case. The Diocese of Southwark was not a legal person with whom a contract could be concluded. The Church Commissioners paid Dr Coker's stipend and the Diocesan Board of Finance made the necessary arrangements for the payment. But neither of them appointed him, removed him or had power to control the performance of his services. It was not contended that either of Dr Coker's vicars had a contract with him. That left only the bishop of the diocese. The bishop had legal responsibility for licensing the appointment of assistant curates and the termination of their appointments. But that relationship was 'governed by the law of the established church, which is part of the public law of England, and not by a negotiated, contractual arrangement' (see 148).

A CONTRACT FOR SERVICES

[12] As will be apparent from this brief summary, there are several different strands in the reasoning of these leading authorities. Some of them call for comment before turning to the facts of the instant case. But it should be noted at the outset that in each of these cases the issue was whether a contract of service existed. In particular, in the unfair dismissal cases a statutory prerequisite is that the claimant is an employee. An employee is an individual who has entered into or works under a contract of employment, that is, a 'contract of service': see now ss 94 and 230 of the Employment Rights Act 1996.

[13] That is not the issue in the present case. Ms Percy's claim is based on sex discrimination. The statutory prerequisite for a sex discrimination claim is expressed in wider terms. The Sex Discrimination Act 1975 prohibits discrimination as defined in s 1 'in relation to employment' in the respects set out in s 6. Employment means employment under a contract of service or 'a contract personally to execute any work or labour' (see s 82(1)). Ms Percy accepts she did not enter into a contract of service. That is why she did not pursue her claim for wrongful dismissal by way of appeal from the adverse decision of the industrial tribunal. Her case is that she was employed under a contract personally to execute certain work, that is, a contract for services as distinct from a contract of service. Thus in her case questions about the degree of control exercised over her work by her employer are of little, if any, relevance.

OFFICE HOLDERS AND EMPLOYEES

[14] The first point to note about the authorities arises perhaps most distinctly from the insurance case of *Re National Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563. In that case one element in the court's reasoning was that the claimant was appointed to an ecclesiastical office as distinct from entering into a contract of service. This contrast is capable of misleading. It needs to be handled with care in the present context.

[15] The distinction between holding an office and being an employee is well established in English law. An important part of the background to this distinction is that in the past an employer could dismiss a servant without notice, leaving the servant with any claim he might have for damages for breach of contract. Speaking in the 1960s, Lord Reid famously declared that a master could terminate the contract with his servant at any time and for any reason or for none (see *Ridge v Baldwin* [1963] 2 All ER 66 at 71–73, [1964] AC 40 at 65–68). By way of contrast, some office holders could be dismissed only for good cause. Thereby they were insulated against improper pressures. So the focus in master and servant cases was often on the question whether, to adopt the words of Lord Wilberforce, there was an element of public employment or service, or anything in the nature of an office or status capable of protection (see *Malloch v Aberdeen Corp* [1971] 2 All ER 1278 at 1294, [1971] 1 WLR 1578 at 1595–1596).

[16] In 1971 this focus was changed by the Industrial Relations Act 1971. Employees acquired a right not to be dismissed unfairly. In *102 Social Club and Institute v Bickerton* [1977] ICR 911 at 917, Phillips J drew attention to one of the practical consequences of this radical change in the law:

> 'Before 1971 there was perhaps a tendency to find in contracts of employment elements of a public character which would enable the court to extend to the employee the protection flowing from "the right to be heard" enjoyed by the holders of an office. Since the fundamental change of the law brought about by the Industrial Relations Act 1971, which for the first time created the right of an employee not to be unfairly dismissed, the problem has arisen, which previously was not of much importance, of defining the circumstances in which an office-holder may be said to be employed. Previously, it was a case of defendants seeking to deny an office-holder a right of complaint on the ground that he was party to a "pure contract of service"; now it is a question of defendants seeking to deny employees the right not to be unfairly dismissed on the ground that in reality they are not employees but "pure office-holders."'

[17] So the purpose for which the distinction is relevant has changed. There is a further complication. The distinction between holding an office and being an employee has long suffered from the major weakness that the concept of an 'office' is of uncertain ambit. The criteria to be applied when distinguishing those who hold an office from those who do not are imprecise. In *McMillan v Guest (Inspector of Taxes)* [1942] 1 All ER 606 at 608, [1942] AC 561 at 566, Lord Wright observed that the word 'office' is of indefinite content. Lord Atkin suggested ([1942] 1 All ER 606 at 607, [1942] AC 561 at 564) that 'office' implies a subsisting, permanent, substantive position having an existence independent of the person who fills it, and which goes on and is filled in succession by successive holders. As Lord Atkin indicated, this is a generally sufficient statement of the meaning of the word. It is useful as a broad description of the ingredients normally present with any office.

[18] I am sure Lord Atkin would have been the first to recognise that a difficulty with this general description is that it is wide enough to embrace cases where the relationship between the parties is essentially contractual. In *McMillan v Guest (Inspector of Taxes)* the context was liability to tax under Sch E to the Income Tax Act 1918 in respect of a public 'office'. The issue was whether a taxpayer held a (public) office. So the question whether the taxpayer was also an

employee was not directly in point. In the present case the nature of the issue is quite different. The question is not whether Ms Percy held an office. The issue is whether she had entered into a contract under which she agreed to provide defined services. Holding an office, even an ecclesiastical office, and the existence of a contract to provide services are not necessarily mutually exclusive.

[19] This requires elaboration. Sometimes the existence of an office is clear. An office may be of ancient common law origin, such as the office of constable. Indeed some offices were regarded by the common law as incorporeal hereditaments, belonging to the current office holder. A benefice in the Church of England is regarded as a freehold office belonging to the incumbent for the time being. Or an office may be created by statute, with attendant statutory functions. A superintendent registrar of births, deaths and marriages is an example (see *Miles v Wakefield Metropolitan DC* [1987] 1 All ER 1089, [1987] AC 539).

[20] Less clear cut are cases where an organisation, ranging from the local golf club to a huge multi-national conglomerate, makes provision in its constitution for particular posts or appointments such as chairman or vice-president. In a broad sense these appointments may well be regarded as 'offices'. But caution needs to be exercised here, lest the use of this term in this context lead to a false dichotomy: a person either holds an office or is an employee. He cannot be both at the same time. This is not so. If 'office' is given a broad meaning, holding an office and being an employee are not inconsistent. A person may hold an 'office' on the terms of, and pursuant to, a contract of employment. Or like a director of a company, a person may hold an office and concurrently have a service contract. Whether there is a contract in a particular case, and if so what is its nature and what are its terms, depends upon an application of familiar general principles. That the appointment in question is or may be described as an 'office' is a matter to be taken into account. The weight of this feature will depend upon all the circumstances. But this feature does not of itself pre-empt the answer to the question whether the holder of the 'office' is an employee. This feature does not necessarily preclude the existence of a parallel contract for carrying out the duties of the office even where they are statutory (cf Lord Oliver of Aylmerton in *Miles v Wakefield Metropolitan DC* [1987] 1 All ER 1089 at 1103, [1987] AC 539 at 567).

[21] This approach is sound in principle. It has been adopted in practice in reported decisions. For instance, in *Barthorpe v Exeter Diocesan Board of Finance* [1979] ICR 900, an unfair dismissal case, the Employment Appeal Tribunal considered whether a stipendiary lay reader was employed under a contract of service. Slynn J, giving the judgment of the tribunal, rejected a submission that the claimant was an office holder and, as such, it followed he was not employed under a contract of service. He said (at 904):

> 'Merely to say that someone holds an office does not seem to us to decide the question which has to be decided under [the Trade Union and Labour Relations Act 1974]. Some office holders may well not be employed under a contract of service. It does not follow that an office holder cannot be employed under a contract of service. The question . . . is whether the office he holds is one the appointment to which is made by, or is co-existent with, a contract of service. If it is, then he is entitled to the protection of the Act of 1974.'

I agree. Slynn J added (at 906):

> 'It may be difficult to establish who is the other contracting party, but we are not satisfied that clergy when working within the framework of the Church cannot be engaged under a contract. It may well be that the contract, if it exists, is for services rather than of service . . .'

[22] Another instance, also a decision of the Employment Appeal Tribunal, is *Johnson v Ryan* [2000] ICR 236. There the question was whether a rent officer, appointed pursuant to statutory authority, was an employee within the meaning of the unfair dismissal legislation. The local authority contended that holding that statutory office was not consistent with a contract of employment. The Employment Appeal Tribunal rejected this submission. Morison J said (at 243):

> 'The question that the [employment] tribunal should have asked itself was whether [the applicant] was an employee, on the basis that she was also an office holder. It was an error to concentrate solely on whether the applicant was an office holder. On the basis of the facts, she was in the position of being both an office holder and an employee of the local authority.'

INTENTION TO CREATE LEGAL RELATIONS

[23] A further strand in the authorities, most notably in the judgment of Mummery LJ in *Diocese of Southwark v Coker* [1998] ICR 140, concerns the absence of an intention to create legal relations. There are indeed many arrangements or happenings in church matters where, viewed objectively on ordinary principles, the parties cannot be taken to have intended to enter into a legally-binding contract. The matters relied upon by Mr Parfitt in *President of the Methodist Conference v Parfitt* [1983] 3 All ER 747, [1984] QB 368 are a good example of this. The nature of the lifelong relationship between the Methodist Church and a minister, the fact that he could not unilaterally resign from the ministry, the nature of his stipend, and so forth, all these matters made it impossible to suppose that any legally-binding contract came into being between a newly-ordained minister and the Methodist Church when he was received into full connection. Similarly with the church's book of rules relied on by the Reverend Colin Davies in *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705, [1986] ICR 280. Then the rebuttable presumption enunciated by the Lord President in the present case, following Mummery LJ's statements of principle in *Diocese of Southwark v Coker* [1998] ICR 140 at 147, may have a place. Without more, the nature of the mutual obligations, their breadth and looseness, and the circumstances in which they were undertaken, point away from a legally-binding relationship.

[24] But this principle should not be carried too far. It cannot be carried into arrangements which on their face are to be expected to give rise to legally-binding obligations. The offer and acceptance of a church post for a specific period, with specific provision for the appointee's duties and remuneration and travelling expenses and holidays and accommodation, seems to me to fall firmly within this latter category.

[25] Further, in this regard there seems to be no cogent reason today to draw a distinction between a post whose duties are primarily religious and a post within the church where this is not so. In *President of the Methodist Conference v Parfitt* [1983] 3 All ER 747 at 752, [1984] QB 368 at 376, Dillon LJ noted that a

binding contract of service can be made between a minister and his church. This was echoed by Lord Templeman in your Lordships' House in *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705 at 709, [1986] ICR 280 at 289. Lord Templeman said it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual.

[26] The context in which these issues normally arise today is statutory protection for employees. Given this context, in my view it is time to recognise that employment arrangements between a church and its ministers should not lightly be taken as intended to have no legal effect and, in consequence, its ministers denied this protection.

THE PARTIES TO THE CONTRACT

[27] The final point calling for comment is the need to identify the parties to any alleged contract of service or for services. It goes without saying that before a tribunal can find that a contract of this nature was concluded it must be able to identify the employer with whom the claimant made the contract. As can be seen from the above summary of the authorities, this can be a source of real difficulty with a nationwide church whose complex affairs are conducted through a multiplicity of boards and committees. There may be one body responsible for finance, allocating precious resources between competing demands, all of which are eminently worthy. There may be another body responsible for making payments. There may be a third body charged with selecting the candidate best suited to this or that appointment, a yet further body may formally make the appointment, and have power of dismissal; and so on.

[28] These different bodies are, in a broad but real sense, all part of 'the church' in question. But the 'church' may not be an entity capable of making a contract or of suing or being sued. This is so with the Church of England. It is equally so with a diocese of the Anglican church, for the reason given in *Diocese of Southwark v Coker* [1998] ICR 140 at 148. This is also true of the Church of Scotland. Then the fragmentation of functions within such an 'umbrella' organisation may make it difficult to pin the role of employer on any particular board or committee. But this internal fragmentation ought not to stand in the way of otherwise well-founded claims.

MS PERCY'S APPOINTMENT

[29] I can now turn to apply these principles to the present case. The detailed chronology of Ms Percy's appointment is set out in the speech of my noble and learned friend Lord Hope of Craighead. In short, in 1993 the presbytery of Angus asked the parish reappraisal committee of the Church of Scotland to approve the appointment of an associate minister for the proposed linked charge of Airlie, Ruthven and Kingoldrum with Glenisla linked with Kilry linked with Lintrathen. The parish reappraisal committee is a committee of the Board of National Mission. Part of the remit of this committee is to deal with proposals for the staffing needs of parishes in respect of ministers. The Board of National Mission was set up by the General Assembly of the Church of Scotland. The constitution of the Board expresses its policy, together with that of its constituent committees, in broad terms: to plan and co-ordinate the church's strategy and provision for fulfilment of its mission as the national church.

[30] The parish reappraisal committee approved the appointment sought by the presbytery. The committee's published information sheet, inviting applications for this new post, referred succinctly to the duties of the associate

minister. It stated also, by way of 'terms and conditions', that the appointment would be for five years, the salary would be at the level of the minimum stipend, a manse would be provided and travelling expenses met. The associate minister would also serve as chaplain to HM Prison Noranside, but nothing turns on this additional responsibility.

[31] Ms Percy responded to the advertisement. She was interviewed and her application was successful. The general secretary of the Board of National Mission, the Reverend Douglas Nicol, invited her to accept the appointment. He sent her a copy of the terms and conditions. These were an amplified form of the terms and conditions already mentioned. They included a term that the associate minister, like any other minister, would be responsible to the presbytery in matters affecting life, doctrine and discipline. Ms Percy wrote to Mr Nicol formally accepting the offer. The presbytery ratified the appointment. In due course she was introduced as associate minister at a service at Kilry church.

[32] Subsequently, when the unhappy events leading to Ms Percy's demission occurred, she initially offered her resignation and then changed her mind and asked to withdraw her resignation. On 1 July 1997 Mr Nicol wrote in response, on behalf of the National Board of Mission, to 'your request to withdraw your letter of resignation from employment by the Department of National Mission'. He said that 'we', meaning the Board, agreed 'to reinstate your employment' from 17 June. He added that until further notice 'you are suspended on full pay'. Subsequently the suspension was confirmed by the presbytery.

[33] These documents on their face seem to me to show that Ms Percy entered into a contract with the Board to provide services to the church on the agreed terms and conditions. The House has been shown and told nothing to displace this prima facie impression. Whether the contract was a contract of service or only a contract for services is not material in this case.

[34] The fact that Ms Percy's status as an associate minister might readily be described as an ecclesiastical office leads nowhere. The post to which she was appointed had no content other than that given by the terms and conditions agreed ad hoc between the parties. Her rights and duties were defined by her contract, not by the 'office' to which she was appointed.

[35] Likewise, the fact that, as it seems, power of dismissal rested with the presbytery and not with the Board of National Mission also leads nowhere in this case. Ms Percy's contract with the Board expressly provided for the supervisory and disciplinary role of the presbytery. That was one of the terms of the contract. This allocation of supervisory and disciplinary responsibility to the presbytery in accordance with the constitutional structure of the church does not of itself preclude the Board from being Ms Percy's employer.

[36] In my view the industrial tribunal misdirected itself in this case. Having regard to dicta in some of the authorities this is not surprising. The tribunal's view was that a contract existed. The only reason given for holding this did not amount to employment as defined in the 1975 Act was the religious nature of Ms Percy's duties. Accordingly, had the tribunal directed itself correctly on this point it would have concluded that, notwithstanding the religious nature of the services Ms Percy was engaged to provide, the contract was a contract of employment within the definition in s 82(1) of the 1975 Act. I would so hold. In the circumstances it is not necessary to remit the matter to the employment tribunal for further consideration on this point.

[37] The second issue raised by the respondent Board is that, even if Ms Percy was employed under a contract personally to execute work within s 82(1) of the 1975 Act, the jurisdiction of the employment tribunal is excluded by the 1921 Act.

[38] This statute was concerned to declare the lawfulness of certain articles declaratory of the constitution of the Church of Scotland 'in matters spiritual' prepared by the General Assembly of the church. The title of the Act so stated. Section 1 so declared. Section 3 preserved the jurisdiction of civil courts 'in relation to any matter of a civil nature', subject to the recognition of the matters dealt with in the declaratory articles as matters spiritual.

[39] The declaratory articles are set out in the Schedule to the 1921 Act. The relevant article is art IV:

> 'This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church . . . Recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual . . . does not in any way . . . give to the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction.'

[40] The theme running through these provisions is that in matters spiritual the Church and its courts have exclusive jurisdiction. The expression 'matters spiritual' is not defined. But, on any ordinary understanding of this expression, if the church authorities enter into a contract of employment with one of its ministers, the exercise of statutory rights attached to the contract would not be regarded as a spiritual matter. A sex discrimination claim would not be regarded as a spiritual matter even though it is based on the way the church authorities are alleged to have exercised their disciplinary jurisdiction. The reason why a sex discrimination claim would not be so regarded is that the foundation of the claim is a contract which, viewed objectively, the parties intended should create a legally-binding relationship. The rights and obligations created by such a contract are, of their nature, not spiritual matters. They are matters of a civil nature as envisaged by s 3. In respect of such matters the jurisdiction of the civil courts remains untouched.

[41] This is not to usurp the Church's exclusive jurisdiction in the exercise of its disciplinary powers, a jurisdiction upheld by the Outer House in *Logan v Presbytery of Dumbarton* 1995 SLT 1228. Rather it is to recognise, to adopt the words of the Lord President in the present case, that by entering into a contract of employment binding under the civil law the parties have deliberately left the sphere of matters spiritual in which the church courts have jurisdiction and have put themselves within the jurisdiction of the civil courts (see 2001 SC 757 at 769).

[42] For these reasons I would allow this appeal. I would hold that Ms Percy was employed by the Board of National Mission under a contract personally to execute work within the meaning of s 82(1) of the 1975 Act, and that the employment tribunal's jurisdiction was not excluded by the 1921 Act. The proceedings should be remitted to an employment tribunal to proceed with the claim accordingly. In these circumstances it is not necessary to deal

with further, wide-ranging arguments advanced on behalf of Ms Percy based on Community law.

LORD HOFFMANN.

[43] My Lords, in 1994 six congregations of the Church of Scotland within the presbytery of Angus agreed to unite or be linked for the purpose of worship. It was agreed that the minister of three of these parishes, which were already linked, would become minister of the new charge. But the presbytery considered that the expanded congregation would require the services of another minister. The Parish Reappraisal Committee approved the appointment of an associate minister on the footing that the congregation would provide a manse and £1,000 a year towards his or her salary. It was also expected that the associate minister would obtain an appointment as chaplain at HM Prison, Noranside.

[44] The Board of National Mission, with representation from the presbytery, is responsible for interviewing and choosing ministers. It advertised the appointment in the newspapers. Applicants were sent a sheet of paper with the following information:

> 'Aims and Duties:
>
> The Associate Minister will be expected to work in the following areas of service:
>
> (i) Assisting the Minister of the parish
>
> The Associate Minister would be expected to conduct worship every Sunday and working with the Parish Minister would be expected to assist in increasing the involvement and participation of all members in the united charge.
>
> (ii) As Chaplain to H.M. Prison, Noranside
>
> This is a 9 hour commitment per week to chaplaincy responsibilities within the prison.
>
> Terms and Conditions:
>
> The appointment is for a five year period, the salary at the level of the minimum stipend, a manse will be supplied and travelling expenses will be met.'

[45] The appellant Miss Helen Percy, who had been ordained in 1991, applied for the appointment. Since 1968, women have been eligible for ordination and induction into charges on the same terms as men. On 22 April 1994 the Rev Douglas Nicol, General Secretary of the Board, wrote to Miss Percy inviting her to accept that appointment. He enclosed terms and conditions of appointment. These enlarged slightly on the matters which had been sent to her as an applicant. For example:

> 'Duration of appointment. The appointment shall be for a period of five years.
>
> Salary. Minimum Stipend shall be paid centrally from the resources of the Board of National Mission . . . A manse will be supplied.
>
> Supervision. The Associate Minister shall, as any other Minister, be responsible to the Presbytery in matters affecting life, doctrine or discipline, and shall have a seat in the Presbytery. The Associate Minister will be expected to take due part in the affairs of the Presbytery in terms of Act II (1970).'

[46] On 26 April 1994 Miss Percy wrote to the Rev Nicol formally accepting the appointment. On 19 June 1994 she was duly inducted into the charge by the Presbytery at a service held in accordance with the statutes of the Church.

[47] In 1997 scandal broke. It was alleged by members of the congregation that Miss Percy had been having an affair with a married Elder in the parish. On 17 June 1997 she offered to resign but withdrew her resignation a week later. The Presbytery decided that there was a case to answer and commenced the procedure for a trial by libel to determine the truth of the allegations. On 1 July 1997 the Rev Nicol wrote to her saying that until further notice she was suspended from duty on full salary. But no trial was held because on 2 December 1997 Miss Percy agreed to demit her charge and her status as a minister.

[48] In February 1998 Miss Percy made a complaint to an employment tribunal against 'the Church of Scotland', alleging that the Church had discriminated against her on grounds of sex, contrary to s 6 of the Sex Discrimination Act 1975. The basis for this complaint was an allegation that the Church had not taken 'similar action' (presumably, initiation of a trial by libel and suspension) against male ministers who had extra-marital sexual relationships.

[49] Before the employment tribunal the title of the proceedings was amended to designate the respondent as 'Church of Scotland Board of National Mission'. The Board objected to the jurisdiction of the tribunal on two main grounds. The first was that art IV of the articles declaratory scheduled to the Church of Scotland Act 1921 gave the church courts exclusive jurisdiction over questions of discipline. I shall return to this point later. The second was that Miss Percy was not an employee. She had no contract of employment. She held the office of a minister of the Church of Scotland.

[50] The tribunal disclaimed jurisdiction on the first ground and said that it did not have to deal with the second. It nevertheless expressed the opinion that there was no contract of employment and that Miss Percy was not an employee as defined in the 1975 Act. He referred in support to the cases of *President of the Methodist Conference v Parfitt* [1983] 3 All ER 747, [1984] QB 368; *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705, [1986] ICR 280 and *Diocese of Southwark v Coker* [1998] ICR 140, to which I shall have to return in more detail. The chairman of the tribunal ended this part of his discussion by saying: 'While there was a contract in existence, I was of the view that the contract was not one of service having regard to the religious nature of the applicant's duties.' This obiter opinion that there was a contract of some unspecified nature is heavily relied upon by counsel for Miss Percy.

[51] The Employment Appeal Tribunal upheld the decision of the tribunal on the ground that the church courts had exclusive jurisdiction. It expressed 'with some hesitation' the opinion that the tribunal had been right to say that Miss Percy was not in employment within the meaning of the 1975 Act.

[52] On further appeal to the First Division, the Lord President (Lord Rodger of Earlsferry) dismissed the appeal on the ground that Miss Percy was not in employment (see 2001 SC 757). He said (at 765) that there was a rebuttable presumption that—

> 'where the appointment was being made to a recognised form of ministry within the Church and where the duties of that ministry would be essentially spiritual, there would be no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law.'

[53] In the present case, he said, there was nothing to rebut this presumption. The documents setting out terms and conditions and the offer and acceptance of the appointment were no more than might be expected in connection with any appointment to an office, whether under the Crown or in the church. They did not point to a contract of service or for services.

[54] The distinction in law between an employee, who enters into a contract with an employer, and an office-holder, who has no employer but holds his position subject to rules dealing with such matters as his duties, the term of his office, the circumstances in which he may be removed and his entitlement to remuneration, is well established and understood. One of the oldest offices known to the law is that of constable. It is notorious that a constable has no employer. It required special provision in s 17 of the 1975 Act to bring the office of constable within the terms of the Act and to deem the Chief Constable to be his employer. But there are many other examples of offices; public, ecclesiastical and private. In *Dale v IRC* [1953] 2 All ER 671 at 673, [1954] AC 11 at 26 Lord Normand said that a trustee held an office. The term was apt to describe 'any position in which services are due by the holder and in which the holder has no employer'. A director of a company does not, as such, have a contract with the company and is not an employee. He is an officer of the company. His duties and remuneration as a director are determined by the law and pursuant to the company's constitution. He may in addition have a service contract, but that is a separate relationship. And there are, of course, many offices held under the Crown. They would also not come within the 1975 Act if it were not for s 85(2):

> 'Parts II and IV apply to—(a) service for purposes of a Minister of the Crown or government department, other than service of a person holding a statutory office, or (b) service on behalf of the Crown for the purposes of a person holding a statutory office or purposes of a statutory body . . . as they apply to employment by a private person, and shall so apply as if references to a contract of employment included references to the terms of service.'

[55] Pursuant to these provisions, in *Dept of the Environment v Fox* [1980] 1 All ER 58, [1979] ICR 736, Slynn J held that a rent officer, although holding a statutory office and not in employment, came within s 85(2)(b) because she performed services on behalf of the Crown for the purposes of a statutory body, namely a rent assessment committee.

[56] The proposition that a minister of a church has no employer but holds an office, subject to rules which impose upon him certain rights and entitle him to a salary, stipend and other benefits, has been stated so often and for so long that I would not have thought that it was open to question. In *Hastie v McMurtrie* (1889) 16 R 715 at 732 the Lord President (Lord Inglis) said 'Holders of benefices in the church are public officers, and these offices are munera publica'. In *Scottish Insurance Comrs v Church of Scotland* 1914 SC 16 at 23 Lord Kinnear said:

> 'I think that the position of an assistant minister in these Churches is not that of a person who undertakes work defined by contract but of a person who holds an ecclesiastical office, and who performs the duties of that office subject to the laws of the Church to which he belongs and not subject to the control and direction of any particular master.'

[57] Lord Mackenzie likewise said (at 27) that an assistant minister was—

'really the case of one who is discharging the duties of an office, and whatever authority is exercised over him is in virtue of an ecclesiastical jurisdiction, and is not in virtue of rights which arise out of a contract of service.'

[58] The same conclusion had already been reached by Parker J in respect of curates in the Church of England: see *Re National Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563. He said (at 568–569):

'The position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose duties and rights are defined by contract at all. It appears to me that there can be no pretence in reality for arguing that the relation between him and his vicar, or between him and his bishop, or between him and any one else, is the relation of employer and servant.'

[59] For this reason, the Court of Appeal in *Diocese of Southwark v Coker* [1998] ICR 140 decided that an assistant curate in the Church of England could not bring proceedings for unfair dismissal. The same was held of a minister of the Methodist Church in *President of the Methodist Conference v Parfitt* [1983] 3 All ER 747, [1984] QB 368 and a minister of the Presbyterian Church of Wales in *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705, [1986] ICR 280.

[60] In the face of these authorities, the proposition that an ordinary minister of the Church of Scotland held an office and was not employed by the Board of Mission, the Presbytery, the Kirk-session or anyone else was not contested, at any rate until the argument before your Lordships' House. In the First Division a distinction was sought to be drawn between a minister and an associate minister. But that distinction was, in my opinion, rightly rejected by the Lord President. It is contrary to the decision in *Scottish Insurance Comrs v Church of Scotland*, which dealt with assistant ministers. What makes an associate minister the holder of an office is that she is a minister. As associate minister she may have an ecclesiastical superior (compare what Parker J said of a curate in *Re National Insurance Act 1911* [1912] 2 Ch 563 at 569–570) but not an employer.

[61] I think that difficulty has been caused by some of the reasons given in recent cases for saying that a priest or minister is not an employed person. To say, as Lord Templeman did in *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705, [1986] ICR 280, that a priest is 'the servant of God' is true for a believer but superfluous metaphor for a lawyer. As Laplace told Napoleon, there is no need for such a hypothesis. It would be no more (or less) illuminating to say that a constable was the servant of the law. The fact is that he holds an office, a well-understood legal concept which creates rights and duties but does not involve a contract of employment.

[62] Nor do I think it very helpful to say, as Mummery LJ said in *Diocese of Southwark v Coker* [1998] ICR 140, that a priest is not employed because her appointment was not accompanied by an intention to create legal relations. That, together with the proposition that the priest is the servant of God, gives the impression that she operates entirely outside the legal system, looking to God to provide for her. It is not surprising that the appellant's counsel pointed to the prosaic documents issued by the Board of Mission: the advertisement of the appointment, the written terms and conditions, the letter of offer and formal letter of acceptance. In the face of these documents, how can it be said that there

was no intention to create legal relations? That submission seems to me unanswerable. There was plainly an intention to create legal relations. But those legal relations were not a contract of employment. They were an appointment to a well-recognised office, imposing legal duties and conferring legal rights. The nature of an office inevitably means that the procedures for appointment will closely resemble those attending the engagement of an employee. No doubt similar documentation could be found concerning the appointment of, among many others, judges, rent officers and superintendent registrars of births, deaths and marriages (see *Miles v Wakefield Metropolitan DC* [1987] 1 All ER 1089, [1987] AC 539). But that does not mean that their appointment to these offices created contractual relations.

[63] I would therefore not accept, at any rate without considerable qualification and explanation, the Lord President's statement that there was a rebuttable presumption that the appointment of a minister was not intended to 'give rise to obligations enforceable in the civil law'. Subject to any question of jurisdiction under the 1921 Act, appointment to an office does give rise to obligations enforceable in civil law. So the question is not whether the [appointment] was intended to create legal relations but rather what legal relations it was intended to create. A ministry in the Church of Scotland is either an office recognised by law or it is not. If it is, then appointment to that office does not involve a contract of service or for services. It is, I suppose, possible that in addition to holding her office, a minister might enter into a contract of service with someone: for example, to act as chaplain to a prison or a nobleman. Miss Percy's arrangements with HM Prison, Noranside may have been of such a character. But those arrangements are not relevant to these proceedings. It is concerned with her demission of her charge and her status as minister.

[64] Miss Percy, as I have mentioned earlier, relies upon the statement by the tribunal that there was a contract of some kind. That, she says, is a finding of fact. It did not however form part of the tribunal's findings of fact, expressly set out at the beginning of their reasons. It was simply an obiter remark and I think it was wrong in law because the evidence showed beyond doubt that Miss Percy was appointed to the office of associate minister.

[65] The next question is whether Miss Percy, as she claims, came within the scope of Pt II of the 1975 Act. That is concerned with discrimination 'in the employment field'. 'Employment' is defined in s 82(1) as: 'employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour . . .'

[66] Miss Percy plainly does not fall within this definition. She had no relevant contract of service and the work or labour which she executed were not pursuant to any contract. My noble and learned friend Lord Hope of Craighead, whose opinion I have had the advantage of reading in draft, accepts that Miss Percy had no contract of service but says that she had contracted personally to execute work and labour. But that cannot with all respect be right. The words 'a contract personally to execute any work or labour' were intended to bring within the definition of employment a contract which is not of service but is for the provision of services. But that was not the case here. If the ministry had not been an office and the relationship between Miss Percy and the body who appointed her had been contractual, it would plainly have been a contract of service. It would have had all the characteristics of a contract of service. The reason why

it is not a contract of service is because Miss Percy's duties were not contractual at all. They were the duties of her office.

[67] Counsel urged your Lordships to give the language a broad construction. But I do not see how performance of the duties of an office which does not involve any contractual relationship can be said to be employment under a contract. Furthermore, it is clear from provisions such as s 17 (dealing with constables) and s 85(2) (dealing with public offices) that Parliament was well familiar with the distinction between employment as defined in s 82 and holding an office. In the cases of those office holders intended to be brought within the terms of the Act, special provision was made. There is no such provision for clergymen.

[68] Counsel for Miss Percy referred to s 19 of the 1975 Act, which in certain circumstances exempts from Pt II 'employment for the purposes of an organised religion' (sub-s (1)) and 'an authorisation or qualification . . . for the purposes of an organised religion' (sub-s (2)). These exemptions are framed in terms which would not apply to the present case and counsel submits that Parliament must have inferentially intended that Pt II would apply to ministers of religion, whether or not they were employed and whether or not the matter concerned an authorisation or qualification. In my opinion this is giving s 19 a meaning which it cannot possibly bear.

[69] Mr Napier QC, on behalf of Miss Percy, called in the aid of European law. He said, correctly, that the 1975 Act was regarded as constituting the United Kingdom's compliance with the Equal Treatment Directive (Council Directive (EEC) 76/207 (on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) (OJ 1976 L39 p 40)). Under the interpretative principle stated in *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 [1990] ECR I-4135 at 4146 (para 8), the Scottish court should 'having regard to the usual methods of interpretation in its legal system, give precedence to the method which enables it to construe the national provision concerned in a manner consistent with the directive'.

[70] Mr Napier went on to submit that upon its true construction the Directive required the priests and ministers, though not employed by anyone, to enjoy the protection of the Directive.

[71] I would reject this submission for two reasons. First, there is no way consistent with the usual methods of interpretation applied in Scotland by which s 82 can be construed as applying to someone who has not contracted either to serve or provide work and labour. Secondly, I do not think that the Directive requires it.

[72] The Directive recites that:

> 'Community action to achieve the principle of equal treatment for men and women in respect of access to employment and vocational training and promotion and in respect of other working conditions . . . appears to be necessary; [and] whereas, equal treatment for male and female workers constitutes one of the objectives of the Community . . .'

[73] The recitals thus regard the Community competence exercised by the Directive as relating to equal treatment for 'male and female workers'. Article 2 defines the principle of equal treatment ('no discrimination whatsoever on grounds of sex') but without prejudice to the right of member states to exclude

occupational activities where 'the sex of the worker constitutes a determining factor'. The Directive is thus concerned with equal treatment of 'workers', a term of art in Community law which was defined by the Court of Justice in *Lawrie-Blum v Land Baden-Württemberg* [1987] ICR 483 at 488, [1986] ECR 2121 at 2144 (para 17):

> 'That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.'

[74] In my opinion the office held by Miss Percy did not constitute an employment relationship and she was therefore not a worker. In arguing that the Directive applies to her, Mr Napier relied upon art 5, which requires equal treatment in 'working conditions'. These, he says, include the operation of procedures for dismissal. But 'working conditions' are in my view the conditions under which workers work. The article cannot apply to Miss Percy if she was not a worker.

[75] Since the events of this case, the scope of the 1975 Act has been enlarged and it may be that a minister of the church would come within it. By the Treaty of Amsterdam in 1999, art 119 of the Treaty, which required that men and women receive equal pay, was amended and re-numbered 141. The new matter included para 3:

> 'The Council . . . shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment *and occupation*, including the principle of equal pay for equal work or work of equal value.' (My emphasis.)

[76] Pursuant to this article, the Equal Treatment Directive was amended by European Parliament and Council Directive (EC) 2002/73 (OJ 2002 L269 p 15). Article 5 was deleted and a new art 3 substituted which referred to access to 'employment, to self-employment or to occupation' as well as working conditions. The United Kingdom gave effect to the amending Directive by the Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467, made under the European Communities Act 1972, which substantially amended the 1975 Act with effect from 1 October 2005. In particular, it added s 10B which made it unlawful to discriminate in a number of ways against various office holders, including the termination of an appointment (see s 10B(3)(c)). The office holders to whom the new section applied were defined by s 10A and included an office in which 'persons are appointed to discharge functions personally under the direction of another person'. I do not propose to construe the new legislation, which has its difficulties, but it must be arguable that Miss Percy would today be an office holder within the protection of the 1975 Act. But that was not the law at the relevant time.

[77] For these reasons I do not think that Miss Percy came within the terms of the 1975 Act. That means that, like the Lord President, I do not have to consider whether the 1921 Act would have excluded jurisdiction. I would only observe that if the 1975 Act now, upon its true construction, applies to ministers of the

church, I would think it unlikely that it was not intended to apply to ministers of the Church of Scotland.

[78] I would dismiss the appeal.

LORD HOPE OF CRAIGHEAD.

[79] My Lords, this case raises some fundamental issues of law about the governance of the Church of Scotland. So I should like to set the scene for my discussion of them with these words of introduction.

[80] Article III of the Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual which are set forth in the Schedule to the Church of Scotland Act 1921 states that, as a national church representative of the Christian Faith of the Scottish people, the Church of Scotland (the Church) acknowledges its distinctive call and duty to bring the ordinances of religion to the people in every parish of Scotland through a territorial ministry. The ministry is the principal instrument of the Church for discharging that obligation. Responsibility for planning and co-ordinating the Church's strategy and provision for the fulfilment of its mission as the national church is vested in the Board of National Mission of the Church of Scotland, who are the respondents to this appeal.

[81] The sphere of pastoral duty to which a minister is inducted is known as a charge. The induction of a minister to a charge is a function of the presbytery of the geographical area within which the charge is situated. Induction is the process by which a new minister is recognised as a member of the presbytery in his capacity as minister to the charge to which he has been presented or by which he has been elected. The geographical bounds of each presbytery within Scotland are defined by the General Assembly. The General Assembly is the legislature, the highest administrative body and the supreme court of the Church. The presbytery ranks above the kirk session of each parish within its area in the Church's judicial hierarchy. Supervision of the life, doctrine and discipline of all ministers appointed to charges in its area is the responsibility of the presbytery.

[82] Discharging its obligation to bring the ordinances of religion to the people of Scotland today through the ministry has become increasingly burdensome. As church attendances fall and the financial resources of the Church become ever more stretched various measures have had to be resorted to in order to reduce costs. Among other measures, congregations are being readjusted or united with a view to reducing the number of charges that need to be filled in the area. This is resorted to most frequently, but by no means exclusively, in rural areas. The process may be assisted by enlarging the ministerial team. This is done by the appointment of a part-time, non-stipendiary auxiliary minister or by the induction into the charge as an associate of a full-time salaried assistant minister. Assistant ministers are, as regards their lives and doctrine, subject to the supervision and discipline of the presbytery in the same way as any other minister.

[83] Nowadays, unlike ministers whose ordination and induction to a charge are exclusively functions of the presbytery, auxiliary ministers and assistant ministers are appointed by the Parish Reappraisal Committee, one of the constituent committees of the Board of National Mission, on terms and conditions that are defined in writing by the committee after consultation with the presbytery of the relevant area. To be eligible for appointment as an associate minister persons must, as in the case of those seeking appointment to a charge as

its minister, first be licensed by a presbytery. Licences are obtained at the conclusion of their course of theological study, the object being to enable the presbytery to ensure that the applicant is a fit and proper person to proceed to the ministry.

[84] It is important then, in the context of this case, to appreciate that the method of appointing a person who has been licensed to a charge as an associate minister differs from that which applies in the case of the settlement in a parochial charge of a minister. The right to elect and call a minister belongs to the congregation whenever there is a vacancy which the presbytery decides should be filled. If it is not exercised within six months the right to call the minister to the charge passes to the presbytery. The Parish Reappraisal Committee has to agree that the vacancy should be filled, but it plays no part in that selection process. The role that it plays in the selection and appointment of associate ministers is quite different. These matters are handled centrally by the Committee through the offices of the Board of National Mission in Edinburgh.

[85] That, in brief, is the background to the issues raised by this appeal. A more complete description is to be found in the title on Churches and other Religious Bodies in 3 *Stair Memorial Encyclopaedia*: see especially paras 1506–1573.

[86] One other point must be mentioned. In *Scottish Insurance Comrs v Church of Scotland* 1914 SC 16, it was held that assistant ministers were not employed persons within the meaning of Pt I of the National Insurance Act 1911 because they were persons holding an ecclesiastical office who performed the duties of that office subject to the laws of the church to which they belonged and were not subject to the control and direction of any particular master. So they did not satisfy the conditions of Pt I of the First Schedule to the 1911 Act as they were not employed under 'any contract of service' (see s 1(2) and Pt I(a) of the First Schedule). Their position was contrasted with that of lay missionaries, who enjoyed no ecclesiastical status, had no relation to the presbytery and were under the control of the minister. As Lord Kinnear explained (at 23–24):

> 'The probationers who are appointed to the position of assistant ministers are students of divinity who have obtained a licence to preach from the presbytery . . . Now, we are told in this case what the terms of the licence are. The licence bears that the presbytery licences the person named to preach the Gospel of Christ and to exercise his gifts as a probationer for the holy ministry. When a person so licensed is appointed to be assistant to a minister, I think that his authority to perform the duties that belong to that office does not arise from any contract between himself and the minister, or himself and the kirk-session or anybody else, but arises from the licence given to him by the presbytery to exercise his gifts. He is, therefore, in my opinion a person who is in no sense performing duties fixed and defined by a contract of service.'

[87] The holding of an office and being an employee are not necessarily inconsistent with each other, as my noble and learned friend Lord Nicholls of Birkenhead has explained. This is because it is possible to conceive of the existence of a contract which sets out the duties that are to be performed by the holder of an office which could lead to the conclusion that the office holder was an employee. But the reasoning which led to the decision in *Scottish Insurance Comrs v Church of Scotland* was not called into question during the hearing before your Lordships. The argument proceeded on the basis that

the decision in that case was well founded and that it would have to be distinguished if the appellant was to succeed in her appeal.

THE ISSUES

[88] As I have just said, Miss O'Brien QC for the appellant did not seek to question Lord Kinnear's analysis. She accepted that the appellant could not claim compensation for unfair dismissal because there was no contract of service or apprenticeship in her case within the meaning of s 230(2) of the Employment Rights Act 1996. Her case however is that the position in discrimination cases is different, and that the First Division of the Court of Session (the Lord President (Lord Rodger of Earlsferry), Lord Cameron of Lochbroom and Lord Caplan) were wrong to affirm the decision of the Employment Appeal Tribunal that her claim for unlawful sex discrimination fell outside the jurisdiction given to the employment tribunal by s 63(1) of the Sex Discrimination Act 1975.

[89] Section 63(1) of the 1975 Act confers jurisdiction on an employment tribunal to hear and dispose of a complaint that a person has committed an act of discrimination against the complainant which is unlawful by virtue of Pt II of the Act, which deals with discrimination in the field of employment. Section 82(1) provides that 'employment' for the purposes of the 1975 Act means 'employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly'. Miss O'Brien contended that in this case there was a contract between the appellant and the Board of Mission under which she had contracted personally to execute work or labour as an associate minister.

[90] She accepted however that there was a further point that had to be addressed, namely whether the jurisdiction of the employment tribunal was excluded by s 3 of the 1921 Act on the ground that the issue which the appellant wished to raise was within the sphere of the Church's spiritual government and jurisdiction in terms of art IV of the declaratory articles. Section 3 provides that nothing in that Act shall affect or prejudice the jurisdiction of the civil courts in relation to a matter of a civil nature, subject however to the recognition of the matters dealt with in the declaratory articles as matters spiritual.

[91] Article IV can be divided for convenience into two parts. The first part contains a declaration of the right of the Church to adjudicate finally in all matters of doctrine, worship, government and discipline. It provides:

> 'This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning the membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers . . .'

The second part contains an assertion that the civil authority has no right of interference in the proceedings and judgments of the Church within the sphere of its spiritual government and jurisdiction. It provides:

> '. . . Recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever

manner such recognition be expressed, does not in any way affect the character of this government and jurisdiction as derived from the Divine Head of the Church alone, or give to the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction.'

[92] The question that has to be addressed with reference to the 1921 Act therefore is whether the claim which the appellant wishes to present to the employment tribunal is a claim of a civil nature or falls within the sphere of the Church's spiritual government.

THE FACTS

[93] It is time now to set out the facts which have given rise to the issues raised by this appeal. They have already been referred to by my noble and learned friend Lord Hoffmann, but I have the misfortune to differ from him as to how the appeal should be disposed of. So I should like to set out the facts that I consider to be relevant in my own way.

[94] In 1993 a vacancy arose in the charge of Airlie linked with Kingoldrum linked with Ruthven. A meeting took place between the office-bearers of those congregations and those of the neighbouring charge of Glenisla linked with Kilry linked with Lintrathen. It was proposed that Airlie, Ruthven and Kingoldrum should unite and that the united congregation should be linked to Glenisla linked with Kilry linked with Lintrathen. This proposal was referred to the Presbytery of Angus, which in its turn asked the respondent's Parish Reappraisal Committee to approve of the appointment of an associate minister to the linked charge to assist the minister of the parish for a five-year period. On 21 September 1993 the Parish Reappraisal Committee agreed to this appointment. On 9 February 1994 the Committee approved the basis of union of the congregations of Airlie, Ruthven and Kingoldrum and the basis of linking of the charges of Airlie, Ruthven and Kingoldrum and Glenisla linked with Kilry linked with Lintrathen. The basis of linking provided among other things for the appointment of an associate minister to assist the minister and to act as chaplain at HM Prison Noranside, subject to the approval of the Joint Prison Chaplaincy Board.

[95] Meantime steps were being put in hand for the appointment of the associate minister. On 11 January 1994 the Rev Douglas Nicol, the Department of Mission's General Secretary, sent drafts of an information sheet and a document setting out the terms and conditions of the appointment to the minister of the parish, the Rev Robert Ramsay, for his approval. He told the minister that he was arranging to have the appointment advertised at a later date in certain newspapers and that the Parish Reappraisal Committee had decided to adhere to the custom of inviting the parish minister and a representative of the presbytery to serve on the appointments committee. On 18 January 1994 the Rev Ramsay wrote back saying that he had no comments to make on the drafts. On 1 February 1994 the Presbytery of Angus appointed its depute clerk to represent the presbytery on the appointments committee. The advertisements which were placed on 24 February 1994 in the newspapers asked for expressions of interest from ministers and probationers to be addressed to the Department of National Mission's General Secretary.

[96] The appellant, who was ordained in 1991 and had already served for three years in the ministry, responded to the advertisement. On 20 April 1994 the

Rev Nicol spoke to her on the telephone. He invited her to accept the appointment of associate minister. On 22 April 1994 he wrote to her confirming this invitation and enclosing for her information a copy of the terms and conditions of the appointment. On 26 April 1994 the appellant wrote to the Rev Nicol to give formal acceptance of the offer that he had made to her. On 17 May 1994 the Joint Prison Chaplaincies Board agreed to recommend her appointment to serve as chaplain to the prison at Noranside with effect from 20 June 1994. She was introduced as associate minister at the service of linking of Airlie, Ruthven and Kingoldrum with Glenisla linked with Kilry linked with Lintrathen which was held at Kilry Church on 19 June 1994.

[97] Among the terms and conditions of appointment, which stated that the appointment was to be for a period of five years, were the following:

> '3. Salary: Minimum stipend shall be paid centrally from the resources of the Board of National Mission. For the purposes of National Insurance and Retirement Pension and related payments including travelling expenses the appointment shall be considered the equivalent of a charge and these costs shall be paid from the same source. A manse will be supplied.
>
> 4. Supervision: The Associate Minister shall, as any other Minister, be responsible to the Presbytery in matters affecting life, doctrine or discipline, and shall have a seat in Presbytery. The Associate Minister will be expected to take due part in the affairs of the Presbytery in terms of Act II (1970). The Presbytery shall appoint a Support Committee to consult with the Parish Minister and Associate regularly, and to assist in the appointment . . .
>
> 6. Aims and Duties:
>
> The Associate Minister will be expected to work in the following areas of service:
>
> (i) Assisting the Minister of the parish
>
> The Associate Minister would be expected to conduct worship every Sunday and working with the Parish Minister would be expected to assist in increasing the involvement and participation of all members in the united charge.
>
> (ii) As Chaplain to H.M. Prison, Noranside
>
> This is a 9 hour commitment per week to chaplaincy responsibilities within the prison . . .
>
> 8. Pulpit Supply: The Associate shall not without the prior consent of the Parish Minister agree to conduct public worship outwith the charge. Any fees arising from such occasional supply shall be set against the cost of funding the Associateship and shall not be deemed income for tax purposes.
>
> 9. Chaplaincy Payments: Any payments made by virtue of Chaplaincy work shall be set against the cost of funding, excepting payments made during the six weeks of the Associate Minister's holiday entitlement. Such payments shall be made to whoever provides holiday cover for Chaplaincy work for the Associate Minister.'

[98] In June 1997 an allegation of improper conduct was made against the appellant. The facts have yet to be determined, and I prefer not to say anything about the circumstances that gave rise to it. On 16 June 1997 the appellant wrote to the Rev Nicol at the Department of National Mission asking him to accept her resignation from her associateship. Her resignation was accepted by the Committee on Parish Reappraisal of the Board of National Mission on 17 June

1997. On 20 June 1997 the Rev Nicol wrote to the appellant on the committee's behalf enclosing an ex gratia payment which had been made to her by the committee for the period after the date of its acceptance of her resignation. On 23 June 1997 the appellant wrote to the Rev Nicol telling him that she had had time to seek legal advice, that her solicitor had withdrawn her resignation from the presbytery and that he had told her to withdraw her resignation from employment by the Department of National Mission.

[**99**] On 1 July 1997 the Rev Nicol replied to the appellant's letter of 23 June 1997 in these terms:

> 'I write further to my letter of 25 June 1997 to respond to your request to withdraw your letter of resignation from employment by the Department of National Mission. In doing so I also acknowledge receipt of your letter with the returned cheque and medical line which arrived at our office on 30 June 1997.
>
> While not accepting that there is any legal obligation on the Board to permit you to withdraw your resignation we have noted the advice that you had been given that you had been "over hasty" in submitting the letter. In the light of that we agree to reinstate your employment from 17 June 1997.
>
> In view of the fact, however, that the Presbytery of Angus has appointed a Committee on Enquiry to investigate claims made against you I have to intimate that from 25 June 1997 until further notice you are suspended from duty on full salary. This means that you cannot perform duties as Associate Minister nor as Chaplain to Noranside Prison.'

On 2 December 1997 the Presbytery of Angus accepted an offer by the appellant to demit her status to seek appropriate counselling. It decided to conclude its investigation into the allegations that had been made against her.

[**100**] On 17 February 1998 the appellant applied to an employment tribunal complaining of unfair dismissal and discrimination under the 1975 Act. Her complaint of discrimination was in these terms:

> '. . . the respondents have discriminated against the applicant in terms of s 6 of the Sex Discrimination Act 1975. The allegations made against the applicant are similar to allegations of misconduct which have been brought to the attention of the respondent in respect of a number of other employees of theirs. The respondents have not taken similar action against male ministers who are known to have had/are still having extra marital sexual relationships. In the circumstances the applicant has been treated differently from male colleagues on the basis of her gender and has been unlawfully discriminated against. If the applicant had been treated on a similar basis to her male colleagues she would still be in employment with the respondents.'

On 16 March 1998 the respondents entered a notice of appearance in response to her complaint in which they submitted that the matters raised by the applicant fell outside the jurisdiction of the civil courts and that the application was incompetent. They also denied that the applicant was an employee of theirs or that there was any intention to enter into such a contract, as her appointment was as the holder of an office and it had been made by the Parish Reappraisal Committee in pursuance of the Church's exclusive jurisdiction in terms of art IV of the declaratory articles.

THE STARTING POINT

[101] Miss O'Brien accepted, as I have said, that the appellant did not have a contract of employment within the meaning of s 230(2) of the 1996 Act as her contract was not one of service or apprenticeship. Her argument was that she had a contract of 'employment' within the meaning of s 82(1) of the 1975 Act because she had entered into a contract personally with the respondents to execute work and labour in the parish as an associate minister. In the Court of Session the Lord President acknowledged (2001 SC 757 at 763) that there were differences between the offices of a parish minister and an associate minister, perhaps the starkest of which lay in the way in which a minister enters into the two offices. He said that it should not too readily be assumed that the two positions fell to be treated in the same way for present purposes:

> 'More particularly, the fact that a parish minister holds a public office and is not "employed" by anyone does not necessarily justify the conclusion that an associate minister is likewise not "employed" by the respondents who appoint her.'

[102] Rejecting the argument that the agreement between the appellant and the respondents comprised a contract of employment for the purposes of the 1975 Act, however, the Lord President said (at 763) that properly construed the agreement was one for the appellant to perform the duties of a minister of the Church along with the parish minister in the new charge. Such duties were, in their very essence, spiritual. It was entirely possible for someone who was employed as a servant or as an independent contractor to carry out spiritual duties. But he would, as he explained (at 765)—

> 'start from the presumption—rebuttable, of course—that, where the appointment was being made to a recognised form of ministry within the Church and where the duties of that ministry would be essentially spiritual, there would be no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law.'

[103] It will be appreciated at once that this approach was strongly influenced by the Lord President's appreciation of the context in which the agreement was entered into. As he went on to say (at 765), in another context the formality of the documents might readily support the inference that the appellant sought to draw from them. The procedures of the Church courts were replete with terminology which was familiar to practitioners of Scots law. None the less, despite their appearance, the laws of the Church operated only within the Church and the formality of the documents did not disclose an intention to create relationships under the civil law which would be enforceable in the civil courts. The Lord President also drew upon the way in which similar questions had been dealt with in the English authorities.

[104] In *Re National Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563 at 568–569 Parker J said that the position of an assistant curate was not in the position of a person whose rights and duties were defined by contract at all. In *President of the Methodist Conference v Parfitt* [1983] 3 All ER 747 at 752, [1984] QB 368 at 376 Dillon LJ said that he had no hesitation in concluding that the relationship between a church and a minister of religion was not apt, in the absence of clear indications to the contrary in the document, to be regulated by a contract of service. In *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705 at 710, [1986] ICR 280 at 290 Lord Templeman said that duties owed

by the church to the pastor were not contractual. In *Diocese of Southwark v Coker* [1998] ICR 140 at 147 Mummery LJ summarised the position in this way:

> 'Although not explicitly analysed in these terms in the authorities, the simple reason, in my view, for the absence of a contract between the church and a minister of religion is the lack of an intention to create a contractual relationship. If that is so, then it is unnecessary to ask whether the contract is one of service or some other kind of contract . . . In my judgment, the legal position is as follows.
>
> (1) Not every agreement constitutes a binding contract. Offer, acceptance and consideration must be accompanied by an intention to create a contractual relationship giving rise to legally enforceable obligations.
>
> (2) That intention is to be objectively ascertained. In the case of an ordinary commercial transaction, it will be for the person who contends that there was no contract to establish that the intention to create a binding contract has been negatived.
>
> (3) In some cases, however, there is no contract, unless it is positively established by the person contending for a contract that there was an intention to create a binding contractual relationship. This is such a case. Special features of the appointment and the removal of a Church of England priest as an assistant curate and the source and scope of his duties preclude the creation of a contract, unless a clear intention to the contrary is expressed.'

[105] In *Diocese of Southwark v Coker* the applicant held a stipendiary position as an assistant curate. His complaint was that he had been unfairly dismissed. Mummery LJ said that the legal implications of the appointment of an assistant curate had to be considered in the context of the pre-existing legal framework of a church, an ecclesiastical hierarchy established by law, of spiritual duties defined by public law rather than by public contract and of ecclesiastical courts with jurisdiction over discipline of the clergy. In that context, the law required clear evidence of an intention to create a contractual relationship in addition to the pre-existing framework. The Lord President based himself on these observations when he said (2001 SC 757 at 765) that he would start with the presumption—rebuttable, of course—that, where the appointment was to a recognised form of ministry within the Church and where the duties of that ministry were essentially spiritual, there would be no intention that the arrangements with the minister would give rise to obligations enforceable in civil law.

[106] This case, however, is not a case about unfair dismissal. It is a case about discrimination on the ground of sex. It is a fundamental rule of sex discrimination law that it is not possible to contract out of it. This rule finds its expression in s 77 of the 1975 Act: see also s 72 of the Race Relations Act 1976. Section 77(1)(c) of the 1975 Act provides that a term of a contract is void where it provides for the doing of an act which would be rendered unlawful by that Act. Section 77(3) states that a term in a contract which purports to exclude or limit any provision of the Act is unenforceable by any person in whose favour the terms would operate apart from that subsection. Section 6(2)(b) of the Act provides that it is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her by dismissing her, or subjecting her to any other detriment. The terms and conditions of the

appellant's appointment did not, of course, contain a provision stating in so many words that the provisions of the 1975 Act did not apply to her appointment. But if it had done, the provision would have been unenforceable by the respondents.

[107] By invoking the proposition that it must be positively established that there was an intention to create a binding contractual relationship enforceable in civil law—that there is a presumption that there was no such intention, in other words—the respondents are seeking to achieve the same result by another route. Miss O'Brien indicated that she wished to lead evidence from the appellant that it was her intention to enter into such a relationship. But the parties' intention when they entered into the agreement can only be established objectively, as Mummery LJ observed in *Diocese of Southwark v Coker* [1998] ICR 140 at 147—by clear indications of a contrary indication in the document, as Dillon LJ said in *President of the Methodist Conference v Parfitt* [1983] 3 All ER 747 at 752, [1984] QB 368 at 376. There is ample authority in Scots law too for the proposition that, as a general rule, extrinsic evidence of the parties' intention as to whether or not they intended to be bound by obligations which they have entered into in writing is inadmissible (see Bell *Commentaries* vol I, p 457; *Stewart v Kennedy* (1890) 17 R (HL) 25 at 30 per Lord Watson). The only way the presumption could have been rebutted therefore, according to this argument, would have been by including an express term in the agreement that it was intended to give rise to obligations enforceable in civil law.

[108] This would, in effect, be placing the onus on the appellant to ask for the inclusion of a term in the agreement that the provisions about discrimination in the employment field in Pt II of the 1975 Act were to apply to it. Since both sides would have to agree to its inclusion, the respondents would be in the position of having a veto in response to her request. This is so contrary to the approach that must be taken to the effect of contracts in the field of employment in discrimination cases that a fresh approach to the problems raised by this case seems to me to be unavoidable. In my opinion it is necessary to treat the question whether this is a case of 'employment' within the meaning of s 82(1) of the 1975 Act ('the contract issue') as a separate issue from the question whether, assuming that this is a case of 'employment' as so defined, the appellant's complaint is excluded from the jurisdiction of the civil courts because it is a matter spiritual within the meaning of art IV of the declaratory articles ('the jurisdiction issue').

THE CONTRACT ISSUE

[109] According to *Stair*'s classification, the law of contract belongs to the law of obligations. An obligation is a legal tie, whereby the debtor may be obliged to pay or perform something by his own consent and engagement (see Stair *Institutions of the Law of Scotland*, Vol I, pp 1, 22). As Gloag *The Law of Contract* (2nd edn, 1929) p 8 puts it, a contract is an agreement constituted by an offer and an acceptance which creates, or is intended to create, a legal obligation between the parties to it. The agreement must, as Gloag accepts later on the same page, be concerned with matters of which the courts will take cognisance. An agreement for purely social purposes is not capable of being enforced by any legal process. As a general rule, where the agreement is with a voluntary association such as a church, some patrimonial interest must be involved before a court will accept that it has jurisdiction to enforce it. Where there is such an interest, the court will provide a legal remedy. Two cases mentioned by Gloag (at pp 9–10) illustrate this distinction.

[110] In *McMillan v Free Church of Scotland* (1861) 23 D 1314, a clergyman complained of the loss of his benefice. It was held that a patrimonial interest was involved and that the court would protect it. Lord President McNeill said (at 1329) that, while the court might not have the power to restore the pursuer to the ministry, it did not follow that he was unable to prosecute his civil rights and interests, whatever they might be. In *Forbes v Eden* (1865) 4 M 143, affirmed (1867) 5 M (HL) 36, on the other hand the contrary view was taken where [the] clergyman's complaint was merely of a change in the doctrinal standards of the church and not that he had been deprived of his status as a minister. But Inglis LJ-C's observation ((1865) 4 M 143 at 157) that the possession of a particular status, meaning by that term the capacity to perform certain functions or to hold certain offices, is a thing which the law recognises as a patrimonial interest, and that no one could be deprived of its possession by the unlawful act of another without having a legal remedy was approved by Lord Chancellor Chelmsford in the House of Lords ((1867) 5 M (HL) 36 at 47).

[111] It is worth noting, too, Lord McLaren's observation in *Skerret v Oliver* (1896) 23 R 468 at 491, that it is indisputable that the governing bodies of voluntary churches or religious associations are responsible for non-fulfilment of their obligations towards their members in the same degree as the directors of associations constituted on a secular basis are responsible. His use of the word 'voluntary' was no doubt chosen to distinguish the situation in that case, which arose from the suspension of the pursuer from his office as a licentiate of the United Presbyterian Church (for having met privately and walked with a member of his congregation who was a young lady), from that of the Church of Scotland, the established church, whose position is regulated by statute. But the point that he was making is relevant to this part of the appellant's argument. In the same case Lord President Robertson repeated (at 490) the point made in the earlier cases that courts of law take no concern with the resolutions of voluntary associations except in so far as they affect civil rights, but that if there is a claim for an invasion of patrimonial rights the court will provide a remedy.

[112] I turn then to the agreement which the appellant and the respondents entered into, taking that background as my starting point. That there was an agreement there is no doubt. The respondents made an offer to the appellant of appointment as an associate minister on the terms and conditions which had been sent to her on 22 April 1994, and by her letter of 26 April 1994 she accepted it. There can be no doubt either that a patrimonial interest was involved in this case. The appointment was to a position which would entitle the appellant to a salary, to reimbursement of her travelling expenses and to a manse for her to occupy: see condition 3. She was to be entitled to the status of an associate minister, with a seat on the presbytery: see condition 4. Payments made to her for conducting worship outwith the charge and for her chaplaincy work were to be set against the cost to the respondents of funding the associateship: see conditions 8 and 9. I leave aside for the moment all questions as to whether, having regard to its subject matter, the agreement was so exclusively concerned with matters spiritual that it would be contrary to s 3 of the 1921 Act for the civil courts to seek to exercise jurisdiction over it. Looking for the moment only at the agreement, it seems to me that it has all the ingredients that would be needed for it to be treated by the courts as intended to create legal obligations between the parties and enforceable in the event of a breach of it so as to provide, in the words of Inglis LC-J in *Forbes v Eden* (1865) 4 M 143 at 157, a legal remedy.

[113] Then there is the question whether the position which the appellant was to enjoy under it was 'employment' within the meaning of s 82(1) of the 1975 Act. This is, of course, a different question than that which has to be answered in unfair dismissal cases. We are not looking to see whether there was a contract of service here, but whether this was a contract under which the appellant undertook personally to execute any work or labour. To fall within this definition there first needs to be a contract of some sort. The agreement must be looked at as a whole and, if the contract is not one of service, the obligation by a contracting party must be an obligation personally to carry out work or labour. And the personal obligation to execute work or labour must be the dominant purpose of the contract (see *Gunning v Mirror Group Newspapers Ltd* [1986] 1 All ER 385 at 388, 393, [1986] ICR 145 at 150, 156 per Oliver LJ; *Patterson v Legal Services Commission* [2003] EWCA Civ 1558 at [21], [2004] IRLR 153 at [21], [2004] ICR 312 per Clarke LJ; *Mingeley v Pennock and Ivory (t/a Amber Cars)* [2004] EWCA Civ 328, [2004] IRLR 373, [2004] ICR 727).

[114] Here too the terms and conditions seem to me to provide what is needed for this definition to be satisfied. Under the heading 'aims and duties', condition 6 states that areas of service in which the associate minister was to be expected to work were assisting the minister of the parish and as chaplain to the prison at Noranside. This was what the appellant was to do in return for the payment of her salary and the other benefits which were to go with her status as an associate minister. By accepting this offer she undertook by her contract to work as an associate minister on the terms and conditions on which the post had been offered to her. Of course it can be said, as Lord Hoffmann points out, that the duties which she was to perform were the duties of an office. But they were duties which she was bound by her contract with [the] respondents to perform. In order to perform them she required to execute work and labour. The dominant purpose of the contract was to secure her appointment to the office so that she could perform those duties personally in the parish as its associate minister. In return the contract gave her a right to enforce the respondents' undertaking to provide her with her salary and the other benefits.

[115] I would hold, in agreement with Lord Nicholls, that these aspects of the agreement were sufficient to bring it within the scope of the protection that the 1975 Act gives to those whose work is in the field of employment. The respondents' response in their letter of 1 July 1997 to the appellant's request on 16 June 1997 to withdraw her letter of resignation, when they agreed to reinstate 'your employment' is entirely consistent with this analysis.

[116] Before I leave this part of the case however I wish to make it clear that in my opinion the contract which the appellant entered into was a contract with the respondents, the Church of Scotland Board of National Mission, and not with the Angus Presbytery. The distinction between these two emanations of the Church is a vitally important one for present purposes. Miss O'Brien said several times that the appellant's complaint was directed at the Church as a whole, not at any particular part of it. That indeed is how the complaint was presented in her application on Form IT1, where the name of the employer is given as 'The Church of Scotland'. But I do not think that this broad approach can be right.

[117] The Church is not a body that has been incorporated by statute. It has, of course, its own distinctive identity and its own constitution, the lawfulness of which was declared by the 1921 Act. But its status in law is that of a voluntary

association, of which its adherents, whether they be elders, communicants or baptised persons, are all members. As such, it does not have the capacity in its own name to own any property, whether heritable or moveable, or to enter into contracts in its own name. It conducts its operations through a variety of other means. Its properties and endowments are vested in the Church of Scotland General Trustees, which were incorporated as a body corporate by the Church of Scotland (General Trustees) Order Confirmation Act 1921. In matters spiritual it handles its affairs in the manner set forth in the declaratory articles. But it also has to deal with matters which are within the jurisdiction of the civil courts. How it chooses to do this is, of course, a matter for the Church itself to decide. The practice has always been for the court to give effect to the choice that a voluntary association makes as to the body in whose name it enters into agreements: see MacLaren *Court of Session Practice* p 253 and the many authorities there cited. Examples of how the Church of Scotland may sue and be sued are given at p 251. In each case, whether it be in the name of the General Assembly, or kirk sessions or presbyteries, it is the bodies in whose name the matter at issue has been conducted that determines the body that is to sue or be sued in respect of it.

[118] The Church has delegated to the respondents, the Board of National Mission, with their constituent committees the responsibility for planning and co-ordinating the Church's strategy and provision for the fulfilment of its mission as the National Church. It was in the discharge of that remit that the respondents assumed the responsibility for the recruitment and appointment of the appellant as an associate minister to assist the minister of the linked charge. It was with the respondents that her contract was entered into. In my opinion it is to the actings of the respondents in the performance of that contract that her complaint of discrimination must be directed.

THE JURISDICTION ISSUE

[119] As the Lord President recognised (2001 SC 757 at 768) the 1975 Act contains no section which specifically disapplies it in the case of the Church of Scotland, nor is it disapplied in the case of churches generally. On the contrary, s 19(1) provides that nothing in Pt II of the Act applies to employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers. I respectfully agree with his conclusion (at 769) that this provision shows that the relevant provisions of the 1975 Act do indeed apply to a religious body such as the Church of Scotland, which has no such limitation on employment to one sex. The Act anent Admission of Women to the Ministry of 22 May 1968 provides that women are eligible for ordination to the ministry on the same terms and conditions as are applicable to men. In any event contracts of employment are entered into on behalf of the Church with many people outside the ministry, in whose case it will without doubt be bound by the 1975 Act. In *Hastie v McMurtrie* (1889) 16 R 715, for example, the pursuer had been appointed a foreign missionary of the Church of Scotland in India. He was held that he had not been appointed to an office in the church but had an ordinary contract of service which was terminable by notice in the usual way.

[120] The Lord President said (2001 SC 757 at 769) that in reality the respondents' argument was not so much concerned with the application of the 1975 Act as with the interplay between that Act and the 1921 Act. That too seems to me to be so. It is right too to note his observation (at 769–770) that,

without deciding the point, he saw force in the argument that, if the appellant and the respondents had indeed entered into a contract of employment binding under the civil law, then they would have deliberately left the sphere of matters spiritual in which the courts of the Church had jurisdiction and would have put themselves within the jurisdiction of the civil courts. This demonstrates, in view of the conclusion that I have already reached on the contract issue, how narrow this issue has now become.

[121] The Lord President's observation was, of course, made against the background of the view that he had already expressed (at 765) that there was a presumption that, where the appointment was made to a recognised form of ministry within the Church and where the duties of that ministry were essentially spiritual, there was no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law. For the reasons already given, however, I do not share the view that there is such a presumption. If anything, I would hold that, especially in the sex discrimination field where contracting out is not permitted, the presumption is the other way. But I would rather not proceed on the basis that the issue can be solved by the application of a presumption which assumes that if the parties had thought about it at the time they were entering into their contract they would have dealt with the issue expressly in their contract. As the Lord President said (at 769), it is the interplay between the 1975 Act and the 1921 Act that lies at the heart of the question.

[122] This brings me to the Equal Treatment Directive (Council Directive (EC) 76/207 (on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) (OJ 1976 L39 p 40)) of 9 February 1976 which, although it was adopted after the 1975 Act, sets out the Community principle of equal treatment and the way it is to be put into effect in the member states which the 1975 Act is taken as having implemented. The 1975 Act is, as it was put in *Alabaster v Barclays Bank plc* [2005] EWCA Civ 508 at [36], [2005] IRLR 576 at [36], [2005] ICR 1246, Parliament's chosen vehicle for remedying unfairness in terms and conditions of employment on grounds of sex. Article 1.1 of the Directive states:

> 'The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".'

Article 5.1 provides:

> 'Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

Article 6 provides:

> 'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within

a the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.'

[123] In the Report of the Committee on Commissions (Bills and Overtures) to the General Assembly of May 2002, in which the instruction of the General Assembly was sought to transmit the appellant's complaint of discrimination to a b Special Commission to determine the issues raised by it, it was stated:

> 'The Church being committed to gender equality and the protection of its ministers from discrimination on grounds of sex, the Special Commission should give due consideration to the principles contained in the Sex Discrimination Act 1975, whilst recognising that because of the exclusive c jurisdiction of the courts of the Church to legislate and adjudicate finally in all matters of doctrine, worship, government and discipline in the Church, the Act does not form part of the law of the Church.'

The Church's position could not have been put more bluntly. There is, as one d would expect, an unequivocal commitment to the principle of equal treatment. But there is an assertion that the 1975 Act does not form part of the law of the Church, as it claims exclusive jurisdiction in all matters of doctrine, worship, government and—as is especially important in this case—discipline. It is not difficult to see the potential for conflict between this position and art 6 of the Directive which provides that the member states shall introduce into their e national legal systems such measures as are necessary to enable persons who consider themselves wronged by a failure to comply with the principle to pursue their claims by judicial process.

[124] The Directive cannot, of course, be relied on directly against the respondents. It does not have direct effect: *Marshall v Southampton and South West* f *Hampshire Area Health Authority (Teaching)* Case 152/84 [1986] 2 All ER 584 at 600, [1986] QB 401 at 422 (para 48). But the court, when it is called upon to interpret national law 'is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 98 of the Treaty [now art 249 EC]' (see *Marleasing SA v La Comercial Internacional de AlimentacionSA* Case C-106/89 [1990] g ECR I-4135 at 4159 (para 8)). The important and difficult question is whether s 3 of the 1921 Act together with art IV of the declaratory articles must now be read in accordance with the *Marleasing* principle as permitting an employment tribunal to exercise the jurisdiction that has been given to it by s 63(1) of the 1975 Act in the appellant's case. The Lord President said (2001 SC 757 at 770) that he found it h unnecessary to determine this question. On my approach to this case there is no escape from it. But it is first necessary, as Mr Napier QC who developed this part of the appellant's case recognised, to address the question whether the Equal Treatment Directive applies to the appellant's complaint.

[125] Mr Napier submitted that the principle of equal treatment in terms of j art 5 of the Equal Treatment Directive extended to the 'working conditions' which are available to men and women generally, and that it was not restricted to any particular kind of contractual relationship. The essence of his argument is to be found in Cox J's observation in *Fletcher v Blackpool Fylde & Wyre Hospitals NHS Trust* [2005] IRLR 689 at [56], sub nom *Fletcher v NHS Pensions Agency* [2005] ICR 1458 where she said:

'. . . The Directive, like so many EU Instruments, is broadly drafted and is to be broadly interpreted, having regard to its central purpose of ensuring equal treatment for men and women as regards their working conditions . . .' a

[126] In *Lawrie-Blum v Land Baden-Württemberg* [1987] ICR 483 at 488, [1986] ECR 2121 at 2144 (para 15), the court said that the criterion for the application of art 48 of the Treaty as to the free movement of persons (now art 39 EC) was the existence of an employment relationship. In para 17 it said that the concept of 'worker' for the purposes of that article must be defined in accordance with the objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned, and that the essential feature of an employment relationship was that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. The same approach to the meaning of this word in Community law has been taken in the context of equal pay cases under art 141(1) EC: see *Allonby v Accrington and Rossendale College* Case C-256/01 [2005] All ER (EC) 289 at 302, [2004] ICR 1328 at 1357 (para 43). b c

[127] Mr Napier submitted that a broader approach was being taken in cases under the Equal Treatment Directive than had been done in the cases about equal pay. I do not find it difficult to apply that definition of the expression 'worker' for the purposes of equal pay to the appellant's case. It is true that she was not being asked to work for or under the direction of the respondents. She was being asked to work for and under the direction of the parish minister, her duties in this regard being essentially spiritual ones. But this was a requirement of her contract with the respondents in return for which she was entitled to receive from them her salary and other benefits. I do accept Mr Napier's point however that [in] the context of the Equal Treatment Directive a broad view is taken and that the issue is not resolved by making distinctions which are purely technical. In *Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865, [1999] ICR 100 the protection of the Directive was extended to a refusal by an employer to provide references after the end of the employment relationship, on the ground that fear that discriminatory measures might be taken against them against which no legal remedy was available would be liable seriously to jeopardise implementation of the aim pursued by the Directive (see [1998] All ER (EC) 865 at 877, [1999] ICR 100 at 113 (para 24)). In *Wippel v Peek & Cloppenburg GmbH & Co KG* Case C-313/02 [2005] IRLR 211 the court held that the Directive applied to a worker whose hours of working and the organisation of whose work were dependent upon the quantity of available work and were determined only on a case-by-case basis by agreement between the parties. d e f g h

[128] The most significant feature of the Equal Treatment Directive for present purposes, however, is the absence of any indication that it was the intention to exclude from its protection any class or category of worker by reference to the occupation or profession on which they were engaged. Article 2.2 provides that the Directive is without prejudice to the right of member states to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor. Section 19(2) of the 1975 Act provides an example of a situation in the case of religious bodies where it was appropriate to exclude the application of the Directive. For the rest, the wording of the j

Directive indicates that the principle of equal treatment with regard to working conditions is of general application, to all men and to all women. The court should not be astute to look for a qualification on this generality which the Directive itself does not provide for. A derogation from art 2.4, for example, must be interpreted strictly (see *Kalanke v Freie Hansestadt Bremen* Case C-450/93 [1996] All ER (EC) 66 at 83, [1996] ICR 314 at 332 (para 21)).

[129] Why then should a person who is employed to work as an associate minister be excluded from the scope of the Directive? The position which she occupied can of course be said to be that of an ecclesiastical office holder (see *Scottish Insurance Comrs v Church of Scotland* 1914 SC 16 at 23–24 per Lord Kinnear; *Re National Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563 at 568 per Parker J). But, as Slynn J said in *Hugh-Jones v St John's College, Cambridge* [1979] ICR 848 at 852, an office holder can agree to execute work or labour. It is not the fact that the appellant held an ecclesiastical office that is determinative for present purposes. It is the fact that she undertook to perform services for another in return for remuneration that brings her within the description of a 'worker', with the result that the conditions under which she agreed to do so were 'working conditions', that brings her within the scope of the Directive.

[130] Given then that she is within its scope, how are the 1975 Act and the 1921 Act to be reconciled? It should be noted that, as Lord Keith of Kinkel pointed out in *Webb v EMO Air Cargo (UK) Ltd* [1992] 4 All ER 929 at 939, [1993] ICR 175 at 186, the *Marleasing* principle applies whether the domestic legislation came after or preceded the Directive (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 [1990] ECR I-4135 at 4159 (para 8)). So the fact that the 1921 Act was enacted long before the adoption of the Equal Treatment Directive does not relieve the court from its obligation to construe that Act as far as possible in order to achieve the result pursued by the Directive. It is worth noting too that the 1921 Act was enacted long before it was recognised that women had a fundamental right not to be discriminated against on grounds of sex.

[131] Great care must, of course, be taken to respect the Church's right to exclusive jurisdiction in all matters spiritual as defined in art IV of the declaratory articles. The principle of subsidiarity which is enshrined in art 5 EC encourages respect for the constitutional and religious traditions of member states. Religious traditions are part of the cultural heritage of Europe, and it can be taken to be a principle of European Community law that action to intrude upon those traditions will only be taken at Community level where the aims to be pursued cannot be achieved at the level of member states. The principle of equality which lies at the heart of the Equal Treatment Directive is of general application, however. The only concession that it makes to the need to restrict its application is that stated in art 2.2, where the sex of the worker constitutes a determining factor in the occupational activity. The Church of Scotland does not need to invoke that restriction, as the rule since 1968 has been that women are eligible to ordination on the same terms and conditions as are applicable to men.

[132] The critical words in art IV are those where it refers to 'all matters of doctrine, worship, government, and discipline in the Church' and to 'all questions concerning membership and office in the Church'. A claim of unlawful discrimination in the employment field has nothing to do with matters of doctrine, worship or government or with membership in the Church. But it may

have something to do with the way that discipline is exercised, and it may also have something to do with the way a person is deprived of an office in the Church. As the Report of the Committee on Commissions (Bills and Overtures) to the General Assembly of May 2002 shows, the Church accepts the principle of equal treatment but claims exclusive jurisdiction to deal with the appellant's claim that she has been wronged by the respondent's failure to apply that principle to her. I do not think that this claim goes far enough. The solution that it offers falls short of what art 6 of the Directive requires—the introduction into the domestic system of such measures as are necessary to enable such persons to pursue their claims by judicial process after possible recourse to other competent authorities.

[133] Article IV of the declaratory articles is sufficiently broadly worded for it to be possible, without prejudice in any way to its generality, to say on which side of the dividing line between matters civil and matters spiritual this case lies. In my opinion the provision of a remedy for unlawful discrimination is a civil matter, not a spiritual one. So the exercise of the exclusive jurisdiction of the Church in spiritual matters does not extend to a claim by persons 'employed' by the respondents within the meaning of s 82(1) of the 1975 Act that they have been unlawfully discriminated against. In such cases it is for the civil courts whose jurisdiction in civil matters is expressly preserved by s 3 of the 1921 Act, and to whom jurisdiction in these cases has been given by s 63(1) of the 1975 Act, to provide the appropriate remedy.

[134] I would hold therefore that it is not open to the Church to claim exclusive jurisdiction under s 3 of the 1921 Act where it is alleged that a person whom the respondents have 'employed' as an associate minister has been unlawfully discriminated against in regard to her conditions of working, including those governing her dismissal. The appellant is entitled to the determination of her claim by an employment tribunal in the exercise of the jurisdiction that has been given to it by s 63(1) of the 1975 Act.

ARTICLE 234 EC

[135] Miss Dunlop QC for the respondents said that the conclusion that the appellant was entitled to the protection of the Equal Treatment Directive would have wide ramifications and she sought a reference to the European Court of Justice under art 234 EC for a preliminary ruling on the question whether she was entitled to that protection. But the fact that your Lordships' decision may have wide ramifications is not the test. We have to consider whether there is a real issue which needs to be determined by that court, having regard to the guidance that it has already given on the application of the Directive. I would hold that the matter at issue in this case is acte claire and that a reference would be inappropriate.

CONCLUSION

[136] For these reasons I would hold that the employment tribunal has jurisdiction to determine the appellant's claim that she had been unlawfully discriminated against. I would allow the appeal, recall the interlocutor of the First Division of the Court of Session and remit the appellant's discrimination claim for determination by an employment tribunal under s 63(1) of the 1975 Act.

LORD SCOTT OF FOSCOTE.

[137] My Lords, I have had the advantage of reading in advance the opinions prepared by my noble and learned friends Lord Nicholls of Birkenhead, Lord Hope of Craighead and Baroness Hale of Richmond and agree that, for the reasons they give this appeal should be allowed. I wish, in particular, to express my agreement that the agreement between the appellant and the Church of Scotland Board of National Mission, whereunder in return for salary, accommodation and other benefits the appellant undertook to perform the duties of an associate minister, was an agreement which created legal obligations between the parties. If the Board had withheld or reduced her salary the civil courts would surely have had jurisdiction to entertain an action for payment. If the reason for non-payment had been that she had declined to perform the duties of her office, the civil courts would have had jurisdiction to decide whether that circumstance justified the withholding of salary. The fact that her duties were duties of an office would have made no difference whatsoever (cf *Methodist Conference (President) v Parfitt* [1983] 3 All ER 747, [1984] QB 368). It seems to me clear that the agreement was one which created a legally-binding relationship between the parties to it.

[138] Since the appellant was a person who had been contractually employed by the Board to work as an associate minister I can see no reason why she, or others who have been similarly engaged, should be excluded from the scope of the Equal Treatment Directive (Council Directive (EC) 76/207 (on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) (OJ 1976 L39 p 40)) or regarded as falling outside the statutory jurisdiction given to the employment tribunal (see s 63(1) of the Sex Discrimination Act 1975). The exclusive jurisdiction reserved to the Church of Scotland by art IV of the declaratory articles (as set out in the Schedule to the Church of Scotland Act 1921) applies to 'matters of doctrine, worship, government, and discipline in the Church'. Notwithstanding that the appellant's complaints of unlawful discrimination arise out of the disciplinary proceedings instituted against her by the Presbytery of Angus they do not themselves constitute 'matters of . . . discipline' so as to be within the Church's exclusive jurisdiction. If in their conduct of disciplinary proceedings the Church authorities have committed some form of unlawful discrimination, they cannot, in my opinion, rely on s 3 of the 1921 Act as immunising them from the jurisdiction of the civil courts and tribunals to deal with such matters or from the remedies that the civil law makes available to the victim.

[139] I would, for the reasons given by my noble and learned friends, allow this appeal and make the order Lord Hope has proposed.

BARONESS HALE OF RICHMOND.

[140] My Lords, I agree, for essentially the same reasons as those given by my noble and learned friend, Lord Nicholls of Birkenhead, that this appeal should be allowed. The principal question before us is whether the arrangements made between the appellant and the relevant authorities in the Church of Scotland constituted 'employment' within the meaning of s 82(1) of the Sex Discrimination Act 1975: '"employment" means employment under a contract of service or of apprenticeship or a contract personally to execute any

work or labour . . .' I am in no doubt that those arrangements do fall within that definition.

[141] The familiar concepts of the common law are of limited help in construing modern employment legislation. As the learned authors of *Harvey on Industrial Relations and Employment Law* point out (para A1.2):

> 'At common law the expressions "employer" and "employee" have no precise meaning in law apart from their context. The common law understands the expression "master and servant", and "employer and employee" is frequently used as a modern translation thereof . . . However, whereas "master and servant" has a precise connotation, "employee" may be—and often is—used in a sense wider than that of "servant", and "employer", than that of "master".'

Hence careful attention has to be paid to the definition section of the relevant statute, because these draw some quite deliberate distinctions. The definition of 'employment' with which we are concerned is, of course, wider than that covered by a contract of service between master and servant, because it encompasses 'any contract personally to execute any work or labour'. So the authorities on what did or did not fall within the common law's understanding of a master–servant relationship will not give us much help. In *Harvey*, the view is taken that 'the distinction is between those who work for themselves and those who work for others . . . regardless of the nature of the contract under which they are employed' (see para A1.4).

[142] Similarly, the common law's distinction between a servant and an office holder is not of much help. Before the days of modern employment legislation, it was often in the interests of a person deprived of his occupation to assert that he was an office holder rather than a servant. A servant could be dismissed at will, provided that the terms of his contract of service were observed. The same applied to some office holders. But where there was a public element to the office, for example of constable, there was a long line of authority requiring that the office holder be given a right to be heard before being deprived of his office: see *Ridge v Baldwin* [1963] 2 All ER 66 at 71, [1964] AC 40 at 65 per Lord Reid; *Malloch v Aberdeen Corp* [1971] 2 All ER 1278 at 1294, [1971] 1 WLR 1578 at 1595 per Lord Wilberforce. But once the Industrial Relations Act 1971 introduced the right not to be unfairly dismissed, the question arose of when an office holder might also be said to be employed for that purpose: see *102 Social Club and Institute v Bickerton* [1977] ICR 911 at 918 per Phillips J. The Employment Appeal Tribunal in that case set out a number of factors to be considered in deciding whether the secretary of a members' club might also be an employee. There are clear cases where, for example, a company director also has a written contract of service, but this may also be implied, for example where the director is required to work full time for the company in return for a salary: see *Trussed Steel Concrete Co Ltd v Green* [1946] Ch 115, Cohen J.

[143] There is powerful authority for the proposition that, even before the new ss 10A and 10B introduced by the Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467, an office holder might fall within the wider definition of 'employment' for the purposes of the 1975 Act. In *Perceval-Price v Dept of Economic Development* [2000] IRLR 380 the Northern Ireland Court of Appeal was concerned with whether a full-time chairman of industrial tribunals, a full-time chairman of social security appeal tribunals, and a

social security commissioner were covered by the Equal Pay Act (Northern Ireland) 1970 or the Sex Discrimination (Northern Ireland) Order 1976. It was common ground, uncontroversial one might think, that they were statutory office holders. Section 1(9) of the 1970 Act dealt with people in the public service who at common law were not regarded as employed under a contract of service:

> 'This section shall apply to—(a) service for purposes of a Minister of the Crown or government department, other than service of a person holding a statutory office, or (b) service on behalf of the Crown for purposes of a person holding a statutory office or purposes of a statutory body, as it applies to employment by a private person, and shall so apply as if references to a contract of employment included references to the terms of service.'

The identical provision appears in s 1(8) of the Equal Pay Act 1970 and in s 85(2) of the 1975 Act dealing with the application of that Act to the Crown. Thus while civil servants were included, statutory office holders were expressly excluded. However, the Northern Ireland Court of Appeal held that that express exclusion had to be disregarded, because it was inconsistent with the terms of the 1976 Equal Treatment Directive (Council Directive (EC) 76/207 (on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) (OJ 1976 L39 p 40)). It was also common ground that the Directive had direct effect and that the departments responsible were emanations of the state. Hence the women concerned had directly enforceable claims if the Directive had been infringed.

[144] There was no appeal to this House against that decision. There were two necessary ingredients in the decision which are directly relevant to the case before us. The first was that, without the express exclusion, these office holders would have been covered by the definition of 'employed' in s 1(7) of the 1970 Act: '. . . "employed" means employed under a contract of service or apprenticeship or a contract personally to execute any work or labour.' This, of course, is the equivalent of the definition of 'employment' in the 1975 Act. Thus the court regarded these judicial officer holders as employed under a 'contract personally to execute any work or labour'.

[145] The second necessary ingredient was that these officers were 'workers' and thus entitled to the same working conditions as men under art 5 of the 1976 Directive. The court applied the test in *Lawrie-Blum v Land Baden-Württemberg* [1987] ICR 483 at 488, [1986] ECR 2121 at 2144 (para 17):

> 'The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.'

The Lord Chief Justice, Sir Robert Carswell, giving the judgment of the court, pointed out that the object of art 119 of the Treaty of Rome and the Equal Pay (Council Directive (EC) 75/117 (on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women) (OJ 1975 L45 p 19)) and Equal Treatment Directives was to give protection against inequality and discrimination to those who might be vulnerable to exploitation. The concept of a worker should be construed purposively by reference to this objective. The court went on ([2000] IRLR 380 at 384 (para 26)):

'All judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the president of the industrial tribunals or the Court Service, or more loosely arranged in collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment . . .'

[146] I have quoted those words at length because they illustrate how the essential distinction is, as *Harvey* says, between the employed and the self-employed. The fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition. Judges are servants of the law, in the sense that the law governs all that they do and decide, just as clergy are servants of God, in the sense that God's word, as interpreted in the doctrines of their faith, governs all that they practise, preach and teach. This does not mean that they cannot be 'workers' or in the 'employment' of those who decide how their ministry should be put to the service of the Church.

[147] *Perceval-Price v Dept of Economic Development* was not concerned with non-statutory office holders. But it would be inconsistent with its reasoning if non-statutory office holders were in a worse position, simply because they are said to hold an 'office', when otherwise their work fell within the definition in the 1975 Act or under the Directive. As my noble and learned friend, Lord Hope of Craighead, has said, s 77 of the 1975 Act prohibits contracting out. For an employer simply to label a post as an 'office' cannot be enough to take it out of the Act.

[148] In any event, Miss Percy was clearly not a statutory office holder and I also doubt whether her particular post fell within the classic common law definition of an office, for example in *Great Western Railway Co v Bater (Surveyor of Taxes)* [1920] 3 KB 266 at 274: 'a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders . . .' Nor, as *Harvey* puts it (para A1.168), was she a person whose 'rights and duties are defined by the office she holds' rather than by any contract. Her rights and duties were defined by the terms she had agreed with the Parish Reappraisal Committee of the Board of National Mission. As Lord Nicholls and Lord Hope have demonstrated, these bore all the hallmarks of a contract. For the reasons they have given, I too find it impossible to conclude that there was no intent to enter into legal relations. With the greatest respect to the Court of Appeal in *Diocese of Southwark v Coker* [1998] ICR 140 and to the Lord President in this case, I have difficulty in understanding why there should be any presumption against such an intention. Staughton LJ accepted in *Diocese of Southwark v Coker* (at 150), that there might be a 'subsidiary contract as to a pension, or the occupation of a house'. Miss Percy would clearly have been able to bring legal proceedings had her salary not been duly paid or had she been wrongly deprived of the occupation of her manse. The consideration for these benefits must have been the performance of the duties she had undertaken. In this day and age, the notion that her 'salary', modest though it

was, was simply to meet her basic subsistence needs while she devoted herself to her religious and pastoral duties is unrealistic. As *Perceval-Price v Dept of Economic Development* demonstrates, the fact that she had considerable discretion and independence in the way in which she carried out those duties did not mean that she was not a 'worker' or a person who had contracted 'personally to execute . . . work or labour'. That was exactly what she was.

[149] I would have reached that conclusion on the wording of the 1975 Act alone without resort to the Equal Treatment Directive. However, the Directive reinforces the conclusion. The court in *Perceval-Price v Dept of Economic Development* felt unable to employ the interpretative technique required by *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 [1990] ECR I-4135 because of the express exclusion of statutory office holders. Removing that exclusion would be amendment, not interpretation. The court had therefore to rely upon the duty to disapply a provision in order to safeguard enforceable community rights: see *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* Case 152/84 [1986] 2 All ER 584, [1986] QB 401. That technique would not be available to us, because the Church of Scotland, by common consent, is not an emanation of the state. But the interpretation problem does not arise, because there is no express exclusion. There is simply the definition which can readily be read so as to cover this case.

[150] The fact that there was an express exclusion, the effect of which has now been limited by the provisions relating to public office holders in the 2005 regulations, merely reinforces my view that there was nothing in the earlier version of the Act to exclude this case. This view is further reinforced by the specific and limited exception (inapplicable in this case) contained in s 19 of the 1975 Act of employment for the purposes of an organised religion. Although this obviously includes people other than ministers of that religion, one cannot close one's eyes completely to the heading of s 19, which clearly indicates that, should they otherwise qualify, ministers of religion would also be included. I note with deep sadness that when my own Church caught up with the Church of Scotland in admitting women to the priesthood, and was thus no longer exempted by s 19, they were none the less expressly permitted to continue to discriminate against women in various respects by the (now-repealed) Priests (Ordination of Women) Measure 1993, s 6. The fact that statutory exemption was then deemed necessary further supports the conclusion that otherwise such discrimination would have been unlawful under the 1975 Act.

[151] We were taken to three cases where clergymen had complained of unfair dismissal: *President of the Methodist Conference v Parfitt* [1983] 3 All ER 747, [1984] QB 368, *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705, [1986] ICR 280 and *Diocese of Southwark v Coker* [1998] ICR 140. The definition of 'employee' for the purposes of the law of unfair dismissal is different from, and narrower than, the definition of 'employment' in the 1975 Act. It is confined to 'an individual who has entered into or works under . . . a contract of employment'; and a 'contract of employment' means 'a contract of service or apprenticeship' (see s 230(1) and (2) of the Employment Rights Act 1996). That in itself is sufficient to distinguish those authorities. In any event, all of these cases depend upon their own particular facts. But in so far as those authorities may be explained by a presumed lack of intent to create legal relations between the clergy and their Church, I cannot accept that there is any general presumption to that effect. The nature of many professionals' duties these days is such that they must

serve higher principles and values than those determined by their employers. But usually there is no conflict between them, because their employers have engaged them in order that they should serve those very principles and values. I find it difficult to discern any difference in principle between the duties of the clergy appointed to minister to our spiritual needs, of the doctors appointed to minister to our bodily needs, and of the judges appointed to administer the law, in this respect.

[152] Nor would I see the requirement of the civil law that the Church of Scotland refrain from discriminating between its male and female clergy in the matters covered by the 1975 Act as trespassing upon the spiritual matters which remain the exclusive domain of the Church by virtue of s 3 of the 1921 Act. The Church is free to decide what its members should believe, how they should manifest their belief in worship and in teaching, how it should organise its internal government, and the qualifications for membership and office. But the processes whereby they make decisions about membership and office may be subject to the ordinary laws of the land. It will all depend upon what that law says and means. It would be surprising indeed if Parliament, when enacting a law in 1975 to combat defined acts of discrimination in defined areas of activity which were, as already seen, capable of encompassing employment for the purposes of an organised religion, including the established Church, contemplated that, alone of all such organised religions, the Church of Scotland should be immune. This would be even more surprising given that, at the time the 1975 Act was passed, the Church of Scotland had already decided to admit women to the ministry on the same terms and conditions as men. The Church has, quite rightly, disavowed any desire or intention to discriminate in any way which would fall foul of the 1975 Act and the Equal Treatment Directive. No doubt it wholeheartedly accepts the fundamental values of equal dignity and equal respect for all its members and clergy, irrespective of their sex, which the 1975 Act and the Equal Treatment Directive represent. It now accepts that it does not provide internal remedies which meet the requirements of the 1975 Act and the Equal Treatment Directive. The civil law must therefore do so.

[153] I would, however, express the fervent hope that the parties might be enabled to reach some settlement acceptable to them both. I have no means of knowing whether, after all that has happened, such an agreement would be possible, even with the help of a skilled and independent mediator. In hoping that it might be, I have in mind that mediation is a process to which each party comes on equal terms, in which the mediator is able to detect and redress any imbalance in their bargaining powers, and through which they are assisted and enabled to reach a real agreement with which each is comfortable. A process in which one party is able unilaterally to change the terms in which any agreement is reported to the media, in a case which has attracted a good deal of media attention, would obviously not fulfil those criteria.

[154] For these reasons, and in agreement with the majority of your Lordships, I too would allow this appeal and remit the case for consideration by the employment tribunal.

Appeal allowed.

Kate O'Hanlon Barrister.

Fulham Leisure Holdings Ltd v Nicholson Graham & Jones (a firm) (No 2)

Note

[2006] EWHC 2017 (Ch)

CHANCERY DIVISION

MANN J

20, 23, 26, 27, 30, 31 JANUARY, 1–3, 6, 7, 9, 10, 14–17, 20, 21 FEBRUARY, 1–3, 6, 7 MARCH, 31 JULY 2006

Solicitor – Negligence – Damages – Assessment of damages – Cost of cure.

In giving judgment in a claim for professional negligence against a firm of solicitors, **MANN J** said:

'[**265**] It is apparent enough from those authorities [*County Personnel (Employment Agency) Ltd v Alan R Pulver & Co (a firm)* [1987] 1 All ER 289, [1987] 1 WLR 916; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433; *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801, [1976] AC 443; *Hadley v Baxendale* (1854) 9 Exch 341, [1843–60] All ER Rep 461; *Reeves v Thrings & Long* [1996] PNLR 265] that it would be legitimate as a matter of principle to adopt what is described in *Jackson & Powell on Professional Negligence* (5th edn, 2002) at pp 691–692 (para 10-276) as "cost of cure" (which is a better description in some circumstances than cost of extrication), and in that paragraph they list some other instances where that measure has been allowed in solicitor's negligence cases. It is also apparent from *Ruxley Electronics and Construction Ltd v Forsyth, Laddingford Enclosures Ltd v Forsyth* [1995] 3 All ER 268, [1996] AC 344 that that in theory at any rate would be a permissible measure. In that case builders had been instructed to build a swimming pool of a given depth to allow diving. They built it too shallow, though diving was still possible. At first instance a limited award for loss of amenity was given. On appeal the Court of Appeal awarded the cost of rebuilding the pool (to produce the correct depth) (see [1994] 3 All ER 801, [1994] 1 WLR 650). The House of Lords reversed the Court of Appeal on the footing that the expenditure was out of all proportion to the benefit to be obtained. There is nothing in that case which indicates that cost of cure is somehow an inappropriate measure, and indeed there are many remarks which explicitly or implicitly acknowledge that it may be correct. That cost is, of course, a common measure in building contract cases, of which *Ruxley Electronics* was one. It is a common measure because, in appropriate cases, it reflects the loss which the claimant has suffered and for which he should be compensated. There is no reason in principle to exclude it as a measure of damages just because the action in question bears the label "professional negligence" rather than "building contract dispute". Accordingly, whether or not an award on that basis in the present case would be unusual, it would not necessarily be contrary to principle, and at the end of the day I do not think that [counsel for the defendant] went so far as to suggest that it would. There may be many

reasons why, in many cases, it is not an appropriate measure of damages in a professional negligence case, but it would not be correct to say that as a matter of principle it cannot apply.'

The full text of this judgment, in which *Ian Croxford QC* and *Mark Cannon* (instructed by *Kendall Freeman*) represented the claimant and *Roger Stewart QC* and *Hugh Evans* (instructed by *Mayer, Brown, Rowe & Maw LLP*) represented the defendant, can be found in All England Reporter ([2006] All ER (D) 461 (Jul)) on the LexisNexis Butterworths online service.

Celia Fox Barrister.

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